TITLE 16

CRIMES AND OFFENSES

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Cross references. — Disfranchisement of persons for conviction of felony involving moral turpitude, Ga. Const. 1983, Art. II, Sec. I, Para. III and § 21-2-216. Applicability of title to financial institutions and their directors, officers, and others, § 7-1-841. Offenses giving rise to cancellation, suspension, or revocation of drivers' licenses, § 40-5-50 et seq.

Law reviews. — For article discussing history of criminal law in Georgia, and some of the problems facing the criminal law study commission created in 1961, see 15 Mercer L. Rev. 399 (1964). For article advocating the adoption of the proposed Criminal Code of 1968, see 3 Ga. St. B.J. 145 (1966). For article discussing the 1968 Criminal Code of Georgia, comparing pre-existing provisions of Georgia criminal law, see 5 Ga. St. B.J. 185 (1968). For article discussing developments in Georgia criminal law in 1976 to 1977, see 29 Mercer L. Rev. 55 (1977). For article, "Toward a Perspective on the Death Penalty Cases," see 27 Emory L.J. 469 (1978). For article surveying cases dealing with criminal law and criminal procedure from June 1, 1977 through May 1978, see 30 Mercer L. Rev. 27 (1978). For article surveying judicial developments in Georgia Criminal Law, see 31 Mercer L. Rev. 59 (1979). For annual survey of criminal law and procedure, see 35 Mercer L. Rev. 103 (1983). For article surveying criminal law and procedure in 1984-1985, see 37 Mercer L. Rev. 179 (1985). For annual survey of criminal law and procedure, see 39 Mercer L. Rev. 127 (1987). For annual survey of criminal law and procedure, see 40 Mercer L. Rev. 153 (1988). For annual survey on criminal law and procedure, see 42 Mercer L. Rev. 141 (1990). For annual survey of criminal law and procedure, see 43 Mercer L. Rev. 175 (1991). For annual survey on criminal law and procedure, see 44 Mercer L. Rev. 165 (1992). For annual survey on criminal law and procedure, see 45 Mercer L. Rev. 135 (1993). For annual survey on criminal law and procedure, see 46 Mercer L. Rev. 153 (1994). For annual survey on criminal law and procedure, see 48 Mercer L. Rev. 219 (1996). For annual survey discussing developments in criminal law, see 51 Mercer L. Rev. 209 (1999). For annual survey discussing developments in criminal law, see 52 Mercer L. Rev. 167 (2000). For article, "Criminal Law as Family Law," see 33 Ga. St. U.L. Rev. 285 (2017).

For note, "Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony," see 46 Ga. L. Rev. 213 (2011).

RESEARCH REFERENCES

Am. Jur. Trials. — Investigating Particular Crimes, 2 Am. Jur. Trials 171.

CHAPTER 7

DAMAGE TO AND INTRUSION UPON PROPERTY

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ARTICLE 1

BURGLARY

Cross references. — Restitution and distribution of profits to victims of crimes, T. 17, C. 14.

16-7-1. Burglary.

(a) As used in this Code section, the term:

(1) "Dwelling" means any building, structure, or portion thereof which is designed or intended for occupancy for residential use.

(2) "Railroad car" shall also include trailers on flatcars, containers on flatcars, trailers on railroad property, or containers on railroad property.

(b) A person commits the offense of burglary in the first degree when, without authority and with the intent to commit a felony or theft therein, he or she enters or remains within an occupied, unoccupied, or vacant dwelling house of another or any building, vehicle, railroad car, watercraft, aircraft, or other such structure designed for use as the dwelling of another. A person who commits the offense of burglary in the first degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 20 years. Upon the second conviction for burglary in the first degree, the

defendant shall be guilty of a felony and shall be punished by imprisonment for not less than two nor more than 20 years. Upon the third and all subsequent convictions for burglary in the first degree, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than five nor more than 25 years.

(c) A person commits the offense of burglary in the second degree when, without authority and with the intent to commit a felony or theft therein, he or she enters or remains within an occupied, unoccupied, or vacant building, structure, railroad car, watercraft, or aircraft. A person who commits the offense of burglary in the second degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years. Upon the second and all subsequent convictions for burglary in the second degree, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than eight years.

(d) Upon a fourth and all subsequent convictions for a crime of burglary in any degree, adjudication of guilt or imposition of sentence shall not be suspended, probated, deferred, or withheld. (Laws 1833, Cobb's 1851 Digest, p. 790; Ga. L. 1858, p. 98, § 1; Code 1863, §§ 4283, 4285; Ga. L. 1865-66, p. 232, § 2; Ga. L. 1866, p. 151, § 1; Ga. L. 1868, p. 16, § 1; Code 1868, §§ 4320, 4322; Code 1873, §§ 4386, 4388; Ga. L. 1878-79, p. 65, §§ 1, 2; Code 1882, §§ 4386, 4388; Penal Code 1895, §§ 149, 150; Penal Code 1910, §§ 146, 147; Code 1933, §§ 26-2401, 26-2402; Code 1933, § 26-1601, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1977, p. 895, § 1; Ga. L. 1978, p. 236, § 1; Ga. L. 1980, p. 770, § 1; Ga. L. 2012, p. 899, § 3-1/HB 1176; Ga. L. 2017, p. 417, § 1-2/SB 104.)

The 2017 amendment, effective July 1, 2017, deleted "vehicle," following "structure," near the end of the first sentence of subsection (c).

Cross references. — Entering motor vehicle with intent to commit theft or felony, § 16-8-18.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, "more than" was substituted for "more that" in the next-to-last sentence of subsection (b).

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on recidivism and convictions based on nolo contendere pleas, see 13 Ga. L. Rev. 723 (1979). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012). For annual survey of criminal law, see 67 Mercer L. Rev. 31 (2015). For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 61 (2017). For annual survey on criminal law, see 69 Mercer L. Rev. 73 (2017).

JUDICIAL DECISIONS

Analysis

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Elements of Burglary
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General Consideration

Constitutionality. — Definition of "burglary" in former Code 1933, § 26-1601 (see now O.C.G.A. § 16-7-1) related to main object of legislation, contained no matter variant from title, and bore a natural connection to matter contained in enacting clause. Thus, former Code 1933, § 26-1601 did not violate Ga. Const. 1976, Art. III, Sec. VII, Para. IV (see now Ga. Const. 1983, Art. III, Sec. V, Para. III). Ladson v. State, 248 Ga. 470, 285 S.E.2d 508 (1981).

Second indictment did not need to allege special exception to statute of limitations. — Trial court properly denied the defendant's motion in arrest of a judgment of conviction for burglary and theft by taking because the second indictment was filed within the six-month extension authorized by O.C.G.A. § 17-3-3 and, therefore, did not need to allege an exception to the four-year statute of limitation. Johnson v. State, 335 Ga. App. 886, 782 S.E.2d 50 (2016).

Identification of defendant. — With regard to the defendant's convictions for armed robbery, aggravated assault, burglary, and false imprisonment, the trial court did not err by denying the motion to suppress the out-of-court identifications of the defendant because the court found that the simultaneous lineup was not impermissibly suggestive as a matter of law based on the testimony of the officer who prepared and presented the lineup that the victims were admonished that the suspect may not be in the array. McCowan v. State, 325 Ga. App. 509, 753 S.E.2d 775 (2014).

Board of Immigration Appeals (BIA) properly upheld an immigration judge's order of removal because the alien's Georgia burglary convictions qualified as aggravated felonies under Section 101(a)(43)(G) of the Immigration and Nationality Act where the BIA's interpretation of the Georgia Act aligned with judicial precedent, the facts underlying the alien's conviction fell squarely within the generic burglary definition, the alien was removable as an aggravated felon based on the alien's burglary convictions, and the alien was, therefore, ineligible for discretionary relief from removal proceedings. Pruteanu v. United States AG, No. 16-17757, 2017 U.S. App. LEXIS 22993 (11th Cir. Nov. 16, 2017) (Unpublished).

Replacement of two jurors. — Trial court did not err in replacing two jurors on the panel despite the fact that a transcription of the voir dire was absent from the record, in a prosecution for burglary and armed robbery, as the appellate court was able to decide, based upon a review of the arguments surrounding the state's motion, that the trial court did not err in replacing two jurors on the jury panel due to the defendant's racially motivated strikes; further, the defendant waived appellate review of the court's re-seating procedure. Pitts v. State, 278 Ga. App. 176, 628 S.E.2d 615 (2006).

Right to be present. — Defendant was deprived of defendant's constitutional right to courts during the defendant's burglary trial when the defendant was invol-

untarily excluded from the courtroom while the trial court conducted a colloquy with the jury regarding early morning hang-up telephone calls some or all of the jurors received, and therefore the defendant's conviction was reversed. Vaughn v. State, 281 Ga. App. 475, 636 S.E.2d 163 (2006).

Plea in bar and plea of former jeopardy properly granted. — Trial court properly granted the defendant's plea in bar and plea of former jeopardy in a burglary prosecution as the state improperly terminated the first trial by dismissing the indictment after jeopardy attached without the defendant's consent, and the second burglary prosecution, although alleging a different date, residence, and accomplice was based on the same material facts as the first indictment. State v. Jackson, 290 Ga. App. 250, 659 S.E.2d 679 (2008).

Definition of "dwelling house." — Words "dwelling house" in regard to burglary, both at common law and under statute, refer to the residence or habitation of a person other than the defendant, where the person makes an abode. Mash v. State, 90 Ga. App. 322, 82 S.E.2d 881 (1954).

House that was under repair was a "dwelling" within the meaning of O.C.G.A. § 16-7-1, even though the owner was living in another house during the repairs. Earnest v. State, 216 Ga. App. 271, 453 S.E.2d 818 (1995).

Building rented, goods stored there, sufficient for conviction. — Trial court did not err in convicting the defendant of burglary in violation of O.C.G.A. § 16-7-1(a) because the evidence showed that the house at issue was a building under the burglary statute, and in the final charge to the jury, the trial court instructed that the burglary statute proscribed unauthorized entry into or remaining in any building or dwelling place of another; while the victim and the victim's family had moved out, the victim had continued to pay rent, continued to store most of the victim's belongings there, and checked each day that the house remained locked. Davis v. State, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

Presence of valuables inside the premises can support an inference of intent to steal, particularly when no other motive is apparent. Addis v. State, 203 Ga. App. 270, 416 S.E.2d 837 (1992).

Evidence was sufficient to support defendant's burglary conviction because the jury could infer defendant's intent to steal from the presence of valuables in the home that was burglarized, and a victim testified to the presence of such valuables. Patterson v. State, 274 Ga. App. 341, 618 S.E.2d 81 (2005).

Proof of lack of authority to enter required. — Offense of burglary requires proof of lack of authority to enter or remain within another's dwelling house. Ealey v. State, 139 Ga. App. 110, 227 S.E.2d 902 (1976).

Burglary involves criminal's necessarily placing self within building or structure named in statute. Williamson v. State, 134 Ga. App. 583, 215 S.E.2d 518 (1975).

Crime of burglary is complete when one without authority enters another's building with intent to commit theft. Green v. State, 133 Ga. App. 802, 213 S.E.2d 60 (1975).

Burglary is completed when a person enters the dwelling house of another without authority and with intent to commit a felony or a theft therein, regardless of whether or not the person accomplishes that apparent purpose. Ricks v. State, 178 Ga. App. 98, 341 S.E.2d 895 (1986).

Residence is a dwelling place under O.C.G.A. § 16-7-1. Sapp v. State, 158 Ga. App. 443, 280 S.E.2d 867 (1981).

Burglary of store. — Burglary may consist of breaking and entering a store with intent to commit a theft. Burks v. State, 157 Ga. App. 361, 277 S.E.2d 344 (1981).

Burglary of vehicle. — For a person to be guilty of burglary of a vehicle such vehicle must be designed for use as a dwelling. Massey v. State, 141 Ga. App. 557, 234 S.E.2d 144 (1977).

In a prosecution for burglary of a vehicle under former Code 1933, § 26-1601, as part of the description of the particular offense the fact that the vehicle was designed as a dwelling was an essential element of the offense which had to be alleged; and since the indictment did not make this allegation and no proof to this

General Consideration (Cont'd)

effect was offered at trial, the indictment did not confer jurisdiction to try and convict the defendant of such offense. DeFrancis v. Manning, 246 Ga. 307, 271 S.E.2d 209 (1980).

Burglary of building. — Defendant who is charged with burglary in that the defendant, with intent to commit a theft, entered a certain building without authority may be convicted on proof that the defendant entered a part of the building or one room of the building. Riley v. State, 130 Ga. App. 181, 202 S.E.2d 533 (1973).

Garden center: building. — Garden center contiguous to a department store enclosed with chain link fence and partly enclosed with an unmortared block wall was a room or part of a building within the meaning of O.C.G.A. § 16-7-1. Floyd v. State, 207 Ga. App. 275, 427 S.E.2d 605 (1993).

Shelter from which defendant removed the lawnmower was a "building" within the meaning of the burglary statute because the contiguous nature of the storage shelter and the shelter's accessibility from the main building rendered the shelter "a part" of the main building for purposes of O.C.G.A. § 16-7-1; further, the purpose of the shelter as a storage structure for valuable goods, the shelter's relevance to the business, and the shelter's inaccessibility to the public when the business was secured, rendered the shelter a "building" under the statute, and the unauthorized removal of an item from the shelter with the intent to commit a theft was subject to prosecution for burglary. Garrett v. State, 259 Ga. App. 870, 578 S.E.2d 460 (2002).

Barn constitutes building. — Evidence was sufficient to establish a juvenile's guilt as to burglary as the definition of burglary under O.C.G.A. § 16-7-1(a) had been changed to use the all-inclusive term "building" rather than "dwelling"; thus, the juvenile's entry in the victim's barn for the purpose of taking two gas cans was sufficient. In re J. B. M., 294 Ga. App. 545, 669 S.E.2d 523 (2008).

Telephone booth cannot be subject of burglary, for there is always an absence of the essential element of burglary of an entry without authority. Jones v. State, 142 Ga. App. 274, 235 S.E.2d 681 (1977).

Camper. — Evidence was insufficient to support defendant's burglary conviction for burglary by entering a camper designed for use as a dwelling house without authority and with the intent to commit a theft as the state did not present any evidence that the particular camper which defendant entered was designed for use as a dwelling house as required under O.C.G.A. § 16-7-1; rather, the evidence indicated that the camper merely allowed for shelter and sleeping accommodations. Jenkins v. State, 259 Ga. App. 47, 576 S.E.2d 44 (2002).

Theft by taking does not constitute an affirmative defense in a burglary action. Gray v. State, 163 Ga. App. 720, 294 S.E.2d 697 (1982).

Severance. — No abuse of discretion by the trial court in refusing to sever two counts of burglary. Bailey v. State, 157 Ga. App. 222, 276 S.E.2d 843 (1981).

Trial court did not abuse the court's discretion by denying defendants' motions to sever their trials as defendants failed to make a clear showing of prejudice and a denial of due process protection. Attaway v. State, 259 Ga. App. 822, 578 S.E.2d 529 (2003).

Defendant killed the victim with a gun that the defendant stole in a burglary committed the preceding day. This shows a continuing course of criminal conduct and since the burglary and murder were connected crimes, the trial court did not abuse the court's discretion in denying the defendant's severance motion and defendant's conviction for burglary was properly upheld. High v. State, 282 Ga. 244, 647 S.E.2d 270 (2007).

Witness's improper expression of legal conclusion. — Statement by victim that the victim's house was "burglarized" should have been excluded because it constitutes an improper expression of a legal conclusion by a witness. Wells v. State, 151 Ga. App. 416, 260 S.E.2d 374 (1979), overruled on other grounds, Copeland v. State, 160 Ga. App. 786, 287 S.E.2d 120 (1982).

Knowledge and use of home security code. — Sufficient evidence included an accomplice's testimony (sufficiently

corroborated under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) by accomplice's knowledge and use of the defendant's grandparent's security code) that the defendant hired an accomplice to kill the grandparent, to convict the defendant of burglary, assault, and battery. Hill v. State, 268 Ga. App. 642, 602 S.E.2d 348 (2004).

Denial of motion to suppress did not warrant new trial. — On appeal from convictions on two counts of burglary, the trial court in the court's order denying the defendant a new trial correctly ruled that the defendant's motion to suppress was moot because no tangible physical evidence was admitted at trial. Maxwell v. State, 285 Ga. App. 685, 647 S.E.2d 374 (2007).

Sufficient evidence based on testimony of codefendant and neighbor. — Sufficient evidence supported defendant's O.C.G.A. § 16-7-1 burglary conviction. The former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) "accomplice to a felony" exception did not apply and the defendant's codefendant's evidence was admissible (and subject to cross-examination) since a neighbor also testified that the neighbor saw the defendant enter the victim's home and remove items which were later recovered from the codefendant. Millirons v. State, 268 Ga. App. 644, 602 S.E.2d 346 (2004).

Codefendant's trial should have been severed. — Trial court erred in denying a codefendant's motion to sever the trial from the defendant's trial because the codefendant was not allowed to introduce the exculpatory portions of the statements that explained the excerpted admissions introduced by the state, which supported the codefendant's antagonistic defense that the codefendant was present at the robberies due to coercion by the defendant. To avoid potential Bruton issues, the state introduced only those portions of the codefendant's 9-1-1 calls or custodial statements made establishing that the codefendant was at the scene of two robberies, that the codefendant's vehicles were used, and that the codefendant sent police to a motel room to investigate the robberies, but refused the additional portions of the statements that tended to support the codefendant's defense that the codefendant was coerced into participating in the crimes. Bowe v. State, 288 Ga. App. 376, 654 S.E.2d 196 (2007), cert. dismissed, sub. nom., State v. Baker, No. S08C0548, 2008 Ga. LEXIS 318 (Ga. 2008).

Trial court erred in failing to strike a juror for cause. — In a prosecution for burglary, the trial court abused the court's discretion by failing to strike a juror for cause after the juror stated during voir dire that if the defendant did not testify, it would cause the juror to doubt the defendant's innocence; thus, the conviction was reversed. Rouse v. State, 296 Ga. App. 330, 674 S.E.2d 389 (2009).

Evidence sufficient for delinquency adjudication. — Testimony from the victims of three auto thefts, along with statements given by defendant juvenile, were legally sufficient to support the defendant's delinquency adjudication for acts which, if committed by an adult, would constitute the crimes of burglary and theft by taking-vehicle. In the Interest of E.J., 292 Ga. App. 69, 663 S.E.2d 411 (2008).

Evidence was sufficient to adjudicate a child delinquent for the adult crime of burglary under O.C.G.A. § 16-7-1 based on a neighbor's testimony that the neighbor saw the child tampering with and opening the victim's back door and the child's admission that the child "cracked" the door. That day, it was discovered that money and video games were taken from the victim. In the Interest of R. H., 313 Ga. App. 416, 721 S.E.2d 628 (2011).

Sufficient evidence to prove identity and intent. — Evidence in support of the burglary charge was sufficient to prove identity and intent as the victim identified the defendants as the individuals who had been in the victim's house when the officers drove to the victim's house with the defendants. In addition, the jury was authorized to find that the defendants intended to commit a theft when the defendants entered the house without permission, looked behind and inside the victim's furniture, and left once the victim called police. Gorman v. State, 318 Ga. App. 535, 734 S.E.2d 263 (2012).

Probable cause for arrest. — Arrestee's false arrest claim failed be-

General Consideration (Cont'd)

cause probable cause existed to arrest the arrestee for burglary; an eyewitness observed the arrestee and another person entering a vacant home, officers found that the home's back door appeared to have been damaged, and the arrestee and the other person admitted that they did not have permission to enter. Gray v. Ector, 541 Fed. Appx. 920 (11th Cir. 2013) (Unpublished).

Cited in United States v. Evans, 415 F.2d 340 (5th Cir. 1969); Mixon v. State, 226 Ga. 869, 178 S.E.2d 189 (1970); Blankenship v. State, 123 Ga. App. 496, 181 S.E.2d 544 (1971); Lewis v. State, 228 Ga. 145, 184 S.E.2d 453 (1971); Bissel v. State, 126 Ga. App. 61, 189 S.E.2d 701 (1972); Baker v. State, 127 Ga. App. 99, 192 S.E.2d 558 (1972); Fullewellen v. State, 127 Ga. App. 568, 194 S.E.2d 275 (1972); Kent v. State, 128 Ga. App. 132, 195 S.E.2d 770 (1973); Minor v. State, 129 Ga. App. 7, 198 S.E.2d 383 (1973); Brand v. Wofford, 230 Ga. 750, 199 S.E.2d 231 (1973); D.P. v. State, 129 Ga. App. 680, 200 S.E.2d 499 (1973); Smith v. State, 130 Ga. App. 390, 203 S.E.2d 375 (1973); Farmer v. Caldwell, 476 F.2d 22 (5th Cir. 1973); Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973); Goughf v. State, 232 Ga. 178, 205 S.E.2d 844 (1974); Young v. State, 131 Ga. App. 553, 206 S.E.2d 536 (1974); Cannon v. State, 136 Ga. App. 479, 221 S.E.2d 674 (1975); Bennett v. State, 136 Ga. App. 806, 222 S.E.2d 207 (1975); Boggus v. State, 136 Ga. App. 917, 222 S.E.2d 686 (1975); Burton v. State, 137 Ga. App. 686, 224 S.E.2d 876 (1976); Goins v. State, 139 Ga. App. 6, 228 S.E.2d 13 (1976); Jones v. State, 139 Ga. App. 824, 229 S.E.2d 789 (1976); Paschal v. State, 139 Ga. App. 842, 229 S.E.2d 795 (1976); Brown v. State, 143 Ga. App. 256, 238 S.E.2d 258 (1977); Moss v. State, 144 Ga. App. 226, 240 S.E.2d 773 (1977); Miller v. State, 145 Ga. App. 653, 244 S.E.2d 608 (1978); Tippins v. State, 146 Ga. App. 448, 246 S.E.2d 458 (1978); Thomas v. State, 146 Ga. App. 530, 246 S.E.2d 514 (1978); Hibbert v. State, 146 Ga. App. 887, 247 S.E.2d 554 (1978); Loury v. State, 147 Ga. App. 152, 248 S.E.2d 291 (1978); Guthrie v. State, 147 Ga. App. 351, 248 S.E.2d 714 (1978); Knight v. State, 243 Ga. 770, 257 S.E.2d 182 (1979); Groves v. State, 152 Ga. App. 606, 263 S.E.2d 501 (1979); O'Quinn v. State, 153 Ga. App. 467, 265 S.E.2d 824 (1980); Ingram v. State, 156 Ga. App. 506, 274 S.E.2d 844 (1980); Green v. State, 158 Ga. App. 321, 279 S.E.2d 763 (1981); Fennell v. State, 159 Ga. App. 194, 283 S.E.2d 72 (1981); Ladson v. State, 248 Ga. 470, 285 S.E.2d 508 (1981); Garland v. State, 160 Ga. App. 97, 286 S.E.2d 330 (1981); Wooten v. State, 160 Ga. App. 747, 288 S.E.2d 94 (1981); Arrington v. State, 160 Ga. App. 645, 288 S.E.2d 97 (1981); White v. State, 163 Ga. App. 179, 292 S.E.2d 875 (1982); Mobley v. State, 164 Ga. App. 154, 296 S.E.2d 617 (1982); Driggers v. State, 164 Ga. App. 188, 296 S.E.2d 780 (1982); Jones v. State, 165 Ga. App. 498, 299 S.E.2d 576 (1983); Beasley v. State, 165 Ga. App. 160, 299 S.E.2d 886 (1983); Heard v. State, 165 Ga. App. 252, 300 S.E.2d 213 (1983); Brown v. State, 165 Ga. App. 799, 302 S.E.2d 630 (1983); Shepherd v. State, 173 Ga. App. 499, 326 S.E.2d 596 (1985); Samuels v. State, 174 Ga. App. 684, 331 S.E.2d 62 (1985); Gibson v. Pierce, 176 Ga. App. 287, 335 S.E.2d 658 (1985); Almond v. State, 175 Ga. App. 728, 334 S.E.2d 328 (1985); Turner v. State, 178 Ga. App. 888, 345 S.E.2d 99 (1986); Lowe v. State, 179 Ga. App. 377, 346 S.E.2d 845 (1986); Tutton v. State, 179 Ga. App. 462, 346 S.E.2d 898 (1986); Milner v. State, 180 Ga. App. 97, 348 S.E.2d 509 (1986); Ford v. State, 180 Ga. App. 807, 350 S.E.2d 816 (1986); Stinson v. State, 185 Ga. App. 543, 364 S.E.2d 910 (1988); Towns v. State, 185 Ga. App. 545, 365 S.E.2d 137 (1988); Jones v. State, 258 Ga. 25, 365 S.E.2d 263 (1988); Simmons v. State, 186 Ga. App. 886, 369 S.E.2d 36 (1988); Williams v. Kemp, 846 F.2d 1276 (11th Cir. 1988); Crawford v. State, 188 Ga. App. 841, 374 S.E.2d 781 (1988); Hatcher v. State, 259 Ga. 274, 379 S.E.2d 775 (1989); Miller v. Smith & Smith Land Surveyors, 194 Ga. App. 474, 391 S.E.2d 20 (1990); Coleman v. State, 196 Ga. App. 270, 395 S.E.2d 897 (1990); Hickey v. State, 202 Ga. App. 636, 415 S.E.2d 60 (1992); Johnson v. State, 207 Ga. App. 34, 427 S.E.2d 29 (1993); Bohannon v. State, 208 Ga. App. 576, 431 S.E.2d 149 (1993); Ryles v. State, 216 Ga. App. 462, 454

S.E.2d 639 (1995); Jenkins v. State, 217 Ga. App. 655, 458 S.E.2d 497 (1995); Shy v. State, 220 Ga. App. 910, 470 S.E.2d 484 (1996); Randall v. State, 234 Ga. App. 704, 507 S.E.2d 511 (1998); Mangham v. State, 234 Ga. App. 567, 507 S.E.2d 806 (1998); Meadows v. State, 264 Ga. App. 160, 590 S.E.2d 173 (2003); Brewster v. State, 261 Ga. App. 795, 584 S.E.2d 66 (2003); Price v. State, 281 Ga. App. 844, 637 S.E.2d 468 (2006); Ford v. Schofield, 488 F. Supp. 2d 1258 (N.D. Ga. 2007); Rivera v. State, 282 Ga. 355, 647 S.E.2d 70 (2007); Jackson v. State, 288 Ga. App. 742, 655 S.E.2d 323 (2007); In the Interest of B.R., 289 Ga. App. 6, 656 S.E.2d 172 (2007); Lemming v. State, 292 Ga. App. 138, 663 S.E.2d 375 (2008); Mazza v. State, 292 Ga. App. 168, 664 S.E.2d 548 (2008); Burton v. State, 293 Ga. App. 822, 668 S.E.2d 306 (2008); Jackson v. State, 284 Ga. 484, 668 S.E.2d 700 (2008); Williams v. State, 295 Ga. App. 9, 670 S.E.2d 828 (2008); In the Interest of T. F., 295 Ga. App. 417, 671 S.E.2d 887 (2008); Townes v. State, 298 Ga. App. 185, 679 S.E.2d 772 (2009); Hopkins v. State, 309 Ga. App. 298, 709 S.E.2d 873 (2011); Martinez v. State, 318 Ga. App. 254, 735 S.E.2d 785 (2012); Coleman v. State, 318 Ga. App. 478, 735 S.E.2d 788 (2012); Ware v. State, 321 Ga. App. 640, 742 S.E.2d 156 (2013); Avila v. State, 322 Ga. App. 225, 744 S.E.2d 405 (2013); Williams v. State, 326 Ga. App. 784, 757 S.E.2d 448 (2014); Turner v. State, 331 Ga. App. 78, 769 S.E.2d 785 (2015); Yancey v. State, No. A17A0264, 2017 Ga. App. LEXIS 277 (June 16, 2017); Floyd v. State, 342 Ga. App. 438, 803 S.E.2d 597 (2017).

Elements of Burglary

1. In General

Burglary under Armed Career Criminal Act and state statute. — After the defendant appealed the 180-month sentence for being a felon in possession, the defendant's prior Georgia burglary convictions qualified as predicate violent felonies under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924; Georgia's burglary statute was divisible, and the defendant's certified indictment and guilty plea for the burglary convictions showed that the defendant was convicted of three counts of burglary of a dwelling, which had the same elements as generic burglary under the ACCA's enumerated crimes clause. United States v. Pearsey, No. 16-17378, 2017 U.S. App. LEXIS 11784 (11th Cir. July 3, 2017) (Unpublished).

Illegal entry and evidence of intent required. — To convict of the crime of burglary it is not sufficient merely to prove an illegal entry, but there must also be evidence from which the jury may conclude that there was an intent to commit a theft or felony. Griffin v. State, 148 Ga. App. 311, 251 S.E.2d 161 (1978).

Burglary was the unauthorized entry into the dwelling house of another with the intent to commit a felony or theft therein under O.C.G.A. § 16-7-1(a); so, when defendant pled not guilty to this crime, defendant required the state to prove all its elements, and the burglary defendant committed six years before the charged burglary was thus admissible to prove defendant's state of mind, knowledge, and intent. Johnson v. State, 276 Ga. App. 505, 623 S.E.2d 706 (2005).

It is not necessary that defendant actually commit theft; it is sufficient if defendant enters without authority and with the intent to commit a theft. Johnson v. Jackson, 140 Ga. App. 252, 230 S.E.2d 756 (1976).

To complete the crime of burglary, it is not necessary that a defendant actually commit a theft; it is sufficient if defendant enters without authority and with the intent to commit a theft or a felony. Roberts v. State, 252 Ga. 227, 314 S.E.2d 83, cert. denied, 469 U.S. 873, 105 S. Ct. 228, 83 L. Ed. 2d 157 (1984).

Fact that defendant did not accomplish apparent purpose does not render finding of burglary improper. Coney v. State, 125 Ga. App. 52, 186 S.E.2d 478 (1971); Poole v. State, 130 Ga. App. 603, 203 S.E.2d 886 (1974); Kinney v. State, 155 Ga. App. 95, 270 S.E.2d 209 (1980); Addis v. State, 203 Ga. App. 270, 416 S.E.2d 837 (1992).

Theft of any article is unnecessary to completed offense of burglary. Davis v. State, 139 Ga. App. 105, 227 S.E.2d 900 (1976); Craft v. State, 152 Ga. App. 486, 263 S.E.2d 263 (1979); Freelove v. State,

Elements of Burglary (Cont'd)
1. In General (Cont'd)

229 Ga. App. 310, 494 S.E.2d 72 (1997).

There is no requirement in law that house be continuously occupied to be "dwelling." — It is sufficient that it is occasionally occupied for residential purposes and any such lawful occupant has a superior right as against burglars for the purpose of an indictment. Hess v. State, 132 Ga. App. 26, 207 S.E.2d 580 (1974).

House under construction. — House under construction qualified as a "building" for purposes of O.C.G.A. § 16-7-1. Smith v. State, 226 Ga. App. 9, 485 S.E.2d 572 (1997).

Storage shed was "building." — Storage shed where an air compressor was kept was a "building" under O.C.G.A. § 16-7-1(a). The shed's purpose was to store, shelter, and safeguard commercial goods, and the storage shed was inaccessible to the public when the business was secured. Mezick v. State, 291 Ga. App. 257, 661 S.E.2d 635 (2008).

Construing word "building" within definition of burglary. — Statutory definition of burglary uses the all-inclusive word of "building" which includes a "store house" as well as a "storehouse." Estep v. State, 129 Ga. App. 909, 201 S.E.2d 809 (1973).

Metal trailer serving as a lay-away storage facility and located behind a store was a building within the meaning of O.C.G.A. § 16-7-1. Franks v. State, 240 Ga. App. 685, 524 S.E.2d 545 (1999).

Broadcast tower which does not enclose anything is not a building within the meaning of O.C.G.A. § 16-7-1. Redfern v. State, 246 Ga. App. 572, 540 S.E.2d 701 (2000).

Because a building may be the situs of a burglary even if it is not being used as a dwelling house, proof that a person was an occupant of the building was not necessary to sustain defendant's burglary conviction. Smith v. State, 249 Ga. App. 427, 548 S.E.2d 21 (2001).

Defendant was properly convicted of burglarizing a parking booth under O.C.G.A. § 16-7-1(a) because the booth, a storage structure for valuable goods, was a "building" for purposes of § 16-7-1(a). Holt v. State, 293 Ga. App. 477, 667 S.E.2d 645 (2008).

Conviction for burglary no longer necessarily includes proof of breaking, and it is sufficient if the accused "enters or remains" with intent to commit a felony or theft. Bridges v. State, 123 Ga. App. 157, 179 S.E.2d 685 (1970).

Forced entry is not required; it is sufficient if defendant enters a building "without authority." Brown v. State, 242 Ga. App. 858, 531 S.E.2d 409 (2000).

Failure to substantially prove ownership of building allegedly entered as alleged in indictment is fatal variance. Livingston v. State, 122 Ga. App. 152, 176 S.E.2d 520 (1970).

Proof of "dwelling place of another." — "Ownership," as that term is used in property law, is not an essential ingredient to proving that the premises entered were "the dwelling place of another" within the meaning of the burglary law. Murphy v. State, 238 Ga. 725, 234 S.E.2d 911 (1977); Black v. State, 143 Ga. App. 690, 239 S.E.2d 564 (1977); Phillips v. State, 152 Ga. App. 671, 263 S.E.2d 480 (1979); High v. State, 153 Ga. App. 729, 266 S.E.2d 364 (1980).

Testimony of boarder or renter as proving lack of authority to enter. — It is well established that the testimony of a boarder or renter is sufficient to prove lack of authority or permission to enter a dwelling place. Black v. State, 143 Ga. App. 690, 239 S.E.2d 564 (1977).

Ownership of personal property in indictment for burglary may be laid in a bailee having possession of the property when the property was stolen, though the bailment was gratuitous. Hall v. State, 132 Ga. App. 612, 208 S.E.2d 621 (1974).

Thief cannot question title of apparent owner. Hall v. State, 132 Ga. App. 612, 208 S.E.2d 621 (1974).

2. Unauthorized Entry

Affirmative defenses. — Only authorized entry into building or mistake of fact would constitute an affirmative defense to burglary charge. Gray v. State, 163 Ga. App. 720, 294 S.E.2d 697 (1982).

Because a defendant's evidence that the defendant acted under a misapprehension of fact in entering a house would have

authorized the jury to acquit the defendant of burglary under O.C.G.A. § 16-7-1(a), and because the charge that was given did not properly inform the jury about the true nature of the defendant's affirmative defense, the defendant was entitled to a charge on mistake of fact under O.C.G.A. § 16-3-5. Price v. State, 289 Ga. 459, 712 S.E.2d 828 (2011).

Proof of unauthorized entry of dwelling. — Proof that the dwelling was entered without authority of the victim is sufficient to allow the case to go to the jury where the defendant does not offer to show that entry was made with the authority of the owner. Murphy v. State, 238 Ga. 725, 234 S.E.2d 911 (1977).

An unauthorized entry cannot be inferred from mere recent possession of the stolen goods. Knowles v. State, 124 Ga. App. 377, 183 S.E.2d 617 (1971); Wells v. State, 151 Ga. App. 416, 260 S.E.2d 374 (1979).

Without proof of entry, a conviction for burglary cannot stand. Wells v. State, 151 Ga. App. 416, 260 S.E.2d 374 (1979); Caldwell v. State, 183 Ga. App. 110, 357 S.E.2d 845 (1987).

Once the victim withdrew the defendant's authority to enter the victim's house, the fact that the defendant once lived there did not give the defendant subsequent authority to enter; further, the jury was authorized to find that the defendant entered the home at least once with the intent to assault the victim. Bilow v. State, 279 Ga. App. 509, 631 S.E.2d 743 (2006).

Because the state's evidence failed to show that the robbery victim was aware that something was being taken before that taking was complete, the defendant was entitled to a directed verdict of acquittal on a robbery by sudden snatching charge; however, given that: (1) the defendant gained entry to a back office by passing through a storage area, and the jury implicitly rejected an argument that the absence of an "Employees Only" sign meant, despite the victim's testimony to the contrary, that the defendant had permission to enter either the storage area or the office; and (2) the defendant admitted to entering the office without permission, took a cash bag, and reentered the store in a manner intended to hide the defendant from view, a burglary conviction was upheld. Smith v. State, 281 Ga. App. 91, 635 S.E.2d 385 (2006).

Trial court did not err in denying a juvenile an acquittal on a burglary charge on grounds that the juvenile had permission to enter the dwelling as the appeals court specifically found that while the juvenile initially entered the burglarized house with permission, no permission had been granted to the juvenile to enter the victim's locked bedroom. In the Interest of S.K., 289 Ga. App. 672, 658 S.E.2d 220 (2008).

For purposes of the revocation of defendant's supervised release, it was established by a preponderance of the evidence that defendant committed burglary, thus violating O.C.G.A. § 16-7-1, even though no one saw the defendant in the victim's house, after the victim testified that the victim heard someone roaming around the victim's house and discovered bloody footprints on the victim's floors, and police who responded to the victim's 9-1-1 call saw defendant walking away from the porch of the victim's home, with bare and bloody feet and a window screen trapped on the defendant's arm. United States v. Harris, No. 08-12888, 2009 U.S. App. LEXIS 1983 (11th Cir. Jan. 30, 2009) (Unpublished).

Evidence was sufficient to prove that the defendant had, without authority, entered a girlfriend's house to threaten her and take her property because the girlfriend testified that the defendant was not on her lease, did not have a key, and did not have permission to be in her home. Wilson v. State, 304 Ga. App. 743, 698 S.E.2d 6 (2010).

Given that the victim was still paying rent to the property owner, still storing the victim's belongings there, and still receiving mail there, the victim's testimony that the defendant was not authorized to be in the house was sufficient to show that the defendant's entry was "without authority." Davis v. State, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

Proof of unauthorized entry into toll booth. — Defendant was properly convicted of burglarizing a parking booth under O.C.G.A. § 16-7-1(a) because a bur-

Elements of Burglary (Cont'd)
2. Unauthorized Entry (Cont'd)

glary did not require a breaking, but only proof of entry, which was supplied by an eyewitness who saw the defendant reach into the booth and then enter the booth. Holt v. State, 293 Ga. App. 477, 667 S.E.2d 645 (2008).

Breaking window of door and reaching inside in attempt to open the door does not constitute entry for purposes of burglary and will only sustain conviction for criminal attempt to commit burglary. Hampton v. State, 145 Ga. App. 642, 244 S.E.2d 594 (1978).

Attempt to push open door sufficient for attempted burglary. — Defendant's attempted burglary conviction, O.C.G.A. § 16-4-1, was supported by evidence that the victim heard someone "snatching" at and "pushing on" the victim's door. When the victim observed the defendant and another person outside the victim's house, the victim threatened to shoot them; they fled in a car that they had parked close enough to the house that they could have stood on the car and climbed through a window. Mock v. State, 306 Ga. App. 93, 701 S.E.2d 567 (2010).

When defendant "breaks the plane" of the structure by removing an alarm device with an instrument stuck in the door, with intent to steal, defendant has done enough to permit a reasonable trier of fact to rationally find proof of entry, with intent to commit a theft, beyond a reasonable doubt. Mullinnix v. State, 177 Ga. App. 168, 338 S.E.2d 752 (1985).

Because defendant kicked in the door of a home while shouting that defendant was a "federal agent," fired a shotgun through a door, shooting off a victim's thumb, inserted the barrel of the shotgun in the same person's mouth, and demanded money, which the victims turned over, two codefendants identified defendant as the user of the shotgun, and defendant's DNA was found on a ski mask recovered from the getaway car and defendant's fingerprints were found on the car, evidence supported conviction for armed robbery, possession of a weapon during the commission of a crime, aggravated assault, burglary, aggravated battery, and impersonating an officer. Garrison v. State, 276 Ga. App. 243, 622 S.E.2d 910 (2005).

Entry gained by fraud, deceit, or false pretense. — Appellate court erred by reversing the appellee's conviction for burglary because a person enters a home without authority when that person enters without the consent of the owner and when that consent was obtained by fraud, deceit, or false pretense, thus, by fraudulently posing as a potential house purchaser and providing false identification and information, the appellee violated O.C.G.A. § 16-7-1. State v. Newton, 294 Ga. 767, 755 S.E.2d 786 (2014).

Entry gained by fraud, deceit, or false pretense. — Intruder who breaches the barrier with a lie or deception, by pretending to deliver a package or to read a meter, is no less dangerous than their more stealthy cohorts, and nothing in the burglary statute, O.C.G.A. § 16-7-1, suggests an intent to exempt them from liability. State v. Newton, 294 Ga. 767, 755 S.E.2d 786 (2014).

Entry into store. — Evidence was sufficient to convict a defendant of burglarizing a tool supply store, because the defendant's blood was found on the smashed-in door and the defendant had two prior convictions for strikingly similar hardware store burglaries. Although the evidence was circumstantial, there was no other evidence of how the defendant's blood could have been at the scene. The trial court's definition of "entry" as entry on to real estate was not error or, if error, was not harmful because the charge as a whole required that the defendant enter the building. Roberts v. State, 309 Ga. App. 681, 710 S.E.2d 878 (2011).

Unauthorized entry alone is not enough. — Mere illegal entry alone does not satisfy the elements of the crime of burglary; there must be some evidence of an intent to commit theft separate and distinct from the unauthorized entry. Ealey v. State, 139 Ga. App. 604, 229 S.E.2d 86 (1976).

Proof of unauthorized entry does not dispense with the need to further show such entry was with the intent to commit a felony or theft; it does make, however,

the jury's conclusion, reached by consideration of all circumstances connected with the act, that the requisite intent was present, a logical one. Ealey v. State, 139 Ga. App. 604, 229 S.E.2d 86 (1976).

Marriage alone not a defense to burglary. — An entry into the separate residence of an estranged spouse, without authority and with the intent to commit a felony or theft therein, constitutes burglary; disapproving language to the contrary in Mitchell v. State, 263 Ga. 129, 429 S.E.2d 517 (1993); reversing Kennedy v. State, 215 Ga. App., 450 S.E.2d 252 (1994). State v. Kennedy, 266 Ga. 195, 467 S.E.2d 493 (1996).

Evidence was sufficient to prove that defendant lacked authority to enter the victims' house and that defendant intended to commit the specified felonies once inside under O.C.G.A. § 16-7-1(a), and defendant's argument that defendant had authority to enter due to defendant's marriage to one of the victims was not supported by the law; the trial court did not err by refusing to grant defendant's motion to dismiss the statutory aggravating circumstance based on defendant's commission of a burglary under O.C.G.A. § 17-10-30(b)(2). Sallie v. State, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

"Claim of right" defense. — Defendant claimed that defendant had entered the home after a neighbor of the victim told the defendant that defendant could purchase some weights there; however, the state's evidence was sufficient to defeat defendant's "claim of right" defense. Williams v. State, 227 Ga. App. 147, 488 S.E.2d 708 (1997).

Authority to enter withdrawn by victim. — Once the authority to enter a dwelling has been withdrawn by the inhabitant, the fact that defendant may have once lived in the dwelling and left personal property therein does not, in itself, give defendant subsequent authority to enter. Pittman v. State, 230 Ga. App. 799, 498 S.E.2d 309 (1998).

Defendant was without authority to enter his girlfriend's home, notwithstanding that he had lived with her there, since she asked him to leave several days before the incident at issue and, thereby, withdrew his permission to be there. Armour v. State, 247 Ga. App. 592, 544 S.E.2d 516 (2001).

Proof of one entry did not support two counts. — When evidence which was intended to support two counts of burglary could only show that appellant had entered the building one time, the evidence could not support two guilty verdicts. Maynard v. State, 170 Ga. App. 683, 317 S.E.2d 666 (1984).

Evidence sufficient to create jury question as to whether entry into pastorium was accomplished without authority. — See Glisson v. State, 165 Ga. App. 342, 301 S.E.2d 62 (1983).

3. Intent

Time of forming intent. — Intent necessary for commission of burglary, pursuant to O.C.G.A. § 16-7-1(a), need not be formed at the precise moment of entry, but can be formed thereafter while the perpetrator is remaining on the premises. Hewatt v. State, 216 Ga. App. 550, 455 S.E.2d 104 (1995); Stephens v. State, 232 Ga. App. 738, 503 S.E.2d 643 (1998).

Intent necessary for commission of burglary need not be formed at the precise moment of entry but can be formed thereafter while the perpetrator is remaining on the premises; therefore, even though defendant argued that the State of Georgia failed to prove that defendant intended to commit a felony "prior to entering the residence," the evidence was sufficient to convict defendant of burglary because defendant assaulted defendant's love interest's child with a knife in defendant's love interest's house, so the jury was authorized to determine that at some point before defendant entered the house or while defendant remained in it, defendant intended to commit the aggravated assault. The fact that defendant threatened defendant's love interest, cut the telephone line, and kicked in the love interest's back door also supported the conclusion that defendant intended to commit a felony in the house. Williams v. State, 268 Ga. App. 384, 601 S.E.2d 833 (2004).

Question of intent to commit burglary is for determination of jury un-

Elements of Burglary (Cont'd)
3. Intent (Cont'd)

der the facts and circumstances proved. Griffin v. State, 148 Ga. App. 311, 251 S.E.2d 161 (1978).

Whether a defendant entertained an intent to commit a felony after entering is a matter for the jury to say, under the facts and circumstances proved. Kinney v. State, 155 Ga. App. 95, 270 S.E.2d 209 (1980).

Intent is sufficient when actual felony is not committed. — Although defendant was acquitted of the aggravated assault of his wife, there was evidence to support a finding that when defendant forced his way past his wife and into her apartment, he had the intent to commit a felony, either against her or against the victim. For such action to constitute burglary, it is not necessary that the felony be committed as long as the intent to commit the felony was present. Johnson v. State, 262 Ga. 441, 421 S.E.2d 70 (1992).

Effect of defendant's drunkenness. — While drunkenness may be a circumstance from which the jury may infer that one who has taken and carried away another's property did not intend to steal it, still, if the intention to steal is present, drunkenness is no excuse for the crime, even though the intent to steal is caused by the drunkenness itself. Greeson v. State, 90 Ga. App. 57, 81 S.E.2d 839 (1954).

Effect of defendant's intoxication. — Evidence was sufficient to support the defendant's burglary conviction since the jury decided that evidence of the defendant's intoxication did not disprove intent. In addition to testimony about the television wires having been disconnected from various devices in the victim's house, one witness testified that the television was sitting upright on the floor, not face-down, despite the defendant's testimony that the defendant had knocked the television off the stand. Dillard v. State, 323 Ga. App. 333, 744 S.E.2d 863 (2013).

Generally state must, of necessity, rely on circumstantial evidence in proving intent. Kinney v. State, 155 Ga. App. 95, 270 S.E.2d 209 (1980).

Evidence admissible to show intent, motive, and identity of burglar. — In a burglary trial, evidence tending to show that the accused, a few weeks after the burglary in question, again burglarized the same house, was admitted on the ground that it tended to show intent, motive, and the identity of the person who had committed the burglary for which the defendant was then on trial. Hillery v. State, 51 Ga. App. 373, 180 S.E. 499 (1935).

Defense to burglary charge where no intent. — Where, through unconsciousness or other cause, there can be no intent, there would be a defense to a criminal charge. Greeson v. State, 90 Ga. App. 57, 81 S.E.2d 839 (1954).

Presence of valuables inside premises can support inference of intent to steal, particularly when no other motive is apparent. Parrish v. State, 141 Ga. App. 631, 234 S.E.2d 174 (1977); Bradshaw v. State, 172 Ga. App. 330, 323 S.E.2d 253 (1984).

Finding of theft by taking. — There are two essential elements which must be established by the state: (1) lack of authority to enter the dwelling or building; and (2) intent to commit a felony or theft. A finding of theft by taking constitutes proof of the second prerequisite element of burglary. Lloyd v. State, 168 Ga. App. 5, 308 S.E.2d 25 (1983).

Inference of intent to commit theft and rape. — Defendant's testimony that he opened a drawer to look for her purse while he was holding the victim down authorizes an inference that he intended to commit a theft in addition to a rape on entering her house. Holt v. State, 147 Ga. App. 186, 248 S.E.2d 223 (1978).

Motive is not element of burglary. Pope v. State, 140 Ga. App. 643, 231 S.E.2d 549 (1976).

Sufficient evidence of intent. — There was sufficient evidence of intent to commit theft for the defendant to be convicted of burglary under O.C.G.A. § 16-7-1(a); although nothing appeared to be missing from the victim's apartment when the victim returned, electrical equipment that had been hooked up when the victim left was disconnected and left on a chair and some movies that were in a cabinet when the victim left were found in a plastic bag on a chair in the living room,

and the jury was permitted to infer intent from the presence of valuables on the premises, the defendant's holding such valuables, and the defendant fleeing upon being discovered, as the defendant quickly left when the defendant learned that the police had been called. Westmoreland v. State, 281 Ga. App. 497, 636 S.E.2d 692 (2006).

Despite a juvenile's claim that the state failed to prove the element of intent as part of a burglary charge, the appeals court found that when the accomplice testimony and evidence of the juvenile's prior similar acts were coupled with evidence of an unlawful entry and the juvenile's flight, sufficient evidence of intent was presented. In the Interest of S.K., 289 Ga. App. 672, 658 S.E.2d 220 (2008).

Evidence that a defendant, who was under a restraining order, broke into the basement of a former spouse's home, bringing lighter fluid and several lighters, was sufficient to prove that the defendant was guilty of burglary with the intent to commit arson. Bubrick v. State, 293 Ga. App. 502, 667 S.E.2d 666 (2008).

Defendant's intent to commit a felony in the defendant's former girlfriend's home could be inferred from the defendant's conduct in committing physical violence both outside and inside the house, entering the house armed with a tire lug wrench the defendant had taken from the defendant's car, telephoning the girlfriend from her residence to tell her that her children were "going to die," and then in fact murdering one of the children and injuring the other. Foster v. State, 288 Ga. 98, 701 S.E.2d 189 (2010).

Evidence that the defendant and another were carrying stolen items toward a police officer's car and that they dropped the items and ran when they realized it was a police car, despite the officer shouting at them to stop, was sufficient to convict the defendant of burglary and obstruction of justice in violation of O.C.G.A. §§ 16-7-1(a) and 16-10-24(a). Mitchell v. State, 312 Ga. App. 293, 718 S.E.2d 126 (2011).

Indictments

Required contents of indictment. — All that the law requires is that the indictment should identify the dwelling broken and entered with burglarious intent, and that it was not the dwelling of the party so breaking and entering, but that it was occupied by the prosecutor. Phillips v. State, 152 Ga. App. 671, 263 S.E.2d 480 (1979); High v. State, 153 Ga. App. 729, 266 S.E.2d 364 (1980).

Person's "residence and dwelling house" within a county sufficiently describes the particular and peculiar attributes of a house to properly inform the accused of the charges against the accused. Askea v. State, 153 Ga. App. 849, 267 S.E.2d 279 (1980); McCarty v. State, 157 Ga. App. 336, 277 S.E.2d 259 (1981).

There must be specification in a burglary indictment of the particular business structure burglarized when that business operates from two or more locations in the county. Askea v. State, 153 Ga. App. 849, 267 S.E.2d 279 (1980).

Burglary indictment charging the taking of currency and coins was not fatally defective when in fact only currency was taken because it sufficiently alleged the theft of money to enable the defendant to prepare a defense. Dixon v. State, 165 Ga. App. 133, 299 S.E.2d 608 (1983).

Defendant's counsel provided ineffective assistance under U.S. Const., amend. 6 because counsel failed to file a timely demurrer to the burglary count of an indictment, pursuant to O.C.G.A. § 16-7-1, as it was fatally defective because it did not specify an underlying felony, and such could not be imputed when there was no specific incorporation by reference; as such failure contributed to defendant's conviction on a void count, defendant was prejudiced and harmed. Polk v. State, 275 Ga. App. 467, 620 S.E.2d 857 (2005).

Failure to file timely special demurrer. — Defendant could admit every allegation of the indictment and still lack the requisite intent for an attempt at burglary. Consequently, the indictment would not have withstood a timely general demurrer, and trial counsel's performance was deficient in counsel's failure to timely challenge the validity of the attempted burglary count. Coleman v. State, 732 S.E.2d 466, No. A12A1087, 2012 Ga. App. LEXIS 777 (2012).

Indictments (Cont'd)

It is not necessary that indictment for burglary state time of day of alleged burglary. Sellars v. State, 113 Ga. App. 510, 149 S.E.2d 158 (1966).

Indictment need not be in exact statutory language. — That an indictment alleges that the defendant did "feloniously enter" the building from which the goods were stolen rather than using the words "without authority" as provided in the statute does not prevent the indictment from alleging the crime defined. Bass v. State, 123 Ga. App. 705, 182 S.E.2d 322 (1971).

Proof of burglary conviction was not fatally at variance with the indictment, and the conviction was affirmed, where evidence showed that while the victim opened the victim's door to defendant, who the victim knew, the victim did not invite defendant inside, but rather, a codefendant rushed the victim, grabbed the victim, asked where the victim's child was, and pushed the victim back in the living room. Adcock v. State, 269 Ga. App. 9, 603 S.E.2d 340 (2004).

Sufficient. — Burglary count of the indictment was sufficient to withstand a general demurrer because although the offense was mislabeled as "aggravated battery" in the body of the count, the averment portion of the count followed the language of the burglary statute and fully apprised the defendant of the offense charged. The subject heading of the count clearly referred to the offense as burglary and the heading was followed by a citation to the burglary statute itself. Jackson v. State, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Consolidation of indictments. — Trial court did not abuse its discretion in consolidating two indictments charging defendant with peeping Tom and burglary with the intent to commit rape as the charges involved a common plan and a common method of operation where: (1) all the victims were young, black, female students at a particular university; (2) the offenses involved the invasion of their privacy, and all incidents occurred in the same apartment complex within a three-week period; (3) authorities were investigating the peeping Tom incident at the time defendant attacked the second victim; (4) some of the evidence found during the investigation of that attack resulted in evidence relevant to the charge of peeping Tom; and (5) as defendant was acquitted of one of two counts of the first indictment and three of nine counts of the second indictment, it was clear that the jury was able to distinguish the evidence and apply the law intelligently as to each offense. Howard v. State, 266 Ga. App. 281, 596 S.E.2d 627 (2004).

Description of goods involved need not be alleged. — When an indictment for burglary alleges, as the purpose of the breaking, the intent to commit a larceny, and when the indictment further alleges, for the purpose of illustrating the intent to steal at the time of the breaking and entering, an actual stealing after the breaking and entering, no description, value, or ownership of any goods intended to be stolen, or actually stolen after the breaking and entering, need be alleged. Green v. State, 133 Ga. App. 802, 213 S.E.2d 60 (1975).

When value is alleged in an indictment for burglary, the specific amount need not be proved. Green v. State, 133 Ga. App. 802, 213 S.E.2d 60 (1975).

It was not necessary to allege a description, value, or ownership of goods actually stolen to have a valid indictment under the burglary statute. Davis v. State, 139 Ga. App. 105, 227 S.E.2d 900 (1976).

Identity of stolen articles must be indisputably established. — In a prosecution for the offense of burglary where the state relies upon the defendant's recent possession of goods allegedly stolen or feloniously taken for conviction, it is absolutely essential that the identity of the stolen articles be indisputably established. Davis v. State, 154 Ga. App. 803, 269 S.E.2d 874 (1980).

No fatal variance between indictment and proof. — Fatal variance did not occur between an indictment, which alleged that defendant committed burglary by entering the victim's house without authority, and the proof, which showed that defendant had the permission of defendant's roommate to enter the house, because the indictment did not

mislead defendant to the extent that it impeded the defendant's ability to pursue a defense, did not result in any surprise to the defendant at trial, and did not raise the possibility that the defendant could be subjected to a second prosecution for burglary under the same facts; the jury was authorized to find that the defendant made unauthorized entry into one bedroom of the house with the intent of assaulting the victim. Rubaldino v. State, 271 Ga. App. 726, 611 S.E.2d 68 (2005).

In a prosecution for burglary, because the variance between the indictment and the proof presented at trial did not misinform or mislead the defendant in any manner that resulted in surprise or impaired a defense, and the defendant could not be subjected to another prosecution for the same offense, the alleged variance was not fatal; as a result, the trial court did not err in denying the defendant's motion for a directed verdict. Chambers v. State, 284 Ga. App. 400, 643 S.E.2d 871 (2007).

Defendant failed to show that any variance in an indictment was fatal because the burglary count of the indictment correctly specified the location of the building unlawfully entered and also accurately identified the date of the crime; the allegations definitely informed the defendant as to the charge against the defendant so as to enable the defendant to present the defendant's defense and not to be taken by surprise, the indictment's description of the structure as a dwelling house as opposed to a building did not mislead the defendant in such a manner that impeded the defendant's ability to present a subsequent defense or surprise the defendant at trial, and the defendant could not be subjected to a subsequent prosecution for the burglary of the building in question. Davis v. State, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

Any variance between the indictment and the evidence at trial pertaining to the ownership of the building burglarized was not fatal, because ownership was not an element of burglary. Smarr v. State, 317 Ga. App. 584, 732 S.E.2d 110 (2012).

Defendant waived the defendant's argument that there was a fatal variance between the indictment for burglary and the proof by not presenting the indictment to the trial court; moreover, given evidence from the victim that the victim did not owe the defendant any money and that the defendant broke into the victim's apartment and then left with the victim's television and a cell phone, there was no variance. Thompson v. State, 324 Ga. App. 20, 749 S.E.2d 27 (2013).

Burglary of abandoned rental property. — Burglary as alleged in indictment and as proved at trial was committed against landlord's property rights where rental unit had been abandoned without landlord's knowledge; it was not incumbent upon the state to prove that entry into the rental unit had not been authorized by the former tenant. Purdue v. State, 165 Ga. App. 466, 302 S.E.2d 118 (1983).

Motion to sever based on separate indictments. — Where the defendant was charged in separate indictments with the burglary of a business and the burglary of a residence, and there was more than sufficient evidence showing that the crimes charged in the indictments were a series of acts connected together, the trial court did not abuse its discretion in denying the defendant's motion to sever. Denton v. State, 186 Ga. App. 864, 368 S.E.2d 811 (1988).

Included Crimes

When criminal trespass is included within crime of burglary. — When the intent to steal was proved, the crime of criminal trespass merged with or was included within the crime of burglary. Deese v. State, 137 Ga. App. 476, 224 S.E.2d 124 (1976); Varnes v. State, 159 Ga. App. 452, 283 S.E.2d 673 (1981); Poole v. State, 205 Ga. App. 652, 423 S.E.2d 52 (1992).

Defendant could properly be sentenced to serve consecutive terms on defendant's convictions of criminal damage to property in the second degree and criminal trespass since the latter crime had been charged as the lesser offense of burglary. Williams v. State, 180 Ga. App. 854, 350 S.E.2d 837 (1986).

Trial court must give a requested charge on criminal trespass as a lesser included offense of burglary where the testimony of the accused, if believed,

Included Crimes (Cont'd)

would negate an element of the crime of burglary, i.e., entry with intent to commit a felony or theft. Hiley v. State, 245 Ga. App. 900, 539 S.E.2d 530 (2000).

Defendant did not meet defendant's burden to show through the record that the trial court did not consider criminal trespass under O.C.G.A. § 16-7-21(b) as a lesser included offense of burglary under O.C.G.A. § 16-7-1 in light of the fact that both defendant and defense counsel put forth the theory of criminal trespass, and the trial court explicitly stated that it believed the victim's testimony over that of defendant. Joyner v. State, 267 Ga. App. 309, 599 S.E.2d 286 (2004).

Neither burglary nor robbery is included offense of other. — Statutory definition of burglary and robbery makes it clear that the legislature intended to prohibit two designated kinds of general conduct, and that the two crimes, which were codified in separate chapters, are not established by the same proof of all the facts, thus neither crime is a lesser, or included, offense of the other as a matter of law or fact. Moore v. State, 140 Ga. App. 824, 232 S.E.2d 264 (1976).

Common-law burglary was recognized as an offense against habitation, whereas robbery was classified as a species of aggravated larceny which violated the social interest in the safety and security of the person as well as the social interest in the protection of property rights. Moore v. State, 140 Ga. App. 824, 232 S.E.2d 264 (1976).

Neither burglary nor robbery is a lesser or included offense of the other as a matter of law or fact, for the facts must differ to convict for each offense. Luke v. State, 171 Ga. App. 201, 318 S.E.2d 833 (1984); Williams v. State, 178 Ga. App. 581, 344 S.E.2d 247 (1986).

No double jeopardy violation occurred when defendant was convicted of and sentenced for both burglary and robbery. Luke v. State, 171 Ga. App. 201, 318 S.E.2d 833 (1984).

Burglary did not merge with attempted armed robbery. — Convictions for burglary, kidnapping, terroristic threats, and possession of a firearm during the commission of a felony did not merge with attempted armed robbery conviction because the attempted armed robbery was complete before the crimes were committed inside the residence; the defendant discussed with the co-worker the idea to dress up as a heating and air technician to perform a robbery, traveled to the residence armed with handguns and a hollow clipboard used to conceal the handgun, and pointed the handgun at a victim before entering the house. McKinney v. State, 274 Ga. App. 32, 619 S.E.2d 299 (2005).

Arson was not included in the offense of burglary because the same facts were not necessary to prove the commission of both offenses and defendant was properly convicted and sentenced on each. Carter v. State, 238 Ga. App. 632, 519 S.E.2d 717 (1999).

Crimes of burglary and attempted armed robbery. — Elements and the culpable mental state required of burglary and attempted armed robbery are different; the trial court did not err in refusing to merge defendant's burglary and attempted armed robbery convictions where the facts which proved each crime were different and because neither of those crimes was included in the other. Skaggs-Ferrell v. State, 266 Ga. App. 248, 596 S.E.2d 743 (2004).

Merger of armed robbery and burglary charges was not required because not only are the elements and the culpable mental state required for these crimes different, but the facts that proved each crime were different. Evans v. State, 240 Ga. App. 297, 523 S.E.2d 103 (1999).

Defendant's burglary conviction was upheld on appeal, and not subject to reversal merely because of a jury's acquittal of an armed robbery charge as: (1) the verdict was inconsistent, not mutually exclusive; and (2) the inconsistent verdict rule was abolished in Georgia two decades ago; furthermore, the rule was not implicated when verdicts of guilty and not guilty were returned. Einglett v. State, 283 Ga. App. 497, 642 S.E.2d 160 (2007).

Neither burglary nor murder lesser included offense of other. — For substantive double-jeopardy purposes, neither a burglary conviction nor a murder

conviction is a lesser included offense within the other, since proof of additional elements must necessarily be shown to establish each crime. Cash v. State, 258 Ga. 460, 368 S.E.2d 756 (1988).

State may convict and punish for burglary and for unlawful possession of firearm by a previously convicted felon when the firearm was taken in the burglary. The offenses charged were separate and distinct and there was no merger; evidence used to establish the burglary was not again used to establish the later crime of possession of a weapon by a convicted felon. Bogan v. State, 177 Ga. App. 614, 340 S.E.2d 256 (1986).

Burglary and rape not included offenses. — Jury's verdicts of acquittal for a burglary charge and conviction for a rape charge were not inconsistent or repugnant, since a verdict of acquittal upon a burglary charge does not necessarily include a finding against a fact essential for a rape conviction. Smith v. State, 173 Ga. App. 625, 327 S.E.2d 584 (1985).

Offense of burglary is separate and distinct from the sexual offenses committed subsequent to the unlawful entry upon the premises and, therefore, the offenses do not merge, even though the evidence utilized to establish the sexual offenses may also be relied upon to establish the felonious intent necessary to prove the burglary. Palmer v. State, 174 Ga. App. 720, 331 S.E.2d 77 (1985).

Kidnapping not included in burglary. — Where the offense of burglary was completed when the defendant entered or remained in his wife's house with the intent to commit the offense of kidnapping, and it was not necessary to the burglary charge to prove that he actually committed the offense of kidnapping, the offense of kidnapping was not included in the offense of burglary as a matter of fact or of law, and he therefore was convicted properly of both offenses. Childs v. State, 257 Ga. 243, 357 S.E.2d 48, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Criminal damage to property-second degree is not lesser included offense of burglary. — Former Code 1933, § 26-1502 was not a lesser included offense of the crime of burglary. Christian v. State, 130 Ga. App. 582, 203 S.E.2d 914 (1974).

Theft by taking is a lesser included offense to burglary. Lockett v. State, 153 Ga. App. 569, 266 S.E.2d 236 (1980).

Theft by taking may be lesser included offense to burglary while theft by receiving is not lesser included offense to burglary. Breland v. Smith, 247 Ga. 690, 279 S.E.2d 204 (1981).

Burglary and theft by taking did not merge. — Defendant's burglary and theft by taking charges involving the same house were not based on the same facts; the burglary was complete when the defendant entered the dwelling house with the intent to commit theft, and the theft by taking occurred when the defendant actually took the property described in the indictment. Martin v. State, 285 Ga. App. 375, 646 S.E.2d 339 (2007).

Theft by taking may in some circumstances be a lesser included offense of burglary; but it does not follow that when a burglary was committed but nothing was actually taken the attempt to commit theft by taking will be a lesser included offense which the defendant is entitled to have charged. Cannon v. State, 167 Ga. App. 225, 305 S.E.2d 910 (1983).

Theft by receiving stolen property contains elements not present in offense of burglary. — Only an intent to commit theft is required — not the complete act. Gearin v. State, 127 Ga. App. 811, 195 S.E.2d 211 (1973); Pruitt v. State, 217 Ga. App. 681, 458 S.E.2d 696 (1995).

Theft by receiving stolen property is not lesser included offense of burglary and it is not error for the trial court, in the absence of a written request, to fail to charge on the lesser crime. Jacobs v. State, 140 Ga. App. 410, 231 S.E.2d 155 (1976).

As matter of fact or of law, theft by receiving is not a lesser included offense of burglary. State v. Bolton, 144 Ga. App. 797, 242 S.E.2d 378 (1978).

Theft by receiving is not a lesser included offense of burglary. Nebbitt v. State, 187 Ga. App. 265, 370 S.E.2d 1 (1988).

Theft by receiving stolen property is not a lesser included offense of burglary; thus, if the indictment avers that the defendant

Included Crimes (Cont'd)

is the thief by way of burglary, it is not error for the court to refuse to charge theft by receiving as a lesser included offense. Porter v. State, 264 Ga. App. 526, 591 S.E.2d 436 (2003).

Because theft by receiving is not a lesser included offense of burglary, the trial court's reduction of the charge against appellant from burglary to theft by receiving was error as the bill of indictment did not charge the appellant with theft by receiving. Holloman v. State, 168 Ga. App. 683, 310 S.E.2d 734 (1983).

One cannot be a principal thief of stolen property and at the same time be convicted of theft by receiving the same property. — Defendants' convictions for the crimes of burglary and theft by receiving as to one residence were reversed because one cannot be a principal thief of stolen property and at the same time be convicted of theft by receiving the same property. Clark v. State, 289 Ga. App. 612, 658 S.E.2d 190 (2008).

Theft other than from burglarized premises. — When a golf cart was removed from a fenced area on the grounds, not from the inside of the burglarized clubhouse, the theft of the cart was a separate offense and not included in the burglary offense. Floyd v. State, 186 Ga. App. 777, 368 S.E.2d 541 (1988).

Neither burglary nor voluntary manslaughter are included in the other within the meaning of the burglary statute. Oglesby v. State, 243 Ga. 690, 256 S.E.2d 371 (1979).

Charges of burglary and murder not legally incompatible or lesser included offenses of each other. Williams v. State, 250 Ga. 553, 300 S.E.2d 301, cert. denied, 462 U.S. 1124, 103 S. Ct. 3097, 77 L. Ed. 2d 1356 (1983).

Evidence was sufficient to support defendant's convictions for malice murder and burglary, where defendant entered the victim's apartment with keys that defendant had as a maintenance worker. Oliver v. State, 276 Ga. 665, 581 S.E.2d 538 (2003).

Possession of burglary tools and burglary are separate and distinct offenses and conviction of one is not an essential part of conviction of the other. Butler v. State, 130 Ga. App. 469, 203 S.E.2d 558 (1973); McKinney v. State, 155 Ga. App. 930, 273 S.E.2d 888 (1980), overruled on other grounds, 184 Ga. App. 607, 362 S.E.2d 65 (1987).

Burglary conviction and entering an automobile with intent to commit a theft conviction did not merge as the state was required to show unlawful entry into a warehouse to convict defendant of burglary, but not to obtain a conviction for entry of automobile with intent to commit a theft; the burglary offense was completed when defendant entered the warehouse without authority and with the intent to commit the theft of the computers; the automobile offense occurred when defendant entered the victim's car with the intent to take the computers. Morris v. State, 274 Ga. App. 41, 616 S.E.2d 829 (2005).

Court need not charge lesser included offense where not requested. — In prosecution for burglary, although theft by taking could have been considered to be a lesser included offense given facts of case, where defendant did not request such a charge, trial court did not err in failing to give such a charge. Gray v. State, 163 Ga. App. 720, 294 S.E.2d 697 (1982).

Jury Instructions

Scope of instructions. — Burglary, as it is defined in O.C.G.A. § 16-7-1, is a legal word of art, and whether or not all of its elements have been proven beyond a reasonable doubt cannot be rationally determined by an uninstructed jury. Rivers v. State, 250 Ga. 303, 298 S.E.2d 1 (1982).

Clarifying charge not required. — Trial court properly gave the pattern jury charge on burglary, which charge was not incomplete because the charge failed to distinguish between authorized and unauthorized entry, as defendant failed to make a written request for an additional clarifying charge; the law does not recognize authorized entry as a separate defense to burglary. Smith v. State, 279 Ga. 172, 611 S.E.2d 1 (2005).

Defendant's burglary conviction was not reversed due to the trial court's charge to the jury as to the use of prior inconsistent

statements as the instruction was an accurate statement of the law, and the defendant failed to submit a written request for any additional clarifying charge; hence, the giving of an otherwise correct charge was not rendered erroneous for lack of an additional explanatory charge, in the absence of an appropriate request. Thomas v. State, 284 Ga. App. 222, 644 S.E.2d 160 (2007).

Jury charges as to intent. — Refusal to give a charge under the burglary statute that the jury must acquit if the defendant had no intent to commit a felony or theft, "or that he formed that intent only after he was inside the building," was not error. Keith v. State, 138 Ga. App. 239, 225 S.E.2d 719 (1976).

Charge to the jury that states that a person commits burglary when and without authority the person enters the building of another constitutes reversible error as the charge omits the necessary stipulation that the person must have entered the building of another "with the intent to commit a felony or theft therein." Brooks v. State, 146 Ga. App. 519, 246 S.E.2d 506 (1978).

Charge on inference of intent to steal. — Instructing the jury that it would be authorized but not required to infer an intent to steal from evidence which showed the unlawful entry of another's building wherein valuables were stored or kept states a legally correct principle of the law. Prothro v. State, 186 Ga. App. 836, 368 S.E.2d 793 (1988).

Charge on voluntariness of incriminating statement. — In a prosecution for burglary, in the absence of a request, the court is not required to charge on the voluntariness of an incriminating admission. White v. State, 151 Ga. App. 559, 260 S.E.2d 554 (1979).

Charge as to definition of felony. — There was no error in failing to instruct the jury on the definition of "felony" where, under the indictment, theft was the only felony that was relevant. Inman v. State, 191 Ga. App. 497, 382 S.E.2d 122 (1989).

Charge as to definition of building. — Trial court did not err in defining a building as "an enclosed or partially enclosed structure, manmade in whole or in part, capable of ingress or egress by a person, usually on a fixed site, designed or used for the purpose of housing or providing protection for property or persons, whether permanently or temporarily." Franks v. State, 240 Ga. App. 685, 524 S.E.2d 545 (1999).

Curative instruction. — Because the state presented sufficient identification and circumstantial evidence linking the defendant to a burglary, including similar transaction evidence of a prior burglary, and in response to trial counsel's objection to the state's comment that the defendant was under the influence of drugs or alcohol at the time of the offense, the defendant did not object to the curative instruction given, the defendant's motion for a new trial was properly denied. Bryant v. State, 285 Ga. App. 508, 646 S.E.2d 717 (2007).

Shifting burden. — Trial court's instruction to the jury on the inference which may arise from proof of possession of goods recently stolen in a burglary was not burden-shifting. Myles v. State, 186 Ga. App. 817, 368 S.E.2d 574 (1988).

Instruction regarding conviction on circumstantial evidence may be necessary. — In a burglary prosecution when the only evidence tending to connect the accused with the alleged offense was the accused's unsatisfactorily explained possession of recently stolen goods, it was error for the trial court to fail to give, with or without request, a charge on the principle contained in former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6), relating to when a conviction may be had on circumstantial evidence. Price v. State, 180 Ga. App. 215, 348 S.E.2d 740 (1986).

Jury instructions on "parties to crime" not misleading. — When the court charged on "parties to a crime," and the defendant contended that the jury might have been confused and thought the charge applied to the offense of theft by receiving stolen property, which is not a lesser included offense of burglary, but the court did not charge on any lesser included offense, instructing the jury only on the offense charged, namely burglary, and also instructed the jury that there were only two findings it could make, either guilty or not guilty of burglary,

Jury Instructions (Cont'd)

there was nothing in the charge which could have misled the jury as to lesser included offenses. Accordingly, it was not error to deny defendant's motion for a new trial. Ivey v. State, 180 Ga. App. 407, 349 S.E.2d 272 (1986).

Charge on identification. — It was not error for the trial court's charge to include instructions regarding identification, where the only eyewitness to the actual burglary could not give a positive identification, but the eyewitness did give a general description of the individuals the eyewitness saw had seen fleeing the scene of the crime, there was no contention that defendant would not match one of the descriptions, and this testimony, coupled with the other circumstantial evidence, clearly authorized a jury to find that defendant was one of the perpetrators of the burglary. Price v. State, 180 Ga. App. 215, 348 S.E.2d 740 (1986).

Charge to jury about unaccounted-for possession of recently stolen goods. — Even though the defendant in a burglary prosecution did not testify, a charge to the jury that the possession of recently stolen goods, unaccounted for, raises an inference that the possessor is the one who stole the goods, unless defendant makes explanation, was not an impermissible comment on the defendant's silence in violation of U.S. Const., amends. 5, 14. Thomas v. State, 237 Ga. 690, 229 S.E.2d 458 (1976).

Trial court did not err in recharging a jury twice on the inference to be drawn from the defendant's possession of recently stolen tools and equipment from a victim's residence and outbuildings in the defendant's trial for three counts of burglary. Barbee v. State, 308 Ga. App. 322, 707 S.E.2d 550 (2011).

Charge on theft by taking not warranted. — When the state's evidence established all of the elements of burglary and defendant, testifying in defendant's own behalf, admitted all of the allegations of the indictment, the lesser included offense of theft by taking was not raised by the evidence and it was not error to fail to charge the jury on this lesser crime as a possible verdict. Crawford v. State, 181 Ga. App. 454, 352 S.E.2d 635 (1987).

Because the elements of theft by taking could not be inferred from defendant's testimony, the trial court did not err in denying defendant's requested instruction on the same as a lesser included offense; moreover, any error in failing to give this requested instruction was harmless given the overwhelming evidence that defendant committed a burglary. Goldberg v. State, 280 Ga. App. 600, 634 S.E.2d 419 (2006), aff'd, 282 Ga. 542, 651 S.E.2d 667 (2007).

Charge on circumstantial evidence unwarranted. — While the prosecution against the defendant on charges of burglary, theft by taking, and criminal trespass included both direct and circumstantial evidence, convictions on those charges were not reversed merely because the trial court failed to charge former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6) as the defendant failed to request that charge. Rodriguez v. State, 283 Ga. App. 752, 642 S.E.2d 705 (2007).

When court charged that burglary can be committed in more than one manner, i.e., with the intent "to commit a felony or theft therein"; when the indictment charged, and the evidence showed, an entry "with intent to commit a felony [i.e., kidnapping] . . . therein"; the lack of any evidence or contention that defendant entered or remained in his wife's home with the intent to commit a theft therein eliminates any reasonable probability that the jury convicted him of the commission of this type burglary (i.e., with an intent to commit theft), and any possible error resulting from the trial court's inclusion of the extraneous words, "or theft," is harmless beyond a reasonable doubt. Childs v. State, 257 Ga. 243, 357 S.E.2d 48, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Effect of denial of participation on charge of criminal trespass. — When in prosecution for burglary defendant steadfastly maintained that defendant had neither entered nor had even been near the building where the burglary took place, having denied being there, defendant was not entitled to a charge to the effect that if the jury disbelieved defendant the jury could still come back with a verdict of guilty on the lesser offense of

criminal trespass. Johnson v. State, 164 Ga. App. 429, 296 S.E.2d 775 (1982).

When a defendant defended upon the theory that defendant was not a party to the crime of burglary charged and was not present, the trial court did not err in failing to charge on the lesser included offense of criminal trespass. Weems v. State, 172 Ga. App. 401, 323 S.E.2d 272 (1984).

Charge on criminal trespass as lesser included offense. — When defendant was arrested while standing just inside an unlocked rear door of a store which had been secured for the night a few minutes earlier, the defendant explained to the arresting officer that the defendant "was looking for some food and a place to get warm," and there was no evidence that the defendant was in possession of burglary tools or property belonging to the store, and the officer testified that there was no sign of a forced entry, the trial court erred in refusing defendant's requested charge on criminal trespass as a lesser included offense, since the jury might reasonably have determined that although the defendant acted unlawfully in entering the store, the defendant did not enter "with the intent to commit a felony or theft therein," so as to be guilty of burglary within the contemplation of O.C.G.A. § 16-7-1. Hambrick v. State, 190 Ga. App. 119, 378 S.E.2d 340, cert. denied, 190 Ga. App. 897, 378 S.E.2d 340 (1989).

Based on testimony that the defendant entered a business for a lawful purpose, and the state showed that the defendant entered the building with the intent to commit theft, no evidence was presented that the defendant entered the premises for any other unlawful purpose; hence, the defendant was not entitled to a jury instruction under O.C.G.A. § 16-7-21(b)(1) as a lesser included offense of burglary. Moore v. State, 280 Ga. App. 894, 635 S.E.2d 253 (2006).

When the defendant was charged with burglary but denied entering the premises, it was not error to refuse to instruct on the lesser included offense of criminal trespass; trespass instructions were not appropriate when the defendant denied entering the burglarized premises. Adams v. State, 284 Ga. App. 534, 644 S.E.2d 426 (2007).

There was no error in a trial court's refusal to give a requested instruction on criminal trespass as a lesser included offense in a defendant's criminal trial on a charge of burglary, in violation of O.C.G.A. § 16-7-1(a), as the evidence supported the burglary conviction and, further, there was insufficient evidence of the amount of criminal damage to a broken window and whether such damage exceeded $500 for purposes of the criminal trespass offense. Williams v. State, 292 Ga. App. 811, 665 S.E.2d 910 (2008).

With regard to a defendant's conviction for burglary, and other offenses, based on the defendant's unlawful entry into a building that was under construction, the trial court did not err by refusing to charge the jury on the lesser included offense of criminal trespass based on the status of the construction as the evidence showed that the house was a building under the burglary statute, O.C.G.A. § 16-7-21, since that statute did not require that the property at issue constitute a residence, habitation, or place of abode. As a result, since all of the evidence established all of the elements of burglary, and under the defendant's defense as to the burglary charge, the defendant would have been guilty of no offense at all, a charge on the lesser included offense of criminal trespass was not required. Sanders v. State, 293 Ga. App. 534, 667 S.E.2d 396 (2008).

With regard to a defendant's conviction for burglary, the trial court did not err by refusing to charge the jury on the lesser included charges of criminal trespass and attempt to commit burglary as, by the defendant denying any involvement, the evidence raised only two possibilities, namely that the defendant either committed the burglary or did not. Thus, the evidence did not warrant the charges on the lesser included offenses. Johnson v. State, 296 Ga. App. 112, 673 S.E.2d 596 (2009).

Trial court's error in failing to charge the jury on the lesser included offense of criminal trespass, O.C.G.A. § 16-7-21(b)(1), in the defendants' trial for burglary in violation of O.C.G.A. § 16-7-1(a)

Jury Instructions (Cont'd)

was not harmless because there was evidence that a home had been burglarized previously, and there was very little evidence linking the damage in the house to the defendants. Waldrop v. State, 300 Ga. App. 281, 684 S.E.2d 417 (2009).

Trial court erred in convicting the defendants of burglary in violation of O.C.G.A. § 16-7-1(a) for entering property with intent to take electrical wiring and copper piping because the trial court should have charged the jury on the lesser included offense of criminal trespass, O.C.G.A. § 16-7-21(b)(1), when the jury could have concluded that the defendants were guilty of criminal trespass since the jury could have found that the defendants entered a house with the intent to loiter there; the defendants were on the property without permission, one of the defendants stated that the defendants were not there to steal anything but rather to "look around," and the defendants thought the house was about to be bulldozed, police officers did not find any tools in the building or in the immediate possession of either of the defendants, and the defendants were not found in immediate possession of any purported stolen items. Waldrop v. State, 300 Ga. App. 281, 684 S.E.2d 417 (2009).

Trial court did not err in failing to instruct the jury on criminal trespass as lesser included offense of burglary because the defendant did not request a charge on criminal trespass, either orally or in writing; because the defendant made no oral request for a charge on criminal trespass, the trial court did not err in failing to give one sua sponte. Shindorf v. State, 303 Ga. App. 553, 694 S.E.2d 177 (2010).

Because there was no written request, the trial court did not err by failing to instruct the jury on criminal trespass as a lesser included offense of burglary. Boatright v. State, 289 Ga. 597, 713 S.E.2d 829 (2011).

Defendant's trial counsel was not ineffective for failing to request a jury charge on criminal trespass as a lesser included offense of burglary since such a charge would not have been warranted by the evidence, which showed that the defendant harbored either the unlawful purpose of committing theft or the lawful purpose of going back to sleep in a friend's house. Dillard v. State, 323 Ga. App. 333, 744 S.E.2d 863 (2013).

Defendant was not entitled to an instruction on criminal trespass as a lesser included offense of burglary because, if the jury believed the state's evidence, the defendant was guilty of burglary and if the jury accepted the defendant's defense to the crime, the defendant was guilty of no offense. Stillwell v. State, 329 Ga. App. 108, 764 S.E.2d 419 (2014).

Trial court did not commit plain error by failing to charge the jury on criminal trespass as a lesser included offense of burglary because the defendant did not testify at trial or present any other evidence negating any element of the crime of burglary; the state presented evidence from which the jury could infer an intent to steal; and there was no evidence that the defendant was merely seeking shelter from the cold when the defendant tried to break into the area of the victims' house containing valuables. Daniel v. State, 338 Ga. App. 389, 787 S.E.2d 281 (2016).

Court's failure to charge lesser included offense of theft by taking is not reversible error unless the accused by written application to the trial judge at or before the close of the evidence requests such charge. Lovett v. State, 165 Ga. App. 379, 301 S.E.2d 303 (1983).

Refusal of the trial court to give a requested charge that "in all cases there exists the presumption that no crime has been committed" is not error when the victim's testimony, if believed by the jury, was sufficient direct evidence to establish a corpus for the offenses of rape, burglary, and aggravated sodomy alleged, and the trial court charged the jury the general charge on the presumption of innocence. Smith v. State, 180 Ga. App. 422, 349 S.E.2d 279 (1986).

Objection to charge on recent possession waived. — By failing to object to the charge, defendant waived right on appeal to contend that the trial court incorrectly charged the jury on the doctrine of recent possession of stolen property. Harper v. State, 180 Ga. App. 20, 348 S.E.2d 318 (1986).

Court's failure to define rape in its charge required reversal of defendant's burglary conviction, even in the absence of a request to so charge, where it could not be determined from the verdict, which read "guilty on all three counts," whether the jury convicted defendant of burglary based on entry with intent to commit an assault with a deadly weapon or an assault with intent to commit rape. Kelley v. State, 201 Ga. App. 343, 411 S.E.2d 276 (1991).

Failure to charge common law marriage. — Error by the trial court in refusing to charge the jury that a finding that defendant and his former girlfriend were living together, or that they had a common law marriage, would require a not guilty verdict to the burglary charge. Mitchell v. State, 263 Ga. 129, 429 S.E.2d 517 (1993).

Failure to give charge on burglary harmless. — When case contained some evidence that defendant did not use a weapon to take property from the victim, defendant was therefore entitled to a charge on the lesser included offense of burglary; however, in light of the overwhelming evidence against defendant, it was highly probable that the failure to give this charge did not contribute to the verdict, thus the conviction was affirmed. Edwards v. State, 264 Ga. 131, 442 S.E.2d 444 (1994).

Refusal to charge mistake of fact. — Trial court did not err in failing to charge the jury on the defense of mistake of fact under O.C.G.A. § 16-3-5 as to the burglary counts of the indictment because the fact that the defendant could have thought that someone lived in the home did not constitute the type of mistake of fact that would serve as a defense to the defendant's unauthorized entry into the home since the evidence was uncontroverted that the defendant was not invited into the home. Boatright v. State, 289 Ga. 597, 713 S.E.2d 829 (2011).

Charge stating "enter or remain." — Even though the indictment alleged that defendant did "enter and remain" in a dwelling, the court's charge that to constitute the offense of burglary, it was necessary only that the evidence show that defendant did "enter or remain" in the dwelling did not prejudice defendant's defense. Stander v. State, 226 Ga. App. 495, 486 S.E.2d 712 (1997).

Charge on "without authority" element. — Instruction that if the jury found that a person "has entered or has remained on the premises of another with the intent to commit a theft, that person's entry or remaining would not be legally authorized" constituted reversible error. Thompson v. State, 271 Ga. 105, 519 S.E.2d 434 (1999).

Trial court fully instructed the jury on the prosecution's burden of proving beyond a reasonable doubt the essential elements of the crimes for which defendant was being tried, including burglary; when this charge was considered in conjunction with that which tracked the language of O.C.G.A. § 16-7-1(a), the jurors were given complete and correct instructions as to defendant's authorized entry defense to burglary. Smith v. State, 279 Ga. 172, 611 S.E.2d 1 (2005).

When a trial court improperly removed a question of fact from the jury's consideration, defendant's conviction for burglary was reversed, and a new trial was required. The trial court instructed the jury that the victim had withdrawn defendant's authority to enter the victim's house, but because there was evidence that defendant resided in the house, paid one-half of the down payment for the house, and contributed to the monthly bills, the issue of whether the victim initially withdrew defendant's authority was a question of fact for the jury. Williams v. State, 268 Ga. App. 384, 601 S.E.2d 833 (2004).

Intent to commit a theft. — Trial court did not err in the jury charge it gave on burglary, as the charge tracked the statutory language for burglary and the jury charge the trial court gave on intent could not have misled or confused the jurors that the intent to commit a theft had to occur in the premises entered; accordingly, the jury was properly instructed on the burglary charge. Jackson v. State, 260 Ga. App. 848, 581 S.E.2d 382 (2003).

"Level of certainty" instruction held harmless. — Despite the defendant's correct assertion that the trial court erred in charging the jury that one of the

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factors to be considered in assessing the reliability of identification testimony was the level of certainty shown by the witness about her identification, because there was evidence other than the victim's identification of the defendant which connected the defendant to the offenses of burglary, aggravated sodomy, and aggravated sexual battery, the error was harmless and the convictions for the same were upheld. Bharadia v. State, 282 Ga. App. 556, 639 S.E.2d 545 (2006), cert. denied, No. S07C0522, 2007 Ga. LEXIS 222 (Ga. 2007).

Charge on inference based on recent possession of stolen property. — In a defendant's prosecution for, inter alia, burglary under O.C.G.A. § 16-7-1, the jury was properly instructed on the inferences permitted from recent possession of stolen property because although other items were stolen from the victim's home, an inference of guilt was proper from the defendant's possession of just one stolen check; even though the defendant offered some corroborating evidence for the explanation of the defendant's possession of the check, the jury was still entitled to draw an inference of the defendant's guilt from the defendant's possession of stolen property if the jury disbelieved the defendant. Johnson v. State, 297 Ga. App. 341, 677 S.E.2d 402 (2009).

Failure to object. — In an action in which the defendant, on appeal, argued that a disjunctive jury charge authorized a burglary conviction in a manner not set forth in the indictment, but at trial, the defendant not only failed to raise this objection, but, affirmatively stated to the court that the jury charge was adjusted to the facts, the objection was waived. Moore v. State, 280 Ga. App. 894, 635 S.E.2d 253 (2006).

Inferences and Sufficiency and Admissibility of Evidence

Inference or presumption of fact sufficient to convict. — Where a theft, whether by simple larceny, burglary, or robbery is proven, recent unexplained possession of the stolen goods by the defendant creates an inference or presumption of fact sufficient to convict. Selph v. State, 142 Ga. App. 26, 234 S.E.2d 831 (1977); Wells v. State, 151 Ga. App. 416, 260 S.E.2d 374 (1979), overruled on other grounds, Copeland v. State, 160 Ga. App. 786, 287 S.E.2d 120 (1982).

Where within a day or two following a burglary the defendant sold the stolen goods to the owner of a pawn shop, and the stolen goods were thus found to have been in the possession of the defendant charged with burglary recently after the commission of the offense, that fact authorized the jury to infer that the defendant was guilty, unless the defendant explained the possession to their satisfaction. Cosby v. State, 151 Ga. App. 676, 261 S.E.2d 424 (1979).

In a burglary trial, whether to believe that defendant's explanation of possession of the stolen goods advanced at trial was a reasonable or satisfactory one was a question for the jury. Cosby v. State, 151 Ga. App. 676, 261 S.E.2d 424 (1979).

When property alleged to be stolen is proven to be stolen property and the crime charged has been committed by someone, the recent unexplained possession of the stolen property by the defendant is a circumstance from which guilt may be inferred. From this, it may be inferred that the defendant charged committed the theft proven. This being so, no further proof, circumstantial or direct, showing that the defendant committed the burglary was necessary for conviction. Atkins v. State, 155 Ga. App. 390, 271 S.E.2d 35 (1980); Rakestraw v. State, 155 Ga. App. 563, 271 S.E.2d 696 (1980).

Evidence that defendants were in recent unexplained possession of stolen items taken from a burglarized business creates an inference or presumption of facts sufficient to convict. Nash v. State, 166 Ga. App. 533, 304 S.E.2d 727 (1983).

There was sufficient evidence for a rational trier of fact to find a defendant guilty of burglary where the victim testified that the defendant was on the premises without the victim's consent and the defendant testified that because of defendant's former long-time relationship with the victim and the fact that from time to time the defendant had given the victim valuable gifts, the defendant had felt jus-

tified in entering the victim's house and removing certain contents. Powell v. State, 170 Ga. App. 360, 317 S.E.2d 338 (1984).

Recent possession of stolen property, not satisfactorily explained, is sufficient basis for the corroboration of an accomplice's testimony. Inman v. State, 182 Ga. App. 209, 355 S.E.2d 119 (1987).

Evidence was sufficient to convict defendant of burglary where defendant and three other suspects were found and identified by a public safety officer in the vicinity of a high school which was vandalized and two of the suspects testified that defendant entered the school with them and removed items in a backpack. Smith v. State, 253 Ga. App. 789, 560 S.E.2d 348 (2002).

Evidence was sufficient to convict defendant of burglary under O.C.G.A. § 16-7-1(a) where two alleged accomplices testified against defendant, the victim's brother positively identified defendant as a participant, and clothes seized from defendant's home matched what the burglars were described as wearing. Stargell v. State, 254 Ga. App. 72, 561 S.E.2d 207 (2002).

Since defendant possessed some items stolen from garages within hours of the burglaries, the jury was free to reject the explanation of the possession of the goods; defendant's pawning the items within hours of the theft compounded the inference of his guilt, and, along with similar transaction evidence, was sufficient to support defendant's burglary convictions. Davis v. State, 275 Ga. App. 714, 621 S.E.2d 818 (2005).

Eyewitness testimony identifying defendant as the person who smashed a window to a building and entered it, the scratches on defendant's arms and hands, the carrying of a tool containing a screwdriver, the flight from the police, the presence of valuables in the building, as well as defendant's apprehension near the scene of the crime, constituted sufficient evidence to sustain defendant's burglary conviction. Morton v. State, 276 Ga. App. 421, 623 S.E.2d 239 (2005).

Because: (1) the evidence showed that a juvenile and the juvenile's brothers had been in and around the victim's apartment complex on the day of the burglary; (2) both the victim and the investigating officer observed the boys entering the apartment complex's parking lot through a hole in the perimeter fence while carrying two garbage bags containing some of the victim's recently stolen property; and (3) the rule in Georgia was that where a theft, whether by simply larceny, burglary, or robbery, was proven, that recent unexplained possession of the stolen goods by a defendant created an inference or presumption of fact sufficient to convict, the aforementioned evidence was sufficient to support an adjudication against the juvenile for burglary. In the Interest of T.T., 282 Ga. App. 527, 639 S.E.2d 538 (2006).

There was sufficient evidence to find the defendant guilty of burglary of a daycare center when an expert testified that deoxyribonucleic acid taken from blood on the interior ledge of a window that had been broken into was that of the defendant or the defendant's identical twin, from which the jury could infer that the defendant's blood was left at the time the daycare center was broken into; furthermore, even without evidence that anything was stolen, the jury could infer an intent to steal based on the evidence of an unlawful entry into a building housing an operating business. Adams v. State, 284 Ga. App. 534, 644 S.E.2d 426 (2007).

Defendant's burglary convictions were affirmed based on the property owners' testimony that items were stolen during unauthorized entries into their respective residences, evidence that the stolen items were found in the defendant's bedroom shortly thereafter, and the defendant's inconsistent explanations for the defendant's possession of the stolen items. Additionally, defendant's accomplice testified that the defendant was present with the accomplice on two of the three burglaries. Mays v. State, 306 Ga. App. 507, 703 S.E.2d 21 (2010).

Jury was authorized to find the defendant guilty of burglary beyond a reasonable doubt because the evidence showed that the defendant was seen loading the victim's furniture, television and other items onto a truck, the victim did not know the defendant and did not give the

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defendant permission to enter the apartment or take any belongings, and the defendant's intent could be inferred from falsely telling a witness that permission was given to take the items. Pullins v. State, 323 Ga. App. 664, 747 S.E.2d 856 (2013).

1. Evidence Sufficient.

Sufficient circumstantial evidence supported burglary of school conviction. — State provided circumstantial evidence to support the defendant's burglary conviction including evidence to show that the building had an alarm that was set for the night, the defendant entered the building by breaking a window and setting off the alarm, the defendant was not an employee or parent of a student at the school, and the defendant fled after setting off the alarm. Harris v. State, 322 Ga. App. 122, 744 S.E.2d 111 (2013).

Sufficient circumstantial evidence of intent. — Sufficient circumstantial evidence of defendant's intent supported the defendant's burglary conviction as the defendant admitted entering the victim's home, and the victim testified that medications and cash were missing from the victim's home after the incident and that no one else had been in the victim's home from the time that the victim last saw the items until the victim noticed them missing; trial court's comments as to defendant's intent referred to the trial court's reason for finding defendant not guilty of burglary with intent to commit rape and did not go to defendant's burglary with intent to commit theft. Joyner v. State, 267 Ga. App. 309, 599 S.E.2d 286 (2004).

Evidence was sufficient to support defendant's burglary conviction where defendant knew that the codefendants planned a "job" and that "job" meant a burglary, defendant drove the codefendants to the victim's house and dropped them off, a codefendant discussed the codefendant's reservations in front of defendant, and defendant drove past the stated destination and returned for the codefendants but drove away at an officer's direction and never retrieved them. Botelho v. State, 268 Ga. App. 129, 601 S.E.2d 494 (2004).

Evidence was sufficient to support a burglary conviction, as the defendant broke into the victim's next-door residence with the intent to steal a gun from the victim's bedroom drawer. Meeks v. State, 274 Ga. App. 517, 618 S.E.2d 152 (2005).

Defendant's convictions of aggravated assault, O.C.G.A. § 16-5-21, and burglary, O.C.G.A. § 16-7-1, were affirmed, as there was sufficient circumstantial evidence under former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6) to prove that the defendant was the person who committed the acts in question, based on witness testimony and the discovery of clothes and a gun used in the robbery in the defendant's room. Moore v. State, 277 Ga. App. 474, 627 S.E.2d 107 (2006).

Even if a burglary victim had not testified that the checks were missing, an intent to steal could have been inferred since the evidence showed the defendant's unlawful entry into the building of another where valuable goods were kept, and the trial court did not err in charging the jury that it was allowed to "infer" an intent to steal in the context of burglary; while the defendant denied the burglary upon a defense of alibi, the testimony of a single witness was generally sufficient to establish a fact, and the defendant's challenge to the sufficiency of the evidence was without merit. Studiemeyer v. State, 278 Ga. App. 756, 629 S.E.2d 593 (2006).

Even though the evidence was circumstantial, it was sufficient for a rational trier of fact to find beyond a reasonable doubt that the defendant was the person who cut a fence, broke in a door, and took checks from a desk in a body shop; an expert firearms and tool mark examiner testified with absolute certainty that the wire cutter in the defendant's multipurpose tool had been used to cut the fence at the body shop. Donnell v. State, 285 Ga. App. 135, 645 S.E.2d 614 (2007).

Defendant's burglary conviction in violation of O.C.G.A. § 16-7-1 was supported by sufficient evidence because the defendant entered the victim's house without permission and there was circumstantial evidence that the defendant intended to commit a theft therein since there was

money in the house before the defendant entered, but the money was gone after the defendant left. Hall v. State, 294 Ga. App. 274, 668 S.E.2d 880 (2008).

Evidence was sufficient to support the defendant's burglary conviction because the evidence that the defendant's entry in a house was unauthorized, evidence establishing the presence of valuables in the house, and evidence that contradicted the defendant's innocent explanation for the defendant's entry, authorized the jury to infer that the defendant intended to commit a theft when the defendant entered the victims' house. Long v. State, 307 Ga. App. 669, 705 S.E.2d 889 (2011).

Defendant's conviction of criminal attempt to commit burglary was affirmed because while the defense presented a different theory of events and claimed that the defendant did not act with the intent to commit a theft, it was the jury's province to assess witness credibility, resolve the conflicts in the evidence, and determine whether there was a reasonable hypothesis of innocence favorable to the defendant. Anthony v. State, 317 Ga. App. 807, 732 S.E.2d 845 (2012).

With regard to the defendant's conviction for attempted burglary, sufficient evidence supported the conviction because the jury evaluated the nature of the circumstances of the morning's events, as well as the daughter's eyewitness testimony identifying the defendant and, although the defendant explained that it was mistakenly the wrong house, the jury was authorized to come to a different and reasonable conclusion based on the state's case. White v. State, 323 Ga. App. 660, 744 S.E.2d 857 (2013).

Evidence was sufficient to prove intent for burglary as the jury could infer an intent to steal based on the evidence of an unlawful entry into a building housing an operating business, despite no evidence that valuable items were located in the building, and that the defendant crawled out of the window during a time when the business was closed, and ran when confronted by the security guard. Taylor v. State, 325 Ga. App. 736, 754 S.E.2d 781 (2014).

Conviction without direct or circumstantial evidence that defendant committed burglary. — When a theft, whether by simple larceny, burglary, or robbery, is proven, recent unexplained possession of stolen goods by defendant creates inference or presumption of fact sufficient to convict. Brown v. State, 157 Ga. App. 473, 278 S.E.2d 31 (1981).

When a burglary is proven, recent unexplained possession of the stolen goods by the defendant creates an inference sufficient to convict even without direct proof or circumstantial evidence that defendant committed burglary. Bankston v. State, 159 Ga. App. 342, 283 S.E.2d 319 (1981), cert. denied, 454 U.S. 1154, 102 S. Ct. 1026, 71 L. Ed. 2d 311 (1982); Jackson v. State, 159 Ga. App. 287, 283 S.E.2d 353 (1981).

To convict defendant of burglary based upon recent possession of stolen goods, it must be shown that goods were stolen in a burglary and there must be absence of or unsatisfactory explanation of that possession. Bankston v. State, 159 Ga. App. 342, 283 S.E.2d 319 (1981), cert. denied, 454 U.S. 1154, 102 S. Ct. 1026, 71 L. Ed. 2d 311 (1982); Jackson v. State, 159 Ga. App. 287, 283 S.E.2d 353 (1981).

Identity of stolen articles must be indisputably established. — In prosecution for offense of burglary where state relies upon defendant's recent possession of allegedly stolen or feloniously taken goods for conviction, it is absolutely essential that identity of stolen articles be indisputably established. Tommie v. State, 158 Ga. App. 216, 279 S.E.2d 510 (1981); Collins v. State, 176 Ga. App. 634, 337 S.E.2d 415 (1985).

Identification of defendant. — Sufficient evidence supported the defendant's convictions for two counts of armed robbery with respect to two victims at the first residence, attempt to commit armed robbery with respect to one of the victims at the first residence, and two counts of burglary with respect to the two residences because the accomplice testimony was sufficiently corroborated by one of the witnesses, who identified the defendant. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

When defendant may be convicted of burglary or theft by receiving sto-

Inferences and Sufficiency and Admissibility of Evidence (Cont'd)
1. Evidence Sufficient. (Cont'd)

len property. — When the principal thieves are known, and when it appears the defendant had prior knowledge that the goods were to be stolen or, in some cases, aided in procuring the theft, but was not present at the initial caption and asportation, the defendant may be convicted of violating either the burglary or receiving stolen property statutes, but not both crimes, at the election of the state. Lamb v. State, 108 Ga. App. 722, 134 S.E.2d 505 (1963).

Jury questions. — What constitutes recent possession is in all cases a jury question, to be determined very largely from character and nature of property stolen. Brown v. State, 157 Ga. App. 473, 278 S.E.2d 31 (1981).

Whether defendant's explanation of possession is satisfactory is a question for jury. Brown v. State, 157 Ga. App. 473, 278 S.E.2d 31 (1981); Bankston v. State, 159 Ga. App. 342, 283 S.E.2d 319 (1981), cert. denied, 454 U.S. 1154, 102 S. Ct. 1026, 71 L. Ed. 2d 311 (1982).

Sufficient evidence was presented to the jury to support the defendant's convictions for armed robbery, aggravated assault, burglary, criminal attempt to commit aggravated sodomy, and possession of a knife during the commission of a crime because the victim's testimony alone was sufficient to support the convictions; regardless of any inconsistencies in the victim's testimony, it was for the jury to assess witness credibility, and the jury chose to believe the victim's identification of the defendant as the individual who committed the crimes. Williams v. State, 300 Ga. App. 839, 686 S.E.2d 446 (2009).

Appellant's claim of error as to admitted hearsay evidence mooted by acquittal. — Defendant's claim on appeal that the trial court erred by admitting hearsay testimony identifying certain watches as stolen property was moot as the jury acquitted the defendant of the burglary in which the watches were taken. Price v. State, 283 Ga. App. 564, 642 S.E.2d 191 (2007).

Evidence from search admissible. — The fact that the officers at the stop of defendant's vehicle exceeded their lawful authority by arresting defendant through handcuffing the defendant, rather than merely detaining the defendant and patting the defendant down, did not taint the search of the truck. Hunt v. State, 212 Ga. App. 217, 441 S.E.2d 514 (1994).

Evidence was sufficient to support burglary, aggravated assault, kidnapping, false imprisonment, and armed robbery convictions where one of the victims opened the door to the victim's home when the victim recognized one of defendant's accomplices, where defendant and another then pushed the door open and rushed inside, and where defendant grabbed the first victim, pointed a gun at the first victim's head, took money from the second victim's wallet, kept the gun pointed at both victims during the entire incident, ripped the telephone cord out of the wall, and instructed defendant's accomplices to bind and blindfold the victims, which they did; the victims both identified defendant as the gunman from a police photo array, plus made an in-court identification at trial, and any conflict between the victims' testimony that the gunman had a tattoo on the gunman's arm and a trial demonstration revealing no tattoo on defendant's arm was a matter for the jury to resolve and did not affect the sufficiency of the identification. Kates v. State, 269 Ga. App. 8, 603 S.E.2d 342 (2004).

In a prosecution for burglary and trafficking methamphetamine, probable cause supported the defendant's warrantless arrest and supported the admission of the seized evidence because: (1) it was reasonable for the arresting officers to act upon an investigating deputy's observations; (2) law enforcement had reasonably trustworthy information to warrant their belief that the defendant had committed or had participated in committing a burglary; and (3) a determination of probable cause to arrest the defendant could rest on the collective knowledge of the police, given the communication between them. Murphy v. State, 286 Ga. App. 447, 649 S.E.2d 565 (2007).

Trial court properly denied suppression of the defendant's blood sample for a DNA comparison pursuant to a particularized

search warrant seeking the sample as the warrant and the attached affidavit when read together particularly described the evidence to be seized and gave the executing officers adequate notice of the search warrant's scope and command. Holloway v. State, 287 Ga. App. 655, 653 S.E.2d 95 (2007).

Fingerprint evidence. — When defendant's fingerprints were found on things taken from area of burglarized premises not generally accessible to public shortly after burglary had been committed, evidence presented was sufficient to convince rational trier of fact of guilt of defendant beyond reasonable doubt. Woodliff v. State, 158 Ga. App. 113, 279 S.E.2d 231 (1981).

Where a defendant was positively identified as being the person who was seen on the front door steps of the burglary victim's house on the day of the alleged burglary, and the defendant pawned a pistol later identified as the one stolen from the burglary victim's house on the same date, the evidence was sufficient to enable any rational trier of fact to find the defendant guilty of burglary beyond a reasonable doubt. Wallis v. State, 170 Ga. App. 354, 317 S.E.2d 331 (1984).

There was sufficient evidence to infer that defendant's fingerprint was placed at the time of the burglary where the defendant gave no evidence to draw a contrary inference that the imprinting occurred on another occasion even though the defendant denied committing the burglary. Brown v. State, 180 Ga. App. 188, 348 S.E.2d 575 (1986).

Rule that a conviction may not be based solely on fingerprint evidence unless it is established that the fingerprints could only have been impressed at the time the crime was committed did not apply when the conviction was based on evidence in addition to fingerprint evidence. Kier v. State, 220 Ga. App. 649, 469 S.E.2d 851 (1996).

After a fingerprint examiner identified fingerprints from one victim's door and another victim's jewelry box as belonging to the defendant, when coupled with the defendant's admissions to committing the crimes, such evidence was sufficient to uphold the defendant's burglary convictions. Shelton v. State, 260 Ga. App. 855, 581 S.E.2d 378 (2003).

Because defendant juvenile could not explain how defendant's fingerprints got on the inside of a burglary victim's window, the circumstantial evidence was sufficient to convict defendant of burglary under O.C.G.A. § 16-7-1(a). In the Interest of J.D., 275 Ga. App. 147, 619 S.E.2d 818 (2005).

Sufficient evidence supported defendant's conviction of two counts of residential burglary in violation of O.C.G.A. § 16-7-1 because defendant's fingerprints were found in both residences; because the homeowners did not know defendant and did not give defendant permission to enter, there was no evidence as to how defendant's fingerprints could have been left at the crime scenes at a time other than when the crimes were committed, and defendant had previously committed strikingly similar crimes. Marion v. State, 276 Ga. App. 553, 623 S.E.2d 739 (2005).

Defendant's convictions of murder, felony murder, armed robbery, burglary, possession of a firearm during the commission of an armed robbery, and possession of a firearm during the commission of a burglary were supported by sufficient evidence that, the day before the three murder victims were found shot in the head, the defendant borrowed the defendant's sibling's car to visit one of the victims, who owed the defendant money, the defendant admitted going to the victims' home twice on the day of the murders, but stated that the victims were not home during either visit, neighbors heard gunshots around the home at approximately 7:30 P.M., near the last time that the two younger victims were heard from, and again at 10:00 P.M. that evening, when the older victim returned home for the day, a number of items stolen from the victims' home at the time of the murders were subsequently found in a dumpster next to a storage locker the defendant shared with the defendant's love interest, the items were contained in plastic bags which had the defendant's fingerprints on them, and the plastic bags came from a roll of trash bags found in the trunk of the car which the defendant borrowed on the day of the murders. Griffin v. State, 280 Ga. 683, 631 S.E.2d 671 (2006).

Inferences and Sufficiency and Admissibility of Evidence (Cont'd)
1. Evidence Sufficient. (Cont'd)

Testimony by a victim that the defendant and an accomplice, armed with handguns, forcibly entered the victim's apartment, raped and sodomized the victim, struck the victim with a gun, stole jewelry, bound the victim, and escaped in a car owned by the victim's prospective spouse, and evidence that 24 fingerprints lifted from the apartment and car matched the defendant's fingerprints, was sufficient to convict the defendant of burglary. Crawford v. State, 292 Ga. App. 463, 664 S.E.2d 820 (2008).

Juvenile's fingerprint, which was found on a bottle of tonic water at the crime scene, was sufficient evidence to support the adjudication of the juvenile as delinquent for committing burglary in violation of O.C.G.A. § 16-7-1, and the juvenile's alternative hypothesis that the juvenile earlier touched the bottle while the bottle was in the stream of commerce before the victim purchased the bottle was not plausible. In the Interest of H. A., 311 Ga. App. 660, 716 S.E.2d 768 (2011).

Conviction for burglary based solely on fingerprint evidence is authorized when fingerprints corresponding to those of the accused are discovered at the crime scene and under circumstances disclosing the fingerprints could only have been impressed at the time of the offense. Brown v. State, 180 Ga. App. 188, 348 S.E.2d 575 (1986).

Evidence of flight may be submitted to jury, and the jury may infer guilt therefrom. Cohran v. State, 157 Ga. App. 551, 278 S.E.2d 133 (1981).

Syringes found in defendant's vehicle shortly after burglary of veterinary office were admissible because they were in possession of defendant at time of defendant's arrest and due to relevance in explaining defendant's motive for burglary. Wortham v. State, 158 Ga. App. 19, 279 S.E.2d 287 (1981).

Chain of custody of weapon used in burglary. — Where defendants were convicted of burglary, the trial court did not err by admitting a shotgun used in the crime spree into evidence without establishing an appropriate chain of custody as the state was not required to prove a chain of custody of the exhibit, since the gun was a distinct and recognizable physical object which could be identified upon mere observation. Attaway v. State, 259 Ga. App. 822, 578 S.E.2d 529 (2003).

Denial of defendant's motion for a directed verdict of acquittal was appropriate where the jury was authorized to believe defendant's witnesses, who provided defendant with an alibi and an exculpatory explanation for defendant's subsequent possession of some 984 coins in the trunk of defendant's car, but the jury was not required to believe defendant's witnesses, and it was equally authorized to believe the state's witnesses, who placed defendant at the convenience store shortly before the burglary and who identified an oddly discolored token found in defendant's subsequent possession as having been among those stolen in the burglary. Dean v. State, 181 Ga. App. 452, 352 S.E.2d 633 (1987).

In a trial for burglary, the defendant's motion for a directed verdict based on insufficient evidence was properly denied. Based on the defendant's possession and pawning of the stolen goods within hours of the theft and the defendant's presence at the scene of the crime shortly after the burglary occurred, there was ample evidence to support a finding of guilt. Chambers v. State, 288 Ga. App. 550, 654 S.E.2d 451 (2007).

Trial court did not err in denying the defendant's motion for a directed verdict, which was based on the argument that the state's case relied too heavily on allegedly tainted evidence concerning the victims' pretrial identification of burglars, because at the time trial counsel moved for the directed verdict, the allegedly tainted identification evidence had been admitted without objection, and accordingly, the trial court properly considered that evidence in deciding the motion; even in the absence of testimony concerning the victims' pretrial identification of the defendant, there was sufficient evidence to support the defendant's conviction because the defendant and the codefendant matched the general description of the burglars that the victims gave to police,

they were seen walking a short distance from the scene, not long after the burglary occurred, at the time police first saw them, the codefendant was carrying a backpack stolen during the break-in, when the codefendant saw police, the codefendant immediately discarded the backpack, and a number of items stolen during the burglary were recovered from the front porch of the defendant's residence. Bell v. State, 306 Ga. App. 853, 703 S.E.2d 680 (2010).

Court's determination that essential elements were not established constituted directed verdict of acquittal on the merits, and the state could not appeal and subject defendants to a new trial on the merits. State v. Bryant, 182 Ga. App. 698, 356 S.E.2d 656 (1987).

Admitting evidence of other crimes. — In a trial for burglary certified copies of indictments and guilty pleas from 1982 on four counts of burglary and four counts of theft by taking were admissible, as there was evidence that the defendant was the perpetrator and there was sufficient similarity or connection between the independent crime and the offense charged, that proof of the former tends to prove the latter. Williams v. State, 180 Ga. App. 227, 348 S.E.2d 747 (1986).

Trial court did not abuse its discretion in defendant's trial for peeping Tom and burglary with intent to commit rape in admitting similar transaction evidence of defendant's involvement in a peeping Tom incident where defendant was arrested for entering a restroom at another college and peering into an occupied stall with a hand mirror as: (1) the state offered the testimony of the alleged victim in that peeping Tom incident as well as the testimony of the arresting police officer, for the appropriate purpose of showing defendant's bent of mind, course of conduct, and identity; (2) the alleged victim's testimony provided sufficient evidence that defendant peered into the bathroom stall while the victim was in it; and (3) the acts were sufficiently similar. Howard v. State, 266 Ga. App. 281, 596 S.E.2d 627 (2004).

In trial for burglary, trial court properly admitted evidence of a prior burglary as evidence of intent and state of mind, even though the trial court failed to expressly balance the probative value of the evidence against its prejudicial impact; the evidence was not overly prejudicial as detailed limiting instructions were given when the evidence was admitted and at the close of the case. Clark v. State, 272 Ga. App. 89, 611 S.E.2d 741 (2005).

In a burglary prosecution, because the state presented sufficient similarities between the earlier offenses and the charged offense, specifically that all three offenses were committed in rural or isolated locations on property located at or near the county line and in each instance the defendant drove to the residence and parked a vehicle nearby, and all three offenses were committed in the middle of the day while the homeowners were either at home or returned to their residence while the crimes were in progress, and given the defendant's failure to object to that evidence at trial, no abuse of discretion resulted by the admission of the prior offenses. Kimble v. State, 285 Ga. App. 420, 646 S.E.2d 511 (2007).

While state presented sufficient evidence of the victim's age to support assault charge under O.C.G.A. § 16-5-21(a)(1), because trial court clearly erred in admitting evidence of two burglaries defendant committed in 1998 as similar transactions to help prove the issue of identity, defendant's aggravated assault, burglary, robbery, theft, and battery convictions were reversed. Usher v. State, 290 Ga. App. 710, 659 S.E.2d 920 (2008).

With regard to a defendant's conviction for burglary, the trial court did not err by allowing the admission of similar transaction evidence of the defendant's prior burglary as the evidence was admitted for the appropriate purpose of showing the defendant's bent of mind, course of conduct, and intent; the trial court gave the jury a limiting instruction, and although the defendant's guilty plea was sufficient to establish that the defendant actually committed the prior crime, the state also presented testimony from the officer who arrested the defendant after the defendant fled from the scene of the burglary as well as from the victim in that case. Butler v. State, 294 Ga. App. 540, 669 S.E.2d 525 (2008).

Admission of evidence of a later bur-

Inferences and Sufficiency and Admissibility of Evidence (Cont'd)
1. Evidence Sufficient. (Cont'd)

glary as a similar transaction was proper in the defendants' burglary trial because the state showed a sufficient connection between the two offenses such that proof of the former tended to prove the latter; in the similar transaction, at about 4:45 in the morning, a large chunk of concrete was thrown through the front glass door of a gas station at an interstate exit, cigarettes were stolen, two large black plastic garbage bags containing cigarettes and shards or slivers of glass were found in the defendants' vehicle, and a large chunk of concrete and an empty black plastic bag were on the ground next to the vehicle. In the case charged, a large rock was thrown through the front glass door of a gas station at an interstate exit at approximately 4:45 in the morning, cigarettes and cash were stolen, and some black plastic garbage bags that the owner did not sell in the store were left behind. Kennedy v. State, 298 Ga. App. 372, 680 S.E.2d 478 (2009).

Trial court did not err in admitting evidence of two prior burglaries as similar transactions under former O.C.G.A. § 24-2-2 (see now O.C.G.A. § 24-4-404) during the defendant's trial for burglary, O.C.G.A. § 16-7-1, because the trial court's finding that the offenses satisfied the similarity requirement was not clearly erroneous; there was evidence that the defendant was in a house on the day before the burglary was discovered and was found wearing stolen sunglasses two days later, in each instance the defendant became acquainted with male college students by asking for money or odd jobs and later, when the victims' house appeared to be vacant, entered without authority to appropriate the victims' goods, and the burgled houses were within one mile of each other. Long v. State, 307 Ga. App. 669, 705 S.E.2d 889 (2011).

Evidence of prior burglary convictions admissible. — See Harper v. State, 180 Ga. App. 20, 348 S.E.2d 318 (1986).

There is no abuse of discretion by the trial court in admitting in evidence a prior burglary as tending to prove intent and bent of mind. Masters v. State, 186 Ga. App. 795, 368 S.E.2d 557 (1988).

Evidence sufficient to establish unlawful entry. — See West v. State, 178 Ga. App. 275, 342 S.E.2d 756 (1986); Pruitt v. State, 217 Ga. App. 681, 458 S.E.2d 696 (1995).

Evidence was sufficient to sustain defendant's convictions as a party to the offenses of armed robbery, kidnapping, false imprisonment, burglary, and aggravated assault with a deadly weapon, in violation of O.C.G.A. §§ 16-5-21, 16-5-40, 16-5-41, 16-7-1, and 16-8-41 because: (1) defendant received information from the defendant's love interest, about the victims' house, the location of safes, where money was located, and about the alarm system; (2) the day after the home invasion the defendant's love interest saw defendant and defendant showed defendant's love interest a stack of cash, and defendant told the defendant's love interest it might be the victim's money; and (3) an FBI informant met with defendant and defendant told the informant that defendant had been shorted money from the robbery, and that the defendant got the layout of the house from the defendant's love interest. Pope v. State, 266 Ga. App. 658, 598 S.E.2d 48 (2004).

Burglary of home where previously lived. — Evidence was sufficient to convict defendant of burglary, a violation of O.C.G.A. § 16-7-1, because the defendant's former love interest testified that the former love interest and defendant were separated, that the former love interest had told defendant that defendant could not return to the house, which was titled in the former love interest's name, and that defendant had removed most of defendant's belongings from the home and did not have a house key on the day defendant entered the former love interest's residence by kicking down the back door. From such testimony, the jury was entitled to conclude that defendant was not authorized to enter the house, and in light of defendant's forcible entry the jury could have inferred that defendant knew that defendant was without authority to be in the former love interest's house. Williams v. State, 268 Ga. App. 384, 601 S.E.2d 833 (2004).

In a prosecution for burglary, the evidence was sufficient to prove that defendant entered the victim's house without authority because the victim's testimony showed that when defendant entered the house, the victim told defendant that the victim's sibling "was going to kill him or make him leave and never come back." Winkfield v. State, 275 Ga. App. 456, 620 S.E.2d 670 (2005).

Evidence sufficed to sustain defendant's conviction on three counts of burglary; a video of one of the burglaries showed a masked person wearing a distinctive work shirt and certain other clothing, which shirt and clothing defendant was wearing when defendant was filmed redeeming stolen lottery tickets two days later. Burdette v. State, 276 Ga. App. 695, 624 S.E.2d 253 (2005).

With regard to a burglary conviction, there was sufficient evidence that the defendant lacked authority to enter the mobile home where the victim was found dead; the fact that the victim was found partially dressed in the victim's bathroom allowed the inference that the victim's privacy had been intruded upon, and a witness testified that the victim had recently refused to give the defendant a new key to the mobile home. Bryant v. State, 282 Ga. 631, 651 S.E.2d 718 (2007).

Regarding defendants' convictions for burglary and theft by receiving stolen property, sufficient evidence authorized the jury's decision to reject one defendant's version of events — that defendants believed that the property involved belonged to an accomplice — because, with regard to one of the burglarized residences, the fact that defendants were unsuccessful in taking anything from the home was irrelevant to the burglary convictions since the crime was completed upon entry into the dwelling. As to the second residence, the fact that property from that residence was found in the vehicle in which defendants were in was sufficient to establish that the property had been stolen. Clark v. State, 289 Ga. App. 612, 658 S.E.2d 190 (2008).

With regard to a burglary charge, the evidence authorized the jury to find beyond a reasonable doubt that the defendant did not have authority to enter a residence where the defendant used to live with the victim: the locks on the home had been changed since the defendant had stayed there; the defendant had to break a window in the rear door of the home in order to gain entry; the security alarm was active and armed when the defendant arrived; and the victim was afraid of the defendant and had turned to authorities to prevent the defendant from coming near the victim or the victim's family. Furthermore, the evidence of the defendant's rampage once in the residence also permitted the jury to find that the defendant entered the home with the intent to commit aggravated assault and murder. Allen v. State, 284 Ga. 310, 667 S.E.2d 54 (2008).

Evidence that the defendant entered uninvited into his ex-wife's home, kicked open the bedroom door where his ex-wife was asleep with her boyfriend, laid across the victims, grabbed their throats, and threatened them, in violation of the terms of a condition of bond issued in a previous case, was sufficient to support convictions of aggravated stalking, O.C.G.A. § 16-5-91(a), and burglary, O.C.G.A. § 16-7-1(a). Bray v. State, 294 Ga. App. 562, 669 S.E.2d 509 (2008).

Trial court did not err in convicting the defendant of burglary in violation of O.C.G.A. § 16-7-1(a) because there was sufficient evidence from which the jury could conclude that the defendant entered the victim's apartment without permission when, although the victim, who owned the apartment, did not testify at trial, the evidence was that the victim had changed the locks after the defendant moved out and that the defendant could no longer use the defendant's keys; on the day of the burglary, the defendant attempted unsuccessfully to use the defendant's keys and then went around to the patio, climbed over the railing around the patio, and went, uninvited, into the apartment through the patio door. Ursulita v. State, 307 Ga. App. 735, 706 S.E.2d 123 (2011).

Sufficient evidence supported the defendant's conviction for burglary based on the evidence that showed that the defendant and the co-defendant approached the victim's house armed and with the intent to

Inferences and Sufficiency and Admissibility of Evidence (Cont'd)
1. Evidence Sufficient. (Cont'd)

rob, that the co-defendant knocked and gave a false name to entice the occupants to open the door, that the defendants entered the house without being invited in, that the victim immediately attempted to make the strangers leave the house, and that the intruders drew their guns as the intruders entered, all of which established that the defendant entered the house without authority. Thomas v. State, 292 Ga. 429, 738 S.E.2d 571 (2013).

Neither invited or authorized on premises. — Because defendant was neither invited nor authorized to be in the victim's home, the evidence was sufficient to convict defendant of burglary under O.C.G.A. § 16-7-1. Waters v. State, 294 Ga. App. 442, 669 S.E.2d 450 (2008).

Sufficient evidence supported the defendant's convictions for aggravated assault with the intent to rape, aggravated sexual battery, and burglary based on the testimony of the victim that at approximately 4:00 A.M.. the victim was in bed asleep when a man got into the victim's bed and began choking the victim, that it was not consensual, and that the perpetrator indicated watching the victim for some time and inserted two fingers into the victim's vagina. Davis v. State, 326 Ga. App. 778, 757 S.E.2d 443 (2014).

Sufficient evidence supported the defendant's conviction for burglary based on witnesses observing five or six radiators in the back seat of the defendant's car immediately after exiting the premises, a dummy lock was found on the back gate, tire tracks led up to the rear of the buildings where a roll-up door showed signs of forced entry, two witnesses watched the defendant drive away, and incriminating evidenced existed, including admissions. Harris v. State, 328 Ga. App. 852, 763 S.E.2d 133 (2014).

Based on evidence that the victim changed the locks during the defendant's incarceration, that the defendant moved in with the defendant's mother upon release from jail, and that the defendant forcibly entered the victim's home, the jury was entitled to conclude that the defendant no longer lived at the residence and was no longer authorized to enter the residence and, thus, to convict the defendant of burglary. Polanco v. State, 340 Ga. App. 292, 797 S.E.2d 204 (2017).

Evidence sufficient to sustain conviction of attempted burglary. — See Richardson v. State, 182 Ga. App. 661, 356 S.E.2d 725 (1987).

Presence of valuables inside premises, evidence of defendant's flight, presence of a cement block under a broken window, and a positive identification of defendant were sufficient to support defendant's conviction of criminal attempt to commit burglary. Methvin v. State, 189 Ga. App. 906, 377 S.E.2d 735 (1989).

Evidence supported defendant's conviction for attempted burglary because defendant admitted to trying to break into a gas station to steal beer and cigarettes. Smith v. State, 273 Ga. App. 107, 614 S.E.2d 219 (2005).

Evidence was sufficient to support defendant's conviction for attempted burglary, as it showed that defendant took the substantial step of prying open the carport door of the house of another person, the exterior of which was 100 percent complete, so that defendant could steal the valuable construction tools inside, and that defendant was caught in the act while doing so. Weeks v. State, 274 Ga. App. 122, 616 S.E.2d 852 (2005).

Sufficient evidence, including that the defendant took a substantial step of knocking off the victim's shed door handle, without authority, with the intent to steal valuable goods therein, supported an attempted burglary conviction; moreover, although the defendant denied any intention to commit a theft, the credibility of the witnesses and the questions as to the reasonableness of the defendant's actions were issues for the factfinder to decide. Minor v. State, 278 Ga. App. 327, 629 S.E.2d 44 (2006).

There was sufficient evidence to support a defendant's convictions of malice murder, felony murder, armed robbery, aggravated assault, attempted burglary, and possession of a firearm by a convicted felon; in addition to testimony by a codefendant and eyewitness testimony by the victim's spouse, the victim's blood was on

the defendant's clothes, the defendant had the victim's keys, and the knife used to kill the victim and a pistol were discovered near the site of the defendant's arrest in some woods near the scene of the crime. Walker v. State, 282 Ga. 774, 653 S.E.2d 439 (2007), cert. denied, 129 S. Ct. 481, 172 L.Ed.2d 344 (2008), overruled on other grounds, No. S10P1859, 2011 Ga. LEXIS 267 (Ga. 2011).

Despite a sufficiency challenge to an adjudication on a charge of criminal attempt to commit burglary, the court of appeals upheld the finding because the juvenile's conduct including: (1) repeatedly ringing the victim's doorbell; (2) hiding in the backyard; (3) furtive observation of the victim's house; (4) telephone contact with the other juvenile who was at the victim's front door; and (5) climbing over a basketball goal to reach a window at the back of the house was suspicious and undoubtedly consistent with preparation for a daylight burglary. Moreover, the juvenile's actions, as well as evidence of a bent window screen, constituted evidence of a substantial step towards entering the victim's house without authority and inconsistent with a lawful purpose. In the Interest of R.C., 289 Ga. App. 293, 656 S.E.2d 914 (2008).

Evidence supported a conviction of criminal attempt to commit burglary. The victim heard knocking at the victim's sliding glass door and saw the defendant, a neighbor, crouched down holding a crowbar and beating the bottom track of the door; when the victim asked what the defendant was doing, the defendant said, "Oh, you're home," and asked to borrow the victim's shovel, then said that the defendant had just wanted to make sure the victim was okay and left without the shovel; when police asked the defendant what had gone on, the defendant said, "I didn't have a crowbar in my hand. I had a screwdriver in my hand"; and during an interview with police, the defendant gave differing explanations for the defendant's actions. Rudnitskas v. State, 291 Ga. App. 685, 662 S.E.2d 729 (2008).

Evidence was sufficient to show that the defendant, who was convicted of attempted burglary under O.C.G.A. §§ 16-4-1 and 16-7-1, had the intent to rob the sawmill in question. The defendant and others set out early on a Saturday and entered the property in an unusual way; and the defendant drove the getaway truck, lied to police, and failed to produce a flashlight when asked to empty the defendant's pockets. Armour v. State, 292 Ga. App. 111, 663 S.E.2d 367 (2008).

Trial court did not err in denying a defendant's motion for a directed verdict of acquittal on a charge of attempted burglary in violation of O.C.G.A. §§ 16-4-1 and 16-7-1(a) because the evidence was sufficient to authorize the jury to conclude that the defendant took a substantial step toward entering an owner's apartment to commit a felony; the defendant's inculpatory statement that the defendant intended to enter the owner's apartment to get money was direct evidence of the defendant's guilt, and this statement, combined with a witness's testimony that the witness heard the defendant and the defendant's brother discuss entering the owner's apartment through the window, saw them on the owner's porch, and then heard the window breaking, provided ample evidence to support the defendant's conviction of attempted burglary beyond a reasonable doubt. Durham v. State, 295 Ga. App. 734, 673 S.E.2d 80 (2009).

Juvenile conviction for attempted burglary. — There was sufficient evidence to support a juvenile's adjudication as delinquent after a finding was made that the juvenile had committed acts which, had the juvenile been an adult, would have supported a conviction for attempt to commit burglary, based on the testimony of one victim, who stated that a couple of young people, including a person matching the juvenile's description, were banging loudly on the victim's door and then threw a rock through the back window in an attempt to break into the home. Additionally, the juvenile's cohort pled guilty to the crime and testified to the juvenile's involvement. In the Interest of J. S., 296 Ga. App. 144, 673 S.E.2d 645 (2009).

Window screen removal sufficient for attempted burglary conviction. — Witness's testimony that the witness awoke during the night and found that someone had removed a screen from the

Inferences and Sufficiency and Admissibility of Evidence (Cont'd)
1. Evidence Sufficient. (Cont'd)

window of the witness's apartment, that the witness saw someone when the witness looked outside, that the witness was able to see defendant's face and noticed that the defendant was naked when the defendant moved near a neighbor's porch light, and that police apprehended defendant near the witness's residence a short time later and found that the defendant possessed property belonging to another person who had the screen outside that person's window removed was sufficient to sustain defendant's convictions on charges of burglary with the intent to commit theft and public indecency. Heard v. State, 268 Ga. App. 718, 603 S.E.2d 69 (2004).

Evidence was sufficient to sustain the defendant's attempted burglary conviction since the victim testified that, after the victim woke and saw the defendant outside, the victim found the screen to an open window on the hood of the victim's car and found a piece of carpet the victim had left in the window sill for the victim's cat to sit on in the yard. The jury thus could have found that the defendant removed the screen in an attempt to gain entrance into the house. Dillard v. State, 323 Ga. App. 333, 744 S.E.2d 863 (2013).

Same evidence used to prove attempt and burglary. — Defendant was properly convicted of criminal attempt to commit burglary, O.C.G.A. §§ 16-4-1 and 16-7-1, because prosecution for that crime was not time-barred; the crime for criminal attempt to commit burglary was substituted in lieu of a count of burglary charged in the original indictment, and the same evidence could be used to prove both the crime and criminal attempt to commit that crime. Martinez v. State, 306 Ga. App. 512, 702 S.E.2d 747 (2010).

Identification by victim and codefendant. — Defendant's convictions for robbery, burglary, and false imprisonment, in violation of O.C.G.A. §§ 16-8-40(a), 16-7-1(a), and 16-5-41(a), respectively, were supported by sufficient evidence because the victim and a codefendant both positively identified defendant as a participant in a criminal event, wherein three individuals burst into the victim's apartment, robbed the victim at gunpoint, and tied the victim up; the lack of physical evidence did not alter the sufficiency, as the identification testimony from a photographic line-up and at trial was within the trier of fact's credibility determination, and denial of defendant's new trial motion under O.C.G.A. § 5-5-23 was proper. Tucker v. State, 275 Ga. App. 611, 621 S.E.2d 562 (2005).

Identification of defendant. — Defendant's convictions for armed robbery, aggravated assault with a deadly weapon, burglary, and possession of a firearm during the commission of a crime were supported by sufficient evidence. While the defendant contended that the evidence against the defendant was purely circumstantial, an eyewitness's identification of the defendant as the second gunman during the photographic lineup constituted direct evidence of the defendant's guilt. Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Sufficient evidence existed to support the defendant's conviction for burglary, aggravated assault, and two counts of cruelty to children in the second degree based on the evidence adduced at trial that the defendant broke into the adult victim's apartment through a rear window and attacked the victim, stabbed the adult victim in the neck, dragged the victim down the hall, and stabbed the victim's hand and, although the defendant put a cloth over the victim's face at some point, the adult victim saw that the person stabbing the victim in the neck was the defendant, the victim's ex-boyfriend, and the victim positively and consistently identified the defendant as the perpetrator. White v. State, 319 Ga. App. 530, 737 S.E.2d 324 (2013).

Circumstantial evidence identifying defendant. — There was sufficient evidence to support the defendant's conviction for burglary, despite a witness being impeached, because while there was conflicting testimony about what the witness told police and whether the defendant had sold the stolen phone to someone else, the circumstantial evidence identifying the defendant as the perpetrator was

sufficient. Jordan v. State, 320 Ga. App. 265, 739 S.E.2d 743 (2013).

Defendant's convictions for burglary and smash and grab burglary under O.C.G.A. §§ 16-7-1(c) and 16-7-2(b) were supported by circumstantial evidence, including cell phone evidence that the defendant was near the scenes of the two burglaries and DNA evidence from a cigarette butt found in a very similar burglary days after the charged crimes. Nations v. State, 345 Ga. App. 92, No. A17A1444, 2018 Ga. App. LEXIS 176 (2018).

Burglary of former employer's home. — There was sufficient evidence to convict the defendant of burglary; the defendant: (1) was fired by the victim; (2) knew the home's layout; (3) was seen driving in the area of the home at the time of the crime; and (4) sold the victim's jewelry to a jeweler, who said the jewelry did not appear as though it was found in a junk car as the defendant claimed. Leonard v. State, 268 Ga. App. 745, 603 S.E.2d 82 (2004).

Sufficient evidence for conviction. — See Weems v. State, 172 Ga. App. 401, 323 S.E.2d 272 (1984); Hambrick v. State, 174 Ga. App. 444, 330 S.E.2d 383 (1985); Reed v. State, 174 Ga. App. 573, 330 S.E.2d 790 (1985); McCutchen v. State, 177 Ga. App. 719, 341 S.E.2d 260 (1986); Maxwell v. State, 178 Ga. App. 20, 342 S.E.2d 8 (1986); Howard v. State, 178 Ga. App. 376, 343 S.E.2d 151 (1986); Laidler v. State, 180 Ga. App. 213, 348 S.E.2d 739 (1986); Price v. State, 180 Ga. App. 215, 348 S.E.2d 740 (1986); Hall v. State, 180 Ga. App. 366, 349 S.E.2d 255 (1986); Ivey v. State, 180 Ga. App. 407, 349 S.E.2d 272 (1986); Miller v. State, 180 Ga. App. 525, 349 S.E.2d 495 (1986); Daniel v. State, 180 Ga. App. 687, 350 S.E.2d 49 (1986); White v. State, 182 Ga. App. 93, 354 S.E.2d 693 (1987); Inman v. State, 182 Ga. App. 209, 355 S.E.2d 119 (1987); Eady v. State, 182 Ga. App. 293, 355 S.E.2d 778 (1987); Burson v. State, 183 Ga. App. 647, 359 S.E.2d 731 (1987); Litmon v. State, 186 Ga. App. 762, 368 S.E.2d 530 (1988); Masters v. State, 186 Ga. App. 795, 368 S.E.2d 557 (1988); Cash v. State, 258 Ga. 460, 368 S.E.2d 756 (1988); Clark v. State, 186 Ga. App. 882, 369 S.E.2d 282 (1988); McKenzie v. State, 187 Ga. App. 840, 371 S.E.2d 869, cert. denied, 187 Ga. App. 907, 371 S.E.2d 869 (1988); Smith v. State, 189 Ga. App. 562, 376 S.E.2d 725 (1988); Hurston v. State, 189 Ga. App. 748, 377 S.E.2d 519 (1989); Benford v. State, 189 Ga. App. 761, 377 S.E.2d 530 (1989); McCounly v. State, 191 Ga. App. 266, 381 S.E.2d 552 (1989); Schley v. State, 191 Ga. App. 412, 382 S.E.2d 120 (1989); Garmon v. State, 192 Ga. App. 250, 384 S.E.2d 278 (1989); Mitchel v. State, 193 Ga. App. 146, 387 S.E.2d 390 (1989); Livingston v. State, 193 Ga. App. 502, 388 S.E.2d 406 (1989); Coursey v. State, 196 Ga. App. 135, 395 S.E.2d 574 (1990); Bagley v. State, 202 Ga. App. 416, 414 S.E.2d 547 (1992); Hawkins v. State, 219 Ga. App. 484, 465 S.E.2d 527 (1995); Quinn v. State, 222 Ga. App. 423, 474 S.E.2d 297 (1996); Igle v. State, 223 Ga. App. 498, 478 S.E.2d 622 (1996); Brown v. State, 224 Ga. App. 241, 480 S.E.2d 276 (1997); Alford v. State, 224 Ga. App. 451, 480 S.E.2d 893 (1997); Williams v. State, 224 Ga. App. 665, 482 S.E.2d 415 (1997); Toney v. State, 225 Ga. App. 228, 483 S.E.2d 627 (1997); Patterson v. State, 225 Ga. App. 515, 484 S.E.2d 317 (1997); Jackson v. State, 226 Ga. App. 604, 487 S.E.2d 142 (1997); Howard v. State, 227 Ga. App. 5, 488 S.E.2d 489 (1997); Howard v. State, 228 Ga. App. 784, 492 S.E.2d 759 (1997); Etheridge v. State, 228 Ga. App. 788, 492 S.E.2d 755 (1997); Wilson v. State, 230 Ga. App. 271, 495 S.E.2d 894 (1998); Romines v. State, 233 Ga. App. 790, 505 S.E.2d 530 (1998); Ford v. State, 234 Ga. App. 301, 506 S.E.2d 668 (1998); Hart v. State, 238 Ga. App. 325, 517 S.E.2d 790 (1999); King v. State, 238 Ga. App. 575, 519 S.E.2d 500 (1999); Johnson v. State, 240 Ga. App. 131, 522 S.E.2d 722 (1999); Abney v. State, 240 Ga. App. 280, 523 S.E.2d 362 (1999); Overand v. State, 240 Ga. App. 682, 523 S.E.2d 610 (1999); Ashley v. State, 240 Ga. App. 502, 523 S.E.2d 901 (1999); In re M.M., 240 Ga. App. 571, 524 S.E.2d 274 (1999); Kidd v. State, 241 Ga. App. 446, 526 S.E.2d 916 (1999); Phagan v. State, 243 Ga. App. 568, 533 S.E.2d 757 (2000); Welch v. State, 243 Ga. App. 798, 534 S.E.2d 471 (2000); Massey v. State, 247 Ga. App. 827, 545 S.E.2d 66 (2001); Johnson v. State, 247 Ga. App. 157, 543 S.E.2d 439 (2000);

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Whitehill v. State, 247 Ga. App. 267, 543 S.E.2d 470 (2000); Dunn v. State, 245 Ga. App. 847, 539 S.E.2d 198 (2000); King v. State, 246 Ga. App. 100, 539 S.E.2d 614 (2000); Hawkins v. State, 249 Ga. App. 26, 546 S.E.2d 280 (2001); Hawkins v. State, 249 Ga. App. 26, 546 S.E.2d 280 (2001); Watkins v. State, 249 Ga. App. 302, 548 S.E.2d 56 (2001); Jackson v. State, 260 Ga. App. 848, 581 S.E.2d 382 (2003); Posley v. State, 264 Ga. App. 869, 592 S.E.2d 504 (2003); Griggs v. State, 264 Ga. App. 636, 592 S.E.2d 168 (2003); Walker v. State, 282 Ga. 703, 653 S.E.2d 468 (2007); Brown v. State, 289 Ga. App. 297, 656 S.E.2d 582 (2008); Carr v. State, 289 Ga. App. 875, 658 S.E.2d 419 (2008).

Evidence that the defendant confessed to entering the apartment to burglarize it, the apartment was occupied, and the defendant and the accomplices took items from the apartment was sufficient to support the defendant's conviction for first degree burglary and conspiracy to commit burglary. Taylor v. State, 344 Ga. App. 122, 809 S.E.2d 76 (2017).

Circumstantial evidence, including that a house was burglarized, the defendant sold jewelry stolen from the house at two local pawn shops, and the defendant had a car the same as the one seen leaving the house on the day of the burglary, was sufficient to uphold the jury's conclusion that the defendant had committed burglary and theft. Harvey v. State, 344 Ga. App. 761, No. A17A1789, 2018 Ga. App. LEXIS 133 (2018).

Selling of stolen goods. — In a burglary trial, when evidence of defendant's selling the stolen goods to a pawn shop within one or two days of the burglary was presented to show possession and was uncontested, the evidence was sufficient to support the jury verdict. Cosby v. State, 151 Ga. App. 676, 261 S.E.2d 424 (1979).

Possession of recently stolen goods. — Evidence that accused has been found in possession of property stolen in recently committed burglary is sufficient to sustain defendant's conviction for burglary in absence of reasonable or credible explanation for defendant's possession of the property. Porter v. State, 155 Ga. App. 883, 273 S.E.2d 644 (1980).

At trial the victim of the burglary testified as to the circumstances surrounding the theft and identified with specificity the items stolen. Within approximately 27 to 30 hours after the established time of the burglary, appellant was apprehended driving the van in which was discovered property proven to be fruits of the burglary. In the absence of a satisfactory explanation, this evidence was sufficient to authorize the conviction of burglary. Warfle v. State, 157 Ga. App. 196, 276 S.E.2d 689 (1981).

Considering the proof of the commission of a burglary, defendant's recent possession of the goods stolen in that burglary, and the conflicts between defendant's testimony and his statements, along with all the other circumstances of the case, the evidence was sufficient to authorize a rational trier of fact to find defendant guilty of burglary beyond a reasonable doubt. Myles v. State, 186 Ga. App. 817, 368 S.E.2d 574 (1988).

When a television that had been reported stolen from a duplex was found with defendant in a nearby house, a witness had seen someone carry a television down the street and enter the house, and defendant had previously done painting for the duplex's occupant, the evidence was sufficient to support the conviction for burglary. Buckles v. State, 260 Ga. App. 638, 580 S.E.2d 638 (2003).

Evidence was sufficient to support defendant's conviction for burglary where an accomplice's testimony that defendant was an active participant in the burglary was corroborated by: (1) a police officer's testimony that defendant was in a vehicle with two accomplices shortly after the burglary; (2) another officer's testimony that handguns were found in a pillowcase retrieved from the vehicle; and (3) the pawn shop owner's testimony that the guns found in the vehicle were the guns stolen from the owner's shop. Reynolds v. State, 267 Ga. App. 148, 598 S.E.2d 868 (2004).

Evidence was sufficient to support the defendant's burglary conviction when an employee of the burglarized store testified

that the employee encountered the defendant between 3:30 and 4:30 A.M.. in the store while the defendant was trying to pry open the lock on a jewelry counter with a knife, and the employee identified the defendant from a photographic lineup and at trial; under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the testimony of one witness was sufficient to establish a fact. Standfill v. State, 267 Ga. App. 612, 600 S.E.2d 695 (2004).

Defendant's possession of goods stolen in a burglary, found in a car in which defendant was a passenger, viewed with defendant's presence near the scene of the burglary, was sufficient to support defendant's burglary conviction. Cothran v. State, 269 Ga. App. 256, 603 S.E.2d 762 (2004).

There was sufficient evidence to support defendants' convictions for armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), burglary, O.C.G.A. § 16-7-1(a), and possession of a firearm during the commission of certain crimes, O.C.G.A. § 16-11-106(b)(2), because evidence was seen in one of the defendant's vehicles during a traffic stop, defendants were identified from the videotape of the stop, and the shotgun used by the assailant in the home invasion was found in one of the defendant's homes. Dunbar v. State, 273 Ga. App. 29, 614 S.E.2d 472 (2005).

Evidence was sufficient to support both an armed robbery and a burglary conviction as: (1) defendant admitted to possessing a gun stolen in the robbery and other items used in commission of the crimes; (2) defendant fled when confronted by police; and (3) defendant asked another person in the courthouse why that person snitched on defendant; the state's failure to produce or ever locate the weapon used by defendant was immaterial, as was the fact that defendant was acquitted of the charge of possession of a firearm during the commission of a felony. Roberts v. State, 277 Ga. App. 730, 627 S.E.2d 446 (2006).

There was sufficient evidence to support a defendant's burglary convictions when: a taxi driver had picked up the defendant from outside one of the burglarized residences; evidence indicated that someone had called for a taxi from inside the house; items taken from both burglarized residences were found by police when the police searched the defendant; and the defendant's girlfriend was wearing jewelry that had come from one of the residences and which the girlfriend told police had been a gift from the defendant. Perez v. State, 284 Ga. App. 212, 643 S.E.2d 792 (2007).

Evidence that a defendant was found in possession of stolen property in close proximity to the apartment from which the property had been taken a day earlier, and that when police saw the defendant with the property, the defendant tried to evade the police and then gave the police a false name was sufficient to allow a rational juror to find the defendant guilty beyond a reasonable doubt of burglary, O.C.G.A. § 16-7-1(a). Rivera v. State, 293 Ga. App. 215, 666 S.E.2d 739 (2008).

Theft from a school. — When a defendant was found inside a school building near keys from the school office, the defendant admitted at trial that defendant entered the school through the windows and took the keys from an office desk, and there was also evidence that there was valuable property located in the school, the evidence was sufficient to authorize the jury to conclude that defendant was guilty beyond a reasonable doubt of burglary. Roberson v. State, 165 Ga. App. 179, 300 S.E.2d 196 (1983).

Evidence, both direct and circumstantial, was sufficient to sustain convictions of five counts of burglary; and the fact that evidence did not exclude all reasonable explanations pointing to defendant's innocence did not require a different result where there was direct evidence pointing to the defendant's participation and guilt. McConnell v. State, 166 Ga. App. 530, 304 S.E.2d 733 (1983).

Entering without authority but not taking anything. — When the evidence of record shows that the defendant entered the victim's house without authority, the door had been kicked in, but nothing had been taken, and the defendant's explanation of the circumstances surrounding defendant's presence at the scene was not supported by subsequent police investigation, any rational trier of fact can find

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from such evidence proof of the defendant's guilt of burglary beyond a reasonable doubt. Grice v. State, 166 Ga. App. 706, 305 S.E.2d 438 (1983).

Evidence that a neighbor observed a person enter the house next door through a broken back window, that police officers found almost every room in the house ransacked and found a man subsequently identified as the defendant hiding in a closet and that the homeowner had given no one permission to enter the home in the owner's absence was sufficient for conviction. Anderson v. State, 168 Ga. App. 762, 310 S.E.2d 299 (1983).

Evidence that about an hour before armed robbery and burglary occurred defendant was seen sitting in vehicle near scene of crime, assailant broke into victim's home and took cash and a Cadillac, victim identified defendant as assailant, and Cadillac was found on property where defendant lived was sufficient to convince rational trier of fact of guilt of defendant beyond a reasonable doubt. Johnson v. State, 176 Ga. App. 378, 336 S.E.2d 257 (1985).

Breaking and entering with intent to abduct. — Evidence was sufficient to support defendant's conviction for burglary when the jury was authorized to conclude from the evidence that the defendant broke into the home with the intent to "abduct" defendant's spouse. Childs v. State, 257 Ga. 243, 357 S.E.2d 48, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Circumstantial evidence of entry sufficient. — Evidence which was produced at trial as to defendants' entry of the building, while circumstantial, was sufficient to establish that they had done so. Prothro v. State, 186 Ga. App. 836, 368 S.E.2d 793 (1988).

Testimony of the accomplice and the evidence corroborating the accomplice's testimony were sufficient to justify a rational trier of fact to find the defendant guilty beyond a reasonable doubt of burglary and theft of a motor vehicle. Thurston v. State, 186 Ga. App. 881, 368 S.E.2d 822 (1988).

Taking and using electricity. — When defendant, without lawful permission, was taking and using electricity in the apartment to heat the stove burners to dry defendant's clothing, the state did prove the element of intent to commit a felony or theft with respect to the burglary charge. Phillips v. State, 204 Ga. App. 698, 420 S.E.2d 316 (1992).

Nature of the wounds, the position of the body, and the presence of a spent bullet lodged in an interior wall allowed the jury to conclude that the murder was committed inside the house and the jury was authorized to find defendant was the person who murdered the victim; thus, the defendant can also be found guilty of burglary. Robbins v. State, 269 Ga. 500, 499 S.E.2d 323 (1998).

Evidence supported the defendant's conviction of burglary when the victim identified the defendant as the man she had seen at her house earlier on the day of the burglary, she identified his van as the one seen leaving her house after the driver had entered her house while she was home, and police officers testified that the defendant's shoes and the tires of his van matched shoe and tire tracks at the burglary scene. Grabowski v. State, 234 Ga. App. 222, 507 S.E.2d 472 (1998).

Looking for a place to sleep. — Evidence of the presence of valuable effects inside the premises, the movement of dishes from the cabinet to the recliner, and two similar transactions where defendant pled guilty to attempting burglary with intent to commit theft discounted defendant's alternative theory that defendant was simply looking for a place to sleep. Carr v. State, 251 Ga. App. 117, 553 S.E.2d 674 (2001).

Trial court's admission of recall evidence that defendant threatened a witness, a neighbor of the victims, when defendant was leaving the stand was not error; even if the admission of the recall testimony was error, it was harmless as the evidence was overwhelming to support a conviction for child molestation, burglary, and criminal trespass since: (1) two victims and one mother of a victim, all with a sufficient opportunity to observe defendant, identified defendant in a pre-trial photographic lineup and at trial;

(2) the neighbor also identified defendant; (3) a victim and the neighbor knew defendant by first name preceding the incident; (4) a victim and the neighbor noticed defendant wearing the clothes discovered in a victim's home the night of the incident; and (5) the state presented evidence that defendant had committed similar acts previously. Rubi v. State, 258 Ga. App. 815, 575 S.E.2d 719 (2002).

Evidence was sufficient to convict defendants of burglary under O.C.G.A. § 16-7-1(a) since defendants were seen on the burglarized property at the time of the burglary, they fled the scene, and one defendant gave inconsistent statements as to their reason for being at the scene. Bollinger v. State, 259 Ga. App. 102, 576 S.E.2d 80 (2003).

Hiding in ceiling preceding armed robbery. — Evidence was sufficient to support defendant's conviction for burglary as the evidence showed that defendant, without permission, hid in a space above the store's bathroom ceiling and remained there until the store closed, at which time defendant committed an armed robbery of the store by ordering the bookkeeper to put the store's cash in a trash can and let an accomplice come inside the store who ordered the manager and the bookkeeper into the cooler and threatened them with death if they came out in order to allow defendant and the accomplice to escape. Lighten v. State, 259 Ga. App. 280, 576 S.E.2d 658 (2003).

Taking from unconscious victim. — Evidence was sufficient to support defendant's conviction of burglary where defendant repeatedly hit the victim with a skillet, and robbed the victim's cash while the victim was unconscious. Lord v. State, 259 Ga. App. 449, 577 S.E.2d 103 (2003).

Taking from the elderly. — Evidence was sufficient to support defendant's conviction for burglary as it showed defendant broke into the elderly person's house and took money from the person by force even though the person identified defendant by another name at trial and stated an amount was taken that was different than the amount the elderly person originally reported as the jury was entitled to discredit the person's trial testimony and give more weight to statements the person made at the time the crimes occurred, as well as the testimony of other witnesses at the trial. Currington v. State, 259 Ga. App. 654, 578 S.E.2d 270 (2003).

Evidence supported the defendant's convictions of burglary, kidnapping with bodily injury, rape, aggravated assault, robbery, and theft by taking when a treating physician stated that the 86-year-old victim's injuries, including blood inside her vagina and bruises and contusions on her vagina, were consistent with forcible penetration; when the defendant admitted entering the victim's home, removing her clothing, restraining her with electrical cords, hitting her, putting a plastic bag over her head, forcing her from one room to another, and taking her money and her car; and when DNA from the defendant matched the DNA of two hair roots found on the victim's living room floor. Smith v. State, 291 Ga. App. 545, 662 S.E.2d 323 (2008).

Victim's testimony sufficient for conviction. — Evidence consisting mostly of testimony from the victim, that the victim was awakened by defendant when the defendant broke into the victim's home, placed the defendant's hand around the victim's neck, and forced the victim to shut up or die, as the defendant threw the victim onto a couch and engaged in sexual intercourse with the victim without the victim's consent, was sufficient to uphold defendant's rape conviction, pursuant to O.C.G.A. § 16-6-1, aggravated assault conviction, pursuant to O.C.G.A. § 16-5-21, and burglary conviction, pursuant to O.C.G.A. § 16-7-1. Lowe v. State, 259 Ga. App. 674, 578 S.E.2d 284 (2003).

Evidence was sufficient to support defendant's conviction of malice murder, felony murder, burglary, aggravated assault, kidnapping with bodily injury, and possession of a firearm during the commission of a felony where defendant: (1) planned the crimes, and was armed with a gun and handcuffs; (2) broke into the defendant's in-laws' house after severing their phone line; (3) shot and killed the defendant's father-in-law and wounded the defendant's mother-in-law while they lay in bed; (4) handcuffed the defendant's bleeding mother-in-law to the mother-in-law's

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nine-year-old child and left them tethered to a bed rail in a room with the mother-in-law's dead husband and defendant's two-year-old child; and (5) abducted the defendant's estranged spouse and the spouse's 17-year-old sibling to a mobile home where the defendant made them take showers while the defendant watched, and then raped them both. Sallie v. State, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

Circumstantial evidence sufficient for conviction. — Circumstantial evidence supported defendant's convictions for aggravated assault, burglary, armed robbery, cruelty to children, theft by receiving stolen property, and possession of a firearm as: (1) defendant was driving a stolen car that defendant knew was not defendant's own; (2) defendant returned to the victims' house, which defendant had left only a short time before, slowly circling the victims' residence, pointing at the house; (3) defendant appeared to let codefendants out of the car for a specific purpose, since defendant saw them enter the victims' home and waited for them, demonstrating that defendant knew they would return shortly; (4) when codefendants ran back to the car and jumped in, defendant drove off in response to their rapid return; and (5) shortly thereafter, defendant abandoned the stolen car. Parnell v. State, 260 Ga. App. 213, 581 S.E.2d 263 (2003).

Recent and unexplained possession of stolen goods. — Evidence was sufficient to support defendant's convictions for burglary, as defendant was shown to be in the recent and unexplained possession of property stolen from different residences, the burglarized homes were adjacent to and accessible on foot from the wooded area where defendant was seen around the time the crimes occurred, and similar transaction evidence showed defendant had previously received stolen items from homes in the area, including one home that had been burglarized. Gray v. State, 260 Ga. App. 197, 581 S.E.2d 279 (2003).

Circumstantial evidence sufficient for conviction. — Evidence, though circumstantial, was sufficient to support defendant's conviction for burglary, as the fact that it showed "old money," printed in the 1930's, 1940's, and 1950's, was taken from the site of the burglary, that defendant's codefendant drove defendant, who was carrying a screwdriver, to the house that was burglarized, that similar "old money" was left inside the house, that defendant soon purchased two vehicles in cash, and that defendant gave the codefendant a large amount of money in cash which the codefendant deposited in a bank account and which triggered a police investigation, was sufficient to exclude every reasonable hypothesis except that defendant burglarized the house. Edward v. State, 261 Ga. App. 57, 581 S.E.2d 691 (2003).

Circumstantial evidence supported defendant's burglary conviction because: (1) defendant drove a truck that exactly matched the truck in the surveillance tape; (2) defendant had a board in defendant's truck with glass particles embedded in the board that were of the same thickness and physical chemical properties as the glass of the window that was broken during the crime; (3) a sweater cap and white gloves found in the truck appeared to match those worn by the perpetrator in the surveillance tape; and (4) the stolen television and videocassette recorder were found approximately 500 yards from the defendant's mother's home. Brooks v. State, 273 Ga. App. 691, 615 S.E.2d 829 (2005), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007).

Given that the circumstantial evidence presented against the defendant sufficiently showed that: (1) the victim shot one of the intruders who committed the burglary; (2) shortly after the burglary, the defendant was treated for a gunshot wound and arrived at the hospital in a vehicle matching the description of the automobile seen leaving the crime scene; (3) the DNA evidence on ski masks found at the scene matched that of the owner of the car and the other passenger, who was also the defendant's brother; and (4) according to the defendant's brother, the

driver of the car admitted to shooting the victim, the defendant's convictions for aggravated assault, burglary, and possession of a firearm during the commission of a felony were affirmed on appeal. Sherman v. State, 284 Ga. App. 809, 644 S.E.2d 901 (2007).

Circumstantial evidence supported a defendant's conviction of burglarizing a garden center. On the morning the garden center burglary was discovered, the defendant was caught burglarizing a car dealership two doors down; gloves that fell from the defendant's pocket at the dealership came from the garden center; a shoe print on another glove from the center matched the defendant's boots; an investigator who drove by the area the previous evening testified that neither building showed signs of forced entry at that time; and the defendant stated that the defendant could have committed the garden center burglary but did not remember doing so. Johnson v. State, 291 Ga. App. 253, 661 S.E.2d 642 (2008).

Although circumstantial, the evidence was sufficient to support the defendant's conviction of burglary, O.C.G.A. § 16-7-1(a). The victim's stolen computer was discovered in the attic area between the victim's side of a duplex and the defendant's side, and an officer noticed a path in the insulation from the defendant's side to the victim's attic access door. Norful v. State, 296 Ga. App. 387, 674 S.E.2d 633 (2009).

Circumstantial evidence was sufficient under former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6) for the defendant's conviction of burglary because: (1) an investigating officer, who responded to a burglary alarm at a townhouse, found the defendant coming from the back of the townhouse; (2) the defendant said that the defendant had just put defendant's dog away through the back door of the defendant's neighboring townhouse; (3) the defendant's shoe print was found outside the broken window of the townhouse with the alarm, and the defendant had a remote control in the defendant's pocket that operated a television set that had been unplugged and was put on the floor by the front door of the townhouse; and (4) the defendant's fingerprints were found on the television. Reggler v. State, 307 Ga. App. 721, 706 S.E.2d 111 (2011).

Fleeing without goods. — Evidence which showed that a victim heard a crash in the victim's bedroom, and that defendant was holding a computer game system before defendant saw the victim and fled, was sufficient to sustain defendant's conviction for burglary. Wilson v. State, 261 Ga. App. 576, 583 S.E.2d 243 (2003).

Testimony from an eyewitness at the scene that the eyewitness heard suspicious noises in the adjacent government offices, which were closed for business for the day, then saw defendant flee from police while removing items from defendant's pocket, when coupled with the discovery of 169 quarters which were found in the immediate vicinity of the tree where defendant was apprehended, the presence of tools at the crime scene, visible pry marks on the door which defendant attempted to open, and the destroyed gum ball machines, authorized the jury to infer that although defendant did not have the tools in defendant's possession, defendant used them to break into the offices, steal the money from the destroyed machines, and attempt to flee the police and avoid apprehension; thus, defendant's convictions for burglary, possession of tools for the commission of a crime, interference with government property, and obstruction of an officer were all affirmed. Harris v. State, 263 Ga. App. 866, 589 S.E.2d 631 (2003).

When a victim heard defendant breaking into the victim's home, went to a neighbor for help, and, upon returning to the victim's home with the neighbor, confronted defendant exiting the victim's house with the victim's television, the victim's identification of defendant as the person the victim saw exiting the victim's house with the victim's television, corroborated by the victim's neighbor, together with the victim's testimony that defendant did not have permission to be in the victim's house, was sufficient to convict defendant of burglary. Hill v. State, 264 Ga. App. 622, 591 S.E.2d 484 (2003).

Use of crowbar in attempted burglary. — Insertion of a crowbar into the locked door of a business with the intent of prying open the door and exerting pres-

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sure on the crowbar in such a manner that the striker plate on the door was bent and damaged constituted a substantial step toward the commission of the crime of burglary to support a conviction for attempted burglary. Flanagan v. State, 265 Ga. App. 122, 592 S.E.2d 894 (2004).

There was sufficient evidence to support defendant's conviction for burglary since defendant's friend testified that defendant asked the friend to drive a truck to a dealership, that defendant and another disappeared for a short time, and that the truck and another vehicle then left the dealership; there was testimony that the police stopped their vehicles and found a stolen four-wheeler in the back of the truck, together with burglary tools; and there was testimony from a witness to the crime. Norwood v. State, 265 Ga. App. 862, 595 S.E.2d 537 (2004).

Evidence was sufficient to support all but one of defendant's convictions for burglary, kidnapping, aggravated assault, and possession of a firearm during the commission of a crime because the testimony of the three shooting victims was entirely consistent in all material respects, and any conflicts in the witnesses' testimony raised a credibility issue for jury resolution. Squires v. State, 265 Ga. App. 673, 595 S.E.2d 547 (2004).

Evidence that defendants entered the victim's apartment, took the victim by the hands and demanded money, shoved a gun into the victim's side and removed the victim's ring, watch, and money, and then forced the victim into a closet blocked with a heavy table with instructions not to come out until they had left was sufficient to support convictions for false imprisonment, armed robbery, burglary, and possession of a firearm during the commission of a felony. Pinson v. State, 266 Ga. App. 254, 596 S.E.2d 734 (2004).

Armed robbery of victim in hotel room. — Evidence that defendant, wielding a gun, barged into the victim's hotel room, demanded money, pistol whipped the victim, and took the victim's wallet sufficed to sustain defendant's convictions for armed robbery, possession of a firearm during the commission of a felony, and burglary. Bay v. State, 266 Ga. App. 91, 596 S.E.2d 229 (2004).

Screwdriver used in burglary. — Evidence that defendant was seen exiting a burglarized building, that defendant had items taken from the building, that defendant also had a screwdriver, and that marks on the building's door corresponded to those made by a screwdriver supported defendant's burglary conviction. Taylor v. State, 266 Ga. App. 818, 598 S.E.2d 122 (2004).

Evidence presented at defendant's trial for multiple burglary counts was sufficient to support defendant's convictions where the testimony of defendant's nephew, who acted as an accomplice, was corroborated by the testimony of the victims describing the methods used to break into their homes and the items that were taken. Gibson v. State, 267 Ga. App. 473, 600 S.E.2d 417 (2004).

There was sufficient evidence to support defendant's convictions of burglary in violation of O.C.G.A. § 16-7-1(a), aggravated assault in violation of O.C.G.A. § 16-5-21(a)(1), (a)(2), and possession of a firearm during the commission of a crime in violation of O.C.G.A. § 16-11-106(b), where evidence showed that three persons forcibly entered the victims' apartment and demanded money, that all three persons were in the car together on the way to the apartment and on the way to the hospital to drop off a bleeding codefendant, that all three persons carried guns, that one of the victims was shot, and that defendant's statement that defendant only was involved to drop off the bleeding codefendant at the hospital was in contrast to the fact that defendant had blood on defendant's pants, shirt, boxer shorts, and that defendant ejected the bloody codefendant from the car in a hurried manner at the hospital. Brown v. State, 267 Ga. App. 642, 600 S.E.2d 731 (2004).

Defendant's motion for directed verdict of acquittal was properly denied because evidence from independent sources sufficiently corroborated the son's accomplice's statements implicating defendant in the burglary. The son's statements were corroborated by the victim's testimony that

defendant had seen the victim bring the shotguns inside the apartment, by the victim's spouse's testimony that defendant had seen them leave their apartment, and by the apartment manager's testimony that defendant had been standing outside the victim's apartment, along with the son, during the time period when the crimes were committed. Stocks v. State, 268 Ga. App. 351, 601 S.E.2d 729 (2004).

When defendant, according to defendant's love interest, drove a stolen vehicle onto the victim's property through a locked gate, parked near a building where objects were stolen, and got into the vehicle and drove away, and the owner testified that the owner had not given defendant permission to take the objects that were stolen, there was sufficient evidence to convict defendant of criminal trespass in violation of O.C.G.A. § 16-7-21(a), burglary in violation of O.C.G.A. § 16-7-1(a), and theft by taking in violation of O.C.G.A. § 16-8-2. Sexton v. State, 268 Ga. App. 736, 603 S.E.2d 66 (2004).

Burglary of storage shed. — When an eye-witness identified defendant as the individual the witness saw leave the witness's storage shed with the witness's goods, the evidence sufficed to sustain a guilty verdict on the charge of burglary under O.C.G.A. § 16-7-1(a). Pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), a single witness was generally sufficient to establish a fact. Gibson v. State, 268 Ga. App. 696, 603 S.E.2d 319 (2004).

Because a burglary victim recognized defendant before a photographic lineup was introduced, defendant did not show deficient performance or prejudice based on trial counsel's failure to object to the lineup; in any event, the evidence was sufficient to sustain the convictions for armed robbery, aggravated assault, burglary, making terroristic threats, and possession of a firearm during the commission of the felonies under O.C.G.A. §§ 16-5-21(a)(1), (a)(2), 16-7-1(a), 16-8-41(a), 16-11-37(a), and 16-11-106(b)(1). Williams v. State, 270 Ga. App. 845, 608 S.E.2d 310 (2004).

Defendant's multiple convictions for armed robbery, aggravated assault, kidnapping, possessing a firearm during the commission of a felony, burglary, and kidnapping with bodily injury, were supported by sufficient evidence because defendant and another robbed a store while holding the two owners at gunpoint, the defendant led police on a high-speed car chase, and the defendant broke into and robbed two homes, one of which had an occupant that the defendant beat; only one store owner's testimony was needed to establish the facts to support the aggravated assault conviction. Owens v. State, 271 Ga. App. 365, 609 S.E.2d 670 (2005).

Sufficient evidence supported the defendant's convictions of armed robbery, burglary, possession of a firearm during the commission of a crime, and three counts of kidnapping arising from an incident in which the defendant and a companion robbed the victim at gunpoint, then forced the victim and the victim's children into their house and tied the victim up with duct tape; the victim identified the defendant from a photo line-up, the defendant's fingerprints were found at the scene, a store video showed the defendant buying the duct tape which was used, and the store manager identified the defendant as the buyer of the duct tape. Brownlee v. State, 271 Ga. App. 475, 610 S.E.2d 118 (2005).

Robbery of fast-food restaurant. — When the defendant's victim identified the defendant from a photo lineup and at trial as the person who forced the victim to open the vaults in the fast-food restaurant where the victim worked, then duct-taped the victim's limbs and repeatedly struck the victim as the victim lay face down on the floor, the evidence was sufficient beyond a reasonable doubt to allow the jury to convict the defendant of kidnapping with bodily injury, armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of certain crimes. Banks v. State, 269 Ga. App. 653, 605 S.E.2d 47 (2004).

Evidence was sufficient to support the defendant's conviction for burglary, under O.C.G.A. § 16-7-1(a), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant,

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1. Evidence Sufficient. (Cont'd)

shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told the relatives what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. Donald v. State, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Breaking of window. — Evidence was sufficient to support the defendant's conviction for aggravated assault and burglary, in violation of O.C.G.A. §§ 16-5-20, 16-5-21, and 16-7-1, because the defendant threatened and broke a window in the victim's home, reached in and tried to grab the victim, and the victim positively identified the defendant in a show-up identification that was found to be fair under the totality of the circumstances. Taylor v. State, 271 Ga. App. 701, 610 S.E.2d 668 (2005).

Sufficient evidence supported the defendant's conviction of burglary in violation of O.C.G.A. § 16-7-1(a); testimony indicated that the defendant broke a window in order to enter the victim's apartment and that the behavior of the defendant and the defendant's companions, involving beating the victim and telling the victim not to appear at court to testify against the defendant in a pending criminal case, indicated the defendant's intent to enter the apartment to intimidate the victim from testifying at a criminal trial. Souder v. State, 281 Ga. App. 339, 636 S.E.2d 68 (2006), cert. denied, No. S07C0113, 2007 Ga. LEXIS 97 (Ga. 2007).

There was sufficient evidence to support a defendant's conviction for burglary in violation of O.C.G.A. § 16-7-1(a) after an apartment occupant observed the defendant, without authority, break a window and enter the apartment with the assumed intent to commit a theft or felony; the defendant's claim that defendant tripped over a rock and fell into the window was not deemed credible as the rock was not that close to the window and the window was broken at head level. Williams v. State, 292 Ga. App. 811, 665 S.E.2d 910 (2008).

Trial court did not err in denying a defendant's motion for a new trial or the defendant's motion for a directed verdict because the evidence was sufficient for the trial court to find the defendant guilty of burglary in violation of O.C.G.A. § 16-7-1(a) beyond a reasonable doubt when the back window of a home was broken and police found the defendant hiding in a closet under a pile of clothing. Williams v. State, 297 Ga. App. 723, 678 S.E.2d 95 (2009).

Fleeing as evidence of guilt. — Evidence supported the defendant's burglary conviction as the defendant admitted that the defendant was in a van with the codefendant, who was arrested at the scene, and that the defendant drove off when the defendant heard noises; the victim testified that the victim saw two persons in the home and the jury was free to consider that defendant fled as evidence of guilt. Mitchell v. State, 271 Ga. App. 711, 610 S.E.2d 672 (2005).

Defendant's convictions for child molestation, attempted statutory rape, and burglary were supported by the evidence because: (1) defendant entered the 14-year-old victim's room through a window, uninvited; (2) the defendant told the victim to push the victim's bed against the door; (3) the defendant removed the victim's underwear and the defendant's own pants and laid on top of the victim, but the victim prevented the defendant from penetrating the victim; (4) defendant fondled the victim's breasts and touched the victim's nipples; and (5) on a prior occasion, defendant made the victim touch the defendant's genitals with the victim's hand. Leaptrot v. State, 272 Ga. App. 587, 612 S.E.2d 887 (2005).

Theft from open garage. — Jury was authorized to infer defendant's intent to commit a theft from the fact that defendant backed the car up a long driveway to an open garage attached to the victim's house, left the car running, valuables were present and turned up missing, defendant did not knock or otherwise announce the defendant's presence, defendant was not authorized to enter onto the property or into the garage, defendant opened the door to the interior of the house, and defendant fled in haste when confronted by the victim. Railey v. State, 273 Ga. App. 520, 615 S.E.2d 609 (2005).

Evidence supported defendant's conviction for armed robbery, attempted armed robbery, burglary, and one firearms offense because: (1) defendant confessed to the crimes; (2) a companion wore distinctive shoes that matched those of an armed robber; (3) two dust-free ski masks, similar to those worn by the armed robbers, were found in defendant's very dusty utility closet; and (4) a small red car was parked near a restaurant that was robbed, officers stopped defendant two hours later, and defendant drove the same car to the police station when defendant came for voluntary questioning. Ray v. State, 273 Ga. App. 656, 615 S.E.2d 812 (2005).

Evidence supported defendant's conviction for burglary and entering an automobile with the intent to commit a theft because there was evidence corroborating defendant's confession regarding how defendant gained entry into both a warehouse and a car. Morris v. State, 274 Ga. App. 41, 616 S.E.2d 829 (2005).

Open door to house. — Evidence was sufficient to support burglary conviction because an officer found defendant at the scene of the crime, the doorway of the house was broken, defendant lacked authority to enter the premises, defendant admitted that defendant had entered the house with the intent to steal, and goods stolen from the house were found in the immediate vicinity of defendant's bicycle and bag; further, defendant admitted to the parole officer that, although defendant had found the door to the house open, defendant had gone into the house to find something to steal. Johnson v. State, 275 Ga. App. 21, 619 S.E.2d 731 (2005).

Evidence was sufficient to support a burglary conviction whereas the fact that the victim opened a door without seeing anyone when the victim looked through a pane did not mean that the victim authorized the defendant's entry into the victim's home; furthermore, the fact that there was no evidence that the defendant committed a theft in the victim's home did not mandate reversal as the victim had been kidnapped, and the offense of burglary was completed when one entered the home of another with the intent to commit the felony offense of kidnapping. Smith v. State, 287 Ga. App. 222, 651 S.E.2d 133 (2007).

Trial court did not err in entering judgments of conviction on defendant's three burglary convictions in two cases following jury verdicts finding the defendant guilty of those offenses; the state introduced sufficient evidence apart from the testimony of defendant's accomplice to warrant convictions, primarily based on the three homeowners' identification of the property taken and their testimony about the circumstances under which the relevant property went missing. Daniel v. State, 275 Ga. App. 70, 619 S.E.2d 770 (2005).

Defendant's convictions of aggravated stalking, burglary, aggravated assault, and false imprisonment, in violation of O.C.G.A. §§ 16-5-91, 16-7-1, 16-5-21, and 16-5-41, were supported by sufficient evidence because, despite the victim's recantation at trial, the victim stated to police earlier that defendant broke into the victim's apartment, scratched and damaged furniture and other property, tied the victim up, locked the victim in the bedroom for several hours, harmed the victim, threatened that defendant and defendant's friends were going to lock the victim in a basement for a few months, and defendant had been waiting for the victim to arrive home. Andrews v. State, 275 Ga. App. 426, 620 S.E.2d 629 (2005).

In defendant's prosecution for rape, kidnapping with bodily injury, and burglary, the evidence was sufficient to show that defendant was the perpetrator of the offenses because the evidence showed the assailant to be a young, African-American male driving a white automobile with cer-

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1. Evidence Sufficient. (Cont'd)

tain plates, and defendant admitted to driving a stolen white automobile prior to the date that the crimes occurred; this evidence coupled with DNA evidence showing DNA of both defendant and the victim in stains left on the bedding in the victim's apartment where the rape occurred was sufficient to enable any rational trier of fact to determine beyond a reasonable doubt that defendant was the perpetrator of the crimes. Winkfield v. State, 275 Ga. App. 456, 620 S.E.2d 670 (2005).

Evidence was sufficient to find that defendant was at least a party to the crime of burglary and guilty of burglary beyond a reasonable doubt, in violation of O.C.G.A. § 16-7-1, as defendant's own statements established that the codefendant intended to commit an underlying offense of armed robbery when telling defendant that they should go rob someone in order to get drinking money, and that the codefendant had a handgun; the evidence supported a finding that defendant was present and assisted in the commission of the crime, such that defendant was liable as an aider and abettor under a party to the crime theory pursuant to O.C.G.A. § 16-2-20. Moyer v. State, 275 Ga. App. 366, 620 S.E.2d 837 (2005), overruled on other grounds, Vergara v. State, 283 Ga. 175, 657 S.E.2d 863 (2008).

Because witnesses saw defendant come and go from an empty mobile home and heard defendant brag about a burglary, and the mobile home's back door had pry marks on it that were consistent with defendant's knife, there was sufficient evidence to convict defendant of burglary and possession of criminal tools under O.C.G.A. §§ 16-7-1(a) and 16-7-20(a). Barrow v. State, 275 Ga. App. 522, 621 S.E.2d 537 (2005).

Alleged permission to take. — Evidence was sufficient to support defendant's conviction for burglary, in violation of O.C.G.A. § 16-7-1(a), because defendant was caught in an apartment, taking shoes that belonged to the apartment dweller, and there were other items that belonged to the dweller in defendant's own apartment; defendant's claim that the dweller had informed a neighbor that anyone could take the neighbor's belongings after a fire had destroyed items in the apartment did not negate any elements of the crime, as the trier of fact was within its province in making a credibility determination that defendant was not as believable as the victim, who claimed to have never said that. Cobb v. State, 275 Ga. App. 554, 621 S.E.2d 548 (2005).

Burglary conviction was supported by sufficient evidence because, while defendant claimed to be merely fixing a broken window in the victim's home, the victim claimed that jewelry and compact discs had been taken from the home, defendant's fingerprints were found on the compact disc case, and a bookshelf inside the home which was blocking the broken window had been turned over; although circumstantial, the evidence, which included defendant's statements to the police and in court, was sufficient to authorize a rational trier of fact to conclude that all reasonable hypotheses were excluded, save defendant's guilt. Rolling v. State, 275 Ga. App. 902, 622 S.E.2d 102 (2005).

Evidence regarding defendant's forced entry into the defendant's love interest's house followed by an attempt to murder the defendant's love interest sustained defendant's burglary conviction. Smith v. State, 276 Ga. App. 41, 622 S.E.2d 413 (2005).

Sufficient evidence was introduced to support defendant's convictions for felony murder and burglary despite defendant's claims that defendant was not sufficiently involved in the crimes to be convicted on those charges. Joyner v. State, 280 Ga. 37, 622 S.E.2d 319 (2005).

Forced entry not required for burglary conviction. — Evidence was sufficient to support defendant's convictions of burglary, armed robbery, and malice murder, in violation of O.C.G.A. §§ 16-7-1(a), 16-8-41, and 16-5-1, respectively, because defendant and a friend decided to rob the victim and they entered the apartment unlawfully with that intent, they stabbed and bludgeoned the victim, and they took a lock-box and left; although the evidence as to whether defendant was let into the

apartment by the victim willingly was conflicting, forced entry was not an element of burglary and accordingly, resolution of that fact did not change the sufficiency of the evidence for the burglary conviction. Redwine v. State, 280 Ga. 58, 623 S.E.2d 485 (2005).

Use of DNA in proving offense. — Evidence was sufficient to support defendant's convictions of rape, kidnapping, burglary, and aggravated assault since: (1) the victim testified that the victim discovered a strange person in the victim's den who grabbed the victim as the victim tried to run away, that the person held a knife to the victim's face and told the victim that the person would kill the victim if the victim screamed, that the person then forced the victim to go from room to room in the victim's home to turn out the lights, and that the person then raped the victim; (2) the victim identified defendant as the victim's attacker after hearing the person's voice; and (3) a DNA analyst testified that, with a probability of error of one in a trillion, DNA from defendant's blood matched the DNA found in vaginal swabs that were taken from the victim. McKinney v. State, 261 Ga. App. 218, 582 S.E.2d 463 (2003).

There was sufficient evidence to find defendant guilty of malice murder, burglary, and possession of a gun during commission of a crime because a witness testified that the witness, defendant, and defendant's sibling drove around looking for a home to burglarize and that while in a house, the two victims came home unexpectedly and were killed; also, DNA found at the crime scene matched defendant. Denny v. State, 280 Ga. 81, 623 S.E.2d 483 (2005).

Defendant's convictions for malice murder, burglary, robbery, aggravated assault, and concealing the death of another were supported by sufficient evidence because: (1) defendant broke into the office where the victim was living; (2) defendant hit the victim several times on the head and body with a pair of pliers; (3) defendant choked the victim with defendant's hands and arms, and with the pliers, until the victim was dead; (4) defendant took the victim's credit card and driver's license; and (5) defendant disposed of the victim's body. Young v. State, 280 Ga. 65, 623 S.E.2d 491 (2005).

There was sufficient evidence to support a defendant's convictions for rape, aggravated sodomy, kidnapping, burglary, and misdemeanor sexual battery based on the similar transaction evidence produced by the state, defendant's unlawful entry into the victims' homes, the fact that the defendant's DNA was found in the victims' beds, and that the defendant's identity was established, all of which sufficiently linked the defendant to the crimes beyond a reasonable doubt. Goolsby v. State, 299 Ga. App. 330, 682 S.E.2d 671 (2009).

Evidence that the defendant was found in the laundry room of the home that was the subject of the home burglary; police found masks, gloves, money, a gun, and some of the victim's jewelry in or near the laundry room; and the defendant's DNA was found on one of the masks recovered supported the defendant's convictions for armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of a crime. Rudison v. State, 322 Ga. App. 248, 744 S.E.2d 444 (2013).

While the victim initially identified someone else as the assailant, evidence that the defendant's DNA matched the seminal fluid found on the victim's clothing, the defendant was seen near the house shortly after the rape, and the defendant's shirt was found in the residence supported the defendant's convictions for rape, child molestation, false imprisonment, and burglary. Couch v. State, 326 Ga. App. 207, 756 S.E.2d 291 (2014).

Circumstantial evidence that a cigarette butt with the defendant's DNA on the butt was found in a burglary victim's home, that the defendant was seen standing in a neighbor's yard, that the defendant was wet and muddy, and that some of the stolen items were also wet and near a creek near the victim's home was sufficient to support the defendant's burglary conviction. Stokes v. State, 327 Ga. App. 511, 759 S.E.2d 585 (2014).

Evidence that the defendant's DNA was found on a soda can left inside the victim's house after the burglary, the victim's stolen property was found in a house where the defendant was residing, and the de-

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1. Evidence Sufficient. (Cont'd)

fendant fled when officers tried to arrest the defendant was sufficient to support the defendant's convictions for burglary and theft by taking. Barstad v. State, 329 Ga. App. 214, 764 S.E.2d 453 (2014).

Theft of lottery tickets. — Evidence sufficed to sustain defendant's conviction on three counts of burglary because, regarding one of the burglaries, defendant was videotaped redeeming eight lottery tickets from a stolen roll of tickets within two hours of that burglary, and testimony showed that a person would most likely have to have at least 30 of those tickets to redeem eight winning tickets. Burdette v. State, 276 Ga. App. 695, 624 S.E.2d 253 (2005).

Evidence sufficed to sustain defendant's conviction on three counts of burglary; regarding one of the burglaries, defendant had a police business card, which an officer left with a plumbing business for the owner to use to contact the police, on defendant's person. Burdette v. State, 276 Ga. App. 695, 624 S.E.2d 253 (2005).

Reversing course during burglary. — Evidence was sufficient to convict defendant of burglary with intent to commit theft; a rational jury could have inferred that defendant entered the victim's home to commit a theft and began to carry out the plan by seizing a gold chain, but reversed course and then fabricated another explanation to tell the victim as to why defendant was in the home. Nelson v. State, 277 Ga. App. 92, 625 S.E.2d 465 (2005).

Robbery of drug dealer. — Evidence was sufficient to support the first defendant and the second defendant's convictions for murder, kidnapping, armed robbery, and burglary, as the evidence showed that they were involved in a scheme to rob a man who they believed to be selling large amounts of marijuana from his apartment, that they burst into his apartment brandishing guns, that one of the defendants fatally shot the man, and that the other defendant forced two people present to lie on the ground and divulge the location of a safe in the apartment that held money and marijuana. Howard v. State, 279 Ga. 166, 611 S.E.2d 3 (2005).

Robbery of parents. — Evidence supported defendant's conviction for malice murder, burglary, and hindering a police officer where defendant was at the back door of his mother's home without authorization, and fled when an officer tried to handcuff him, defendant's mother was found dead from massive head injuries, and the mother's rings, a lawnmower blade, and a hatchet were found on defendant's person or stashed in bags outside the home. Smith v. State, 279 Ga. 172, 611 S.E.2d 1 (2005).

Robbery of relative. — Evidence was sufficient to support defendant's conviction for burglary since the evidence showed that defendant broke into the relative's house by crawling through a window without permission and with the intent of falsely imprisoning the relative; defendant not only admitted to doing so, but other family members also positively identified the defendant as the intruder. Alexander v. State, 279 Ga. 683, 620 S.E.2d 792 (2005).

Evidence was sufficient to support the convictions of murder, armed robbery, aggravated assault, burglary, and a statutory violation, all in violation of O.C.G.A. §§ 16-5-1, 16-8-41, 16-5-21, 16-7-1, and 16-11-106, respectively, after the defendant and the codefendant went to a club with the intention of robbing someone, met the victim and drove the victim back to the victim's home, beat and fatally stabbed the victim, and upon leaving the victim's apartment, took some of the victim's belongings. Willoughby v. State, 280 Ga. 176, 626 S.E.2d 112 (2006).

Testimony of a single witness was sufficient to establish a fact under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), and the defendant's convictions for kidnapping, burglary, aggravated sodomy, rape, and false imprisonment were supported by sufficient evidence when the victim testified that the defendant forced the victim into a train boxcar, threatened to kill the victim, and had vaginal and oral sex with the victim against the victim's will and without the victim's consent; there was also circumstantial evidence

showing the victim's lack of consent, including the victim's fleeing from the boxcar while naked, the victim's outcry to a train engineer that the victim had been raped, and the victim's injuries. Davis v. State, 278 Ga. App. 628, 629 S.E.2d 537 (2006).

Conviction of burglary, O.C.G.A. § 16-7-1, was supported by sufficient evidence, including a neighbor's eyewitness testimony that the neighbor saw the defendant taking property out of the victim's house during the time when the burglary happened, the discovery of a business card from the defendant's probation officer at the victim's home, with the time and date of defendant's next appointment written on it, and the discovery of an item of stolen property at the place where the defendant was residing. Walker v. State, 279 Ga. App. 390, 631 S.E.2d 413 (2006).

While the defendant, a passenger in a pick-up truck seen at a burglary scene, and the truck driver both claimed that the defendant was passed out while the driver committed the burglary without the defendant's knowledge, another witness saw the truck outside the dock and two people cutting the chain, an officer heard two car doors shut and an engine start at the scene right before the officers arrived, and the defendant was not passed out when officers intercepted the truck; the jury was authorized to disbelieve the account offered by the defendant and the driver, and the evidence was sufficient to support the defendant's burglary conviction. Spradlin v. State, 279 Ga. App. 638, 631 S.E.2d 828 (2006).

Defendant's burglary conviction, as well as the sentence imposed, were upheld on appeal, as: (1) defendant failed to make out a prima facie showing of racial discrimination in jury selection; (2) the evidence did not warrant a jury charge on theft by taking as a lesser-included offense; and (3) based on defendant's prior felony criminal record, O.C.G.A. § 17-10-7, and not O.C.G.A. § 16-7-1(b), applied. Goldberg v. State, 280 Ga. App. 600, 634 S.E.2d 419 (2006), aff'd, 282 Ga. 542, 651 S.E.2d 667 (2007).

There was sufficient evidence to convict the defendant of malice murder under O.C.G.A. § 16-5-1, burglary under O.C.G.A. § 16-7-1, and possession of a firearm during the commission of a crime under O.C.G.A. § 16-11-106; the defendant was arrested in the white van seen at the scene of the crime, a person resembling the defendant was seen at the scene, the defendant's brother was tied by DNA evidence to the offense, and the defendant and the defendant's brother were known to commit burglaries together. Denny v. State, 281 Ga. 114, 636 S.E.2d 500 (2006).

Sufficient evidence existed to support five defendants' convictions for felony murder and burglary by any rational trier of fact based on the state's introduction of both direct and circumstantial evidence to prove that the defendants rode together in a truck and participated in the invasion of the victim's house; although much of the state's case depended on accomplice testimony, the state presented additional corroborating evidence in the nature of the black clothing, weapons, and cellular telephone records, which tended to connect defendants to the crime. Guyton v. State, 281 Ga. 789, 642 S.E.2d 67 (2007).

As the evidence provided by the state at defendants' criminal trial demonstrated that based on information from defendant-B regarding a large quantity of marijuana possessed by a victim, defendant-A and another person forcibly entered the victim's residence while defendant-A was armed, pushed the victim to the ground, demanded to know where the marijuana was, and a physical struggle resulted, the evidence supported defendants' convictions for burglary, armed robbery, and aggravated assault; defendant-B was convicted as a party to the crimes under O.C.G.A. § 16-2-20(4). Garland v. State, 283 Ga. App. 622, 642 S.E.2d 320 (2007), rev'd on other grounds, 282 Ga. 201, 657 S.E.2d 842 (2008).

Defendant's convictions for malice murder, aggravated battery, burglary, and violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., by unlawfully possessing cocaine and marijuana were supported by sufficient evidence; the defendant walked into a neighbor's house with a butcher knife in each hand and stabbed two people, knives found in the woods behind the defendant's apartment matched the descriptions of

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1. Evidence Sufficient. (Cont'd)

those used in the stabbings and had deoxyribonucleic acid matching the defendant's, two knives were missing from a knife block in the defendant's apartment, marijuana and cocaine were found in the apartment, the defendant told a friend that the defendant had "hurt some people really bad," and three eyewitnesses identified the defendant as the assailant. Swanson v. State, 282 Ga. 39, 644 S.E.2d 845 (2007).

There was sufficient evidence to support defendant's conviction for burglary because defendant was seen exiting a meat store with a white box in defendant's hand, threw the box at the officers who had responded to an alarm at the store and attempted to flee, the store manager indicated that defendant did not have permission to be in the store, and there were boxes of meat and a hand truck outside of the store which the manager indicated had been inside when the manager left the night before. Warren v. State, 281 Ga. App. 490, 636 S.E.2d 671 (2006).

Burglary conviction was upheld on appeal as: (1) sufficient evidence was presented that the defendant entered the victim's home without permission with the intent to commit a theft therein; and (2) the state properly presented res gestae evidence, even if such improperly placed the defendant's character in evidence. Meyers v. State, 281 Ga. App. 670, 637 S.E.2d 78 (2006).

Juvenile's delinquency on charge of burglary — Beyond the witnesses' identification of a juvenile's hairstyle and clothing as those worn by one of the burglars, and beyond the burglars' going to the juvenile's home to escape, the juvenile's possession of the stolen items soon after the burglary was sufficient to uphold the court's adjudication of delinquency on that charge; hence, the admissible evidence sufficed to sustain the finding of delinquency on a charge of burglary. In the Interest of A.D., 282 Ga. App. 586, 639 S.E.2d 556 (2006).

Defendant's challenge to the sufficiency of the evidence presented by the state to support a charge of burglary was rejected given evidence that the defendant's acts of entering the victim's residence without permission and removing items from therein satisfied the elements of that crime. Thomas v. State, 284 Ga. App. 222, 644 S.E.2d 160 (2007).

There was sufficient evidence supporting the defendant's convictions of armed robbery, burglary, possession of a firearm during the commission of a felony, and criminal trespass; the evidence included a custodial statement in which the defendant admitted participating in the crimes and testimony by a witness as to the preparations for the robbery, the clothing worn by the defendant and by the accomplice, and the defendant's disposal of a gun. Medlin v. State, 285 Ga. App. 709, 647 S.E.2d 392 (2007).

Because sufficient evidence was presented consisting of the victim's identification of the defendant as the perpetrator of a burglary, who threatened the victim with a sharp, knife-like letter opener, forcing the victim into a closet, and stealing the victim's camera upon fleeing, sufficient evidence supported the defendant's burglary, armed robbery, aggravated assault, and kidnapping convictions. Bryant v. State, 286 Ga. App. 493, 649 S.E.2d 597 (2007).

Victim's testimony that the defendant forcibly entered the victim's house and accused the victim of sexually assaulting a sibling of the defendant, then beat the victim with a bat and kicked the victim, established the essential elements of aggravated assault and burglary; a single witness's testimony was generally sufficient to establish a fact. Gonzales v. State, 286 Ga. App. 821, 650 S.E.2d 401 (2007), cert. denied, No. S07C1765, 2008 Ga. LEXIS 70 (Ga. 2008).

Evidence was sufficient for any rational trier of fact to find the defendant juvenile delinquent due to the defendant's involvement in the burglary of a pharmacy because an accomplice's testimony that the defendant participated in the burglary was corroborated; the extraneous evidence, even if slight and entirely circumstantial, connected the defendant to the burglary. In the Interest of R.W., 315 Ga. App. 227, 726 S.E.2d 708 (2012).

Defendant found in backyard. — Evidence was sufficient to support a burglary conviction when the defendant was found on a neighbor's back porch after a witness saw the defendant in the witness's backyard; although the neighbor found nothing missing, the neighbor testified that valuables were in the house, that drawers were opened, that the neighbor did not know the defendant, and that the defendant did not have permission to enter, which authorized the jury to conclude that the defendant had the intent to commit a felony in the neighbor's house. Griffith v. State, 286 Ga. App. 859, 650 S.E.2d 413 (2007).

There was sufficient evidence to support a defendant's convictions of malice murder, armed robbery, kidnapping, third-degree arson, burglary, and possession of a firearm during the commission of a crime when the evidence showed that the defendant made the defendant's accomplice shoot a convenience store clerk after the defendant forced the clerk at gunpoint into a wooded area, took money from a cash register in the store, and started a fire in the store. The accomplice's testimony was sufficiently corroborated by the defendant's admission that the defendant owned the shotgun that was used in the shooting, the defendant's admission that the defendant gave the shotgun to the accomplice, the testimony of a third person that the accomplice gave the third person the shotgun after the robbery, and the fact that shotgun shells found in the defendant's home matched shells taken from the clerk's body. Judkins v. State, 282 Ga. 580, 652 S.E.2d 537 (2007).

Evidence supported convictions of malice murder, aggravated assault, burglary, and possession of a firearm during the commission of a crime. The victim had been struck twice in the head with a pistol, strangled, and shot twice in the head; the victim's wallet and keys were missing; and the defendant, who told police where the wallet could be found, admitted shooting the victim and claimed that the defendant had done so after the victim tried to hug and kiss the defendant and things got "ugly." Brown v. State, 283 Ga. 327, 658 S.E.2d 740 (2008).

Party to a burglary. — Evidence was sufficient for a jury to infer that the defendant was a party to a burglary. When police responded to an alarm, the defendant was hiding behind a codefendant's truck, which had been backed into a storage shed; a police scanner and a pair of bolt cutters were found in the truck; the codefendant testified that the codefendant and the defendant went to the codefendant's house to pick up bolt cutters, that the defendant helped the codefendant cut a lock, and that the two "manhandled" an air compressor to try to get the compressor into the truck; the defendant admitted putting the scanner into the truck, riding with the codefendant through a gate, going inside the storage shed, and standing on the rack where the compressor was located; and an investigator found that the 600-pound compressor had been moved about three feet. Mezick v. State, 291 Ga. App. 257, 661 S.E.2d 635 (2008).

There was sufficient evidence to support a burglary conviction, which was based on the intent to commit second-degree criminal damage to property under O.C.G.A. § 16-7-23, when the defendant entered the victim's home, broke glass, attempted to kick down the victim's bedroom door, and caused $13,540 in damage to the victim's home. Jones v. State, 291 Ga. App. 296, 661 S.E.2d 651 (2008).

There was sufficient evidence to support convictions for aggravated assault, aggravated battery, and burglary when the victim unhesitatingly identified the defendant as one of the people who attacked the victim with a bat or a pipe; the victim's roommate was about "70 percent sure" that the defendant was one of the attackers; the defendant came to the victim's door earlier in the evening and told someone in the street, "Oh no, not now"; one of the attackers threatened the victim because the victim befriended the attacker's paramour; the paramour, who was a friend of the defendant and who had called the victim to the victim's door before the attack, knew that the victim had come into some cash; and the parent of the defendant's child testified that the defendant and others left the house saying that they were going to get into a fight. Furthermore, the victim sustained a stab

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1. Evidence Sufficient. (Cont'd)

wound in the liver, a shattered jaw, a broken foot, a stab to the elbow, damage to the facial nerves, and a double hernia and was in constant pain and could not work. Drew v. State, 291 Ga. App. 306, 661 S.E.2d 675 (2008).

Testimony that an 11-year-old child saw the defendant and another person take speakers out of a neighbor's apartment and put the speakers into a truck; evidence that the child identified the defendant from a photo lineup and saw the defendant before at the victim's apartment; and the victim's testimony that the defendant did not have permission to enter the apartment or remove any belongings was sufficient to convict the defendant of burglary in violation of O.C.G.A. § 16-7-1(a). Smith v. State, 293 Ga. App. 569, 667 S.E.2d 421 (2008).

There was sufficient evidence to support a defendant's convictions of armed robbery, aggravated assault, burglary, false imprisonment, and possession of a firearm during the commission of a felony when the state showed that the defendant intentionally aided and abetted a home invasion in which the home was burglarized and the homeowner's teenage child was detained and robbed by use of a handgun. Even in the absence of evidence sufficient to show that the defendant directly committed the charged offenses, there was sufficient evidence that the defendant was a party to the offenses in that the defendant and a person armed with a gun loaded a truck with property stolen from the home during the two-hour home invasion, the defendant was present speaking with the armed person during the home invasion, and the defendant confirmed that the child was home alone. Whitley v. State, 293 Ga. App. 605, 667 S.E.2d 447 (2008).

Evidence that the defendant entered a victim's home brandishing a gun and demanding money was sufficient to convict the defendant of burglary in violation of O.C.G.A. § 16-7-1(a). Serchion v. State, 293 Ga. App. 629, 667 S.E.2d 624 (2008).

Victim's testimony that the defendant kicked in the door of the victim's residence, entered without permission, pointed a shotgun at the victim, and threatened to shoot the victim if the victim did not give the defendant money was sufficient in itself to support the defendant's conviction for burglary in violation of O.C.G.A. § 16-7-1(a). Reed v. State, 293 Ga. App. 479, 668 S.E.2d 1 (2008).

There was sufficient evidence to support a defendant's conviction for burglary based on the overwhelming evidence presented at trial that established that various property was stolen from the victim's home and that the defendant was the person who sold those items to at least three shops that specialized in reselling used goods. Further, at trial, the victims positively identified items recovered from the trunk of the vehicle and all three stores as having been taken from the home, which detail eliminated the chance that the items taken were simply generically similar to the items possessed by the defendant. Butler v. State, 294 Ga. App. 540, 669 S.E.2d 525 (2008).

Writing a check from checkbook of victim. — Convictions against the defendant for malice murder, burglary, armed robbery, and aggravated assault were supported by evidence that the defendant entered the victim's home, hit the victim multiple times about the head and face with a tree limb with a metal piece on the limb, and wrote a check in defendant's name from the victim's checkbook; evidence included witness testimony from the bank where defendant cashed the check, defendant's confession to police, and physical evidence. Bell v. State, 284 Ga. 790, 671 S.E.2d 815 (2009).

Evidence, both direct and circumstantial, was more than sufficient to sustain the defendant's conviction for burglary in violation of O.C.G.A. § 16-7-1(a) because sheriff's deputies found a single check bearing the victim's signature in the defendant's pocket; the victim's spouse testified that around the time of the break-in, the spouse discovered that some of the spouse's checks had been stolen from the house because they began appearing at various banks with the spouse's forged signature. Shindorf v. State, 303 Ga. App. 553, 694 S.E.2d 177 (2010).

Removing door from hinges. — Victim's uncorroborated testimony that the defendant entered the victim's home by removing the back door from the door's hinges, ordered the victim at gunpoint to get in the defendant's truck, and did not bring the victim back home for hours was sufficient to convict the defendant of burglary and kidnapping. Hollis v. State, 295 Ga. App. 529, 672 S.E.2d 487 (2009).

There was sufficient evidence to support a defendant's burglary conviction as it was within the province of the jury to believe the testimony of the owner of the burglarized home, who was a police officer, and the testimony of a detective, regardless if the owner's trial testimony contradicted a prior written statement. Further, because the evidence showed that the defendant committed the burglary in which certain guns were stolen, it followed that the defendant took possession of the guns during the burglary, thus, there was sufficient circumstantial evidence to support the verdict of guilty on the possession of a firearm by a convicted felon charge with regard to the guns found in the bedroom of defendant's parent. Smallwood v. State, 296 Ga. App. 16, 673 S.E.2d 537 (2009), cert. denied, No. S09C0986, 2009 Ga. LEXIS 341 (Ga. 2009).

Juvenile's delinquency on charge of burglary. — Evidence was sufficient to support a defendant juvenile's adjudication of delinquency by the juvenile's commission of an act which, if committed by an adult, would have constituted burglary, in violation of O.C.G.A. § 16-7-1(a); an accomplice's testimony regarding the criminal incident was sufficiently corroborated by the juvenile's threats to the victim beforehand and the juvenile's actions after the incident. In re M. W., 296 Ga. App. 248, 674 S.E.2d 107 (2009).

Evidence of fabric softener supports burglary conviction. — Sufficient evidence supported defendant's burglary conviction, under O.C.G.A. § 16-7-1(a), because: (1) the daughter of the owner of the burglarized dwelling identified defendant as the person the daughter observed in the dwelling; and (2) fabric softener matching the brand present in the dwelling's laundry room was present in defendant's vehicle. Taylor v. State, 298 Ga. App. 145, 679 S.E.2d 371 (2009).

With regard to a defendant's convictions for burglary and possession of tools for the commission of a crime, there was sufficient evidence to support the convictions based on the trial testimony of two accomplices, who testified that the defendant directly participated in the burglaries with them as such evidence was sufficient and established corroboration. Dyer v. State, 298 Ga. App. 327, 680 S.E.2d 177 (2009).

Possession and concealment of stolen cigarettes. — Evidence of the defendants' unexplained possession and concealment of cigarettes stolen during a burglary, which occurred shortly before the defendants' arrest, was sufficient to establish guilt. Kennedy v. State, 298 Ga. App. 372, 680 S.E.2d 478 (2009).

Theft of wiring. — Testimony placed defendant near the crime scene, an owner of the facility testified that wire was missing and the owner testified that the amount and type of wire found at defendant's home was the same as that used at the owner's plant; additionally, a person who was arrested for and pled guilty to burglary of and criminal damage to the same facility, testified that, while the person was at the facility, the person worked with defendant, borrowing and loaning the defendant tools to assist in cutting and preparing the wire to be taken from the facility. Thus, the evidence was sufficient to support the defendant's burglary conviction. Adams v. State, 300 Ga. App. 294, 684 S.E.2d 404 (2009).

Evidence was sufficient to support the defendant's conviction for burglary, in violation of O.C.G.A. § 16-7-1, based on the evidence showing that the defendant was hiding in the bushes in a field near the victim's chicken houses; that the defendant resided with the accomplice; that the defendant made a sale of copper wire to a recycling business the day after the burglary; and that buckets of coil wiring were present at the defendant's home after the burglary, which additional evidence more than satisfied the slight evidence requirement necessary to corroborate the testimony of the accomplice. Garrett v. State, 317 Ga. App. 520, 732 S.E.2d 93 (2012), cert. denied, No. S13C0065, 2013 Ga. LEXIS 81 (Ga. 2013).

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1. Evidence Sufficient. (Cont'd)

There was sufficient evidence to support the defendant's conviction for burglary based on the evidence adduced at trial that showed that the defendant intended to commit a theft based on the hot water heater and pipes being damaged less than an hour before the landlord saw the defendant exit the rental home through a back door while carrying an object with a red handle, there were no personal possessions of the former tenants located inside the home, the defendant and the defendant's friend fled when the landlord called 9-1-1, a red-handled bolt cutter was found underneath bushes near the door where the defendant exited, and the friend told the police that the friend and the defendant had gone to the home looking for copper wire and that the defendant had cut wire in the home. Floyd v. State, 319 Ga. App. 564, 737 S.E.2d 341 (2013).

Sufficient evidence of aiding and abetting burglary. — Evidence was sufficient to convict defendant of aiding and abetting a burglary because, knowing that the defendant's spouse and another person were removing portable items from the home of an unknown person, the defendant asked the spouse to take specific items from the victim's home. Green v. State, 301 Ga. App. 866, 689 S.E.2d 132 (2010).

There was sufficient corroboration of the defendant as a perpetrator of the principal crime, and, ultimately, sufficient evidence to support the defendant's convictions for armed robbery, aggravated assault, false imprisonment, possession of a firearm during the commission of a felony, and burglary because there was circumstantial evidence to show that the defendant committed a similar transaction after the first incident, that the same gun an accomplice bought and used in the first crime was used in the second crime and ended up in a car at the house of the defendant's mother afterwards, and that the defendant was nervous and felt guilty about events that the defendant participated in with the accomplice, whom the defendant had only known a short time; that corroborative evidence connected the accomplice to the crimes. Ward v. State, 304 Ga. App. 517, 696 S.E.2d 471 (2010).

Defendant's convictions for aggravated child molestation, aggravated assault, enticing a child for an indecent purpose, kidnapping, false imprisonment, cruelty to children, burglary, theft by taking, and striking an unattended vehicle were authorized because at trial the defendant was positively identified as the perpetrator of the crimes; a nurse and doctor testified that the victim had an injury that was consistent with the molestation allegation, and a videotape depicted the defendant driving a maintenance truck that the defendant did not have authority to take. Bearfield v. State, 305 Ga. App. 37, 699 S.E.2d 363 (2010).

Circumstantial evidence was sufficient for the factfinder to determine beyond a reasonable doubt that the defendant juvenile committed burglary in violation of O.C.G.A. § 16-7-1(a) and possession of a weapon during the commission of a crime in violation of O.C.G.A. § 16-11-106(b)(2) because the defendant was in the vicinity of the victim's apartment shortly after the burglary, wearing a jacket that matched the victim's description of the jacket worn by the perpetrator, carrying a loaded pistol, and wearing shoes that matched the tread pattern and size of the muddy footprints found in the victim's apartment. In the Interest of J.D., 305 Ga. App. 519, 699 S.E.2d 827 (2010).

Testimony of two codefendants that a defendant was the third man in a burglary was sufficiently corroborated under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) because the codefendants corroborated each other, and one codefendant's sibling testified that the sibling lent the three defendants the sibling's car and later noticed the defendant carrying a flat-screen television, which was taken in the burglary. Sims v. State, 306 Ga. App. 68, 701 S.E.2d 534 (2010).

Evidence that a defendant was seen riding a bicycle after midnight while carrying a tire iron and a black saw case and wearing a new leather tool belt around the defendant's waist, along with the defendant's own statement that the defendant had been working at the address later

determined to have been broken into and a tool belt and saw taken, was sufficient to convict the defendant of burglary under O.C.G.A. § 16-7-1, although the defendant fled from police and the stolen items were not recovered. Wilcox v. State, 310 Ga. App. 382, 713 S.E.2d 468 (2011).

Because the defendant admitted entry into a home, the defendant's statement to a witness, and the victim's in-court identification of the defendant supported the defendant's conviction of armed robbery and burglary under O.C.G.A. §§ 16-7-1(a) and 16-8-41(a), the jury could find that a conspiracy existed without regard to a coconspirator's statements under former O.C.G.A. § 24-3-5 (see now O.C.G.A. § 24-8-801). Lewis v. State, 311 Ga. App. 54, 714 S.E.2d 732 (2011).

Evidence was sufficient to convict a defendant of burglary in violation of O.C.G.A. § 16-7-1(a) because the defendant was caught within four minutes of the burglary in a truck matching the victims' description of the truck outside their home, and the defendant was carrying a crowbar, had the victims' television, and fled from police. Veasley v. State, 312 Ga. App. 728, 719 S.E.2d 585 (2011).

Evidence was sufficient for a rational factfinder to find the defendant guilty beyond a reasonable doubt of false imprisonment, O.C.G.A. § 16-5-41(a), burglary, O.C.G.A. § 16-7-1(a), and aggravated assault, O.C.G.A. § 16-5-21(a)(2), because although the defendant argued that there was insufficient credible and admissible evidence to show that the defendant was the victim's attacker, determinations of witness credibility and the weight to give the evidence presented was solely within the province of the jury; defense counsel thoroughly cross-examined the victim, the responding officers, and the investigator regarding the victim's demeanor after the attack, the victim's description of the attack and the attacker, and the inconsistencies between what the victim told each of them. Pennington v. State, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Burglary by romantic partner. — Evidence was sufficient to convict the defendant of burglary as the victims testified that on the night of an attack by the defendant, the defendant's former girlfriend exclaimed, "What are you doing here?" when the former girlfriend saw the defendant coming upstairs. The former girlfriend testified that the former girlfriend did not invite or allow the defendant into the former girlfriend's home that night. Gray v. State, 291 Ga. App. 573, 662 S.E.2d 339 (2008).

Evidence was sufficient to support the defendant's convictions of aggravated assault, aggravated battery, and burglary because the evidence showed that: (1) the defendant broke into his ex-girlfriend's home; (2) the defendant stabbed the ex-girlfriend's current boyfriend in the spine with a knife, paralyzing him; (3) the defendant cut his ex-girlfriend with a knife on the back of her head, on the side of her face, on her shoulder and back, and stabbed her in the stomach; and (4) the ex-girlfriend continued to bear scars from the knife attack. Jackson v. State, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Evidence supported the defendant's convictions for felony murder, aggravated battery, kidnapping with bodily injury, aggravated assault, and burglary, when the state presented independent corroboration in support of an accomplice's testimony connecting the defendant to the crimes; the defendant's statements to police, the defendant's actions before and after the crimes, and the defendant's girlfriend's testimony stating that the defendant asked the girlfriend to lie about the defendant's whereabouts corroborated the defendant's guilt. Brown v. State, 291 Ga. 750, 733 S.E.2d 300 (2012).

Evidence was sufficient to support the second defendant's conviction for burglary as it was reasonable for the jury to have concluded that the second defendant acted as the getaway driver, waited for the first defendant while the first defendant was in the alley, covered for the first defendant when being questioned by the witness, and drove the first defendant from the scene when the first defendant ran away from the witness after being seen near the broken window. Nangreave v. State, 318 Ga. App. 437, 734 S.E.2d 203 (2012).

Evidence was sufficient to support the first defendant's conviction for burglary as the first defendant was found in close proximity to the window, appeared to be

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1. Evidence Sufficient. (Cont'd)

coming out of the window, ran from the scene, and was apprehended with a bag of merchandise confirmed to be from the store. Nangreave v. State, 318 Ga. App. 437, 734 S.E.2d 203 (2012).

Theft of plastic containers containing quarters. — Defendant's conviction for burglary was affirmed because the evidence, taken together, authorized the jury to find that the defendant was in possession of the victims' stolen plastic container filled primarily with quarters. Defendant knew of the location of the residence and during the burglary a large, heavy container filled with coins, primarily quarters, was stolen. Badie v. State, 317 Ga. App. 712, 732 S.E.2d 553 (2012).

Use of baby stroller in burglary. — There was sufficient evidence to support the defendant's conviction for two counts of burglary based on eyewitness testimony and a videotape showing the defendant with a baby stroller filled with contents taken from a store. Fitzpatrick v. State, 317 Ga. App. 873, 733 S.E.2d 46 (2012).

Sufficient evidence existed to support the defendant's convictions for aiding and abetting armed robbery, burglary, aggravated assault, and false imprisonment based on the evidence that the defendant was a party to the crimes, including evidence that the defendant drove the co-defendants to the house just before the crimes were committed; that the defendant was in the vehicle when plans to commit the crimes were discussed; that the defendant waited in the victim's driveway when the co-defendants entered the front door of the house, wearing masks and carrying guns; and that the defendant drove the perpetrators away from the scene after the crimes were committed—speeding, driving erratically, and not stopping when the police, with sirens and lights activated, began following the vehicle. Simon v. State, 320 Ga. App. 15, 739 S.E.2d 34 (2013).

Evidence, taken together, authorized the jury to find that the defendant was guilty of burglary and contributed to the delinquency of a minor as the victim's neighbor identified the defendant as the person the neighbor saw standing on an air conditioner unit while beating on the victim's kitchen window, the point of entry for the burglary was that window and, just minutes after the neighbor saw the defendant at the window, the victim observed the defendant and a child walking away from the victim's residence carrying an item that was taken during the burglary. Williams v. State, 320 Ga. App. 831, 740 S.E.2d 766 (2013).

Theft of a beer. — Evidence that an officer responding to the burglary observed the defendant on the store's loading dock with an unopen beer, the defendant ran upon seeing the officer, and testimony from two accomplices that the defendant was inside the store and had taken the beer was sufficient to support the defendant's burglary conviction. Russell v. State, 322 Ga. App. 553, 745 S.E.2d 774 (2013).

Evidence was sufficient to convict the defendant of armed robbery and burglary because three black males robbed the store, one of whom pointed a gun at the store manager; after the defendant was apprehended, the defendant made incriminating statements that the defendant took the stuff to pay bills and that the defendant did not know where the other two individuals were; and the bags found in the defendant's vicinity consisted of six cooler totes containing approximately $700 in merchandise from the store and a plastic bag containing money and the deposit slip from the store's safe. Brooks v. State, 324 Ga. App. 352, 750 S.E.2d 423 (2013).

Possession of recently stolen goods. — Evidence that two days after the burglary, the defendant was found in a motel room the defendant shared with a woman who was attempting to sell goods stolen from the burglarized residence; that the woman obtained the goods from the defendant; that stolen goods were found in the motel room; and that after the burglary was reported, the defendant went to the road of the burglarized residence to retrieve some items the defendant claimed the defendant dropped was sufficient to support the defendant's burglary convic-

tion. Riles v. State, 321 Ga. App. 894, 743 S.E.2d 552 (2013).

Evidence that the defendant was found with a chainsaw and towel stolen from the subject residence the same day they were discovered missing, within a mile of the residence, and that the defendant had tried to pawn the chainsaw that same morning was sufficient to allow the jury to convict the defendant of burglary. Gaither v. State, 321 Ga. App. 643, 742 S.E.2d 158 (2013).

Parent's participation in burglary. — Evidence that the defendant had driven the defendant's son to a home that was burglarized, was waiting by the side of the road for the defendant's son to return, and received numerous calls from the defendant's son while an officer stopped to talk to the defendant, was sufficient to convict the defendant for being a party to the crime of burglary under O.C.G.A. §§ 16-7-1(b) and 16-2-20. Wise v. State, 325 Ga. App. 377, 752 S.E.2d 628 (2013).

Evidence was sufficient to convict the defendant of burglary, aggravated assault, possession of a firearm during the commission of the aggravated assault, and possession of a firearm by a convicted felon because a house-sitter returned to a residence to discover an intruder inside; the intruder flashed a gun and told the house-sitter that the intruder would shoot the house-sitter; the house-sitter identified the defendant, whom the house-sitter had known for over 20 years, as the intruder; and a back window of the home had been shattered. Davis v. State, 325 Ga. App. 572, 754 S.E.2d 151 (2014).

Temporary protective order as foundation for burglary charge. — Because the temporary protective order specifically deprived the defendant of authority to enter the victim's home, and because the evidence supported a conclusion that the defendant entered that home without authority and with the intent to commit the crime of aggravated stalking, the evidence was sufficient to sustain the burglary conviction. Slaughter v. State, 327 Ga. App. 593, 760 S.E.2d 609 (2014).

Evidence the defendant and the codefendant were found in a motel room with gloves, a bandana, broken glass pieces, and keys to the codefendant's vehicle, which contained 61 purses belonging to a store that had just been robbed, and that rocks like those used to break the glass were missing from landscaping next to the motel supported the defendant's conviction for burglary. Mackey v. State, 326 Ga. App. 298, 756 S.E.2d 552 (2014).

Pawning of recently stolen items. — Evidence showing that shortly after the burglary the defendant pawned some of the items stolen, which the defendant claimed, but failed to prove, were obtained from a Mexican male, was sufficient to support the defendant's burglary conviction. Ricks v. State, 327 Ga. App. 291, 758 S.E.2d 624 (2014).

Evidence that the defendant confessed to police that the defendant had broken into the first victim's apartment to steal, broke the sliding glass door to gain entry, did not know the victim, and fled from police when the police arrived on the scene was sufficient to support the defendant's burglary conviction. Reeves v. State, 329 Ga. App. 470, 765 S.E.2d 407 (2014).

Evidence was sufficient to convict the defendant of burglary as a party because, pursuant to a plan the defendant designed, the defendant gained entry into the residence, then assisted the accomplice's unauthorized entry by returning to the door, peering outside where the accomplice was staged with a gun and mask, then leaving that door ajar for the accomplice's unauthorized entry; and, seconds later, the accomplice abruptly entered through that door, taking money and property from the other individuals present by use of a gun. Styles v. State, 329 Ga. App. 143, 764 S.E.2d 166 (2014).

Sufficient evidence supported the defendant's conviction for burglary based on the victim's eyewitness encounter with the defendant inside the apartment, the defendant's admission that the defendant made an unauthorized entry into the apartment, the discovery of money exactly like that stolen from the victim's wallet inside the defendant's pocket, and the evidence of the defendant's two prior burglary convictions. Paul v. State, 331 Ga. App. 560, 769 S.E.2d 396 (2015).

Evidence was sufficient to convict the defendant of burglary because the defendant opened a fence gate and entered the

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1. Evidence Sufficient. (Cont'd)

victims' property; upon no one answering a knock on the back door, the defendant broke in the door and entered an enclosed porch; the defendant then attempted to remove the hinges of a door leading into the home's interior, where the victims had many valuable items; a patrol officer saw the defendant while the defendant was still trying to gain entry through the door; the defendant came out from the porch with the defendant's hands up and said that the patrol officer had gotten the defendant; and there was no evidence in the record that would support an inference that the defendant was merely seeking shelter from the cold. Daniel v. State, 338 Ga. App. 389, 787 S.E.2d 281 (2016).

Evidence was sufficient to convict the defendant of first degree burglary as the defendant broke the plane of the structure with the intent to steal or with the intent to commit a felony therein because the defendant, without authority, entered the workshop at the back of the second victim's property and took multiple items; and the defendant broke the glass on the door leading from the patio to the garage of the second victim's occupied home, but the door was locked with a deadbolt and could not be opened without a key. Entwisle v. State, 340 Ga. App. 122, 796 S.E.2d 743 (2017).

Evidence was sufficient to convict the defendant of first degree burglary and entering an auto because the state presented evidence that the defendant entered a dwelling house without authority with the intent to commit a theft as a victim's wallet was stolen from within the home lived in by two of the defendant's victims, and the defendant entered four cars with the intent to commit a theft. Daniel v. State, 342 Ga. App. 448, 803 S.E.2d 603 (2017).

Defendant's concession that the defendant broke into the shed to take a ladder and the damaged window screen under the trailer's window were sufficient for the jury to infer that the defendant entered the shed with the intent to steal the ladder for the purpose of breaking into the classroom building such that the defendant was guilty of burglary of the shed under O.C.G.A. § 16-7-1. Solomon v. State, 342 Ga. App. 836, 805 S.E.2d 293 (2017).

Evidence sufficient to support convictions of murder, aggravated assault, armed robbery, burglary, and possession of a firearm in the commission of a felony. Baty v. State, 257 Ga. 371, 359 S.E.2d 655 (1987).

Evidence was sufficient to support the defendant's convictions of armed robbery under O.C.G.A. § 16-8-41(a), aggravated battery under O.C.G.A. § 16-5-24(a), aggravated assault under O.C.G.A. § 16-5-21(a), burglary under O.C.G.A. § 16-7-1(a)(2), possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b), and conspiracy to possess cocaine under O.C.G.A. §§ 16-4-8 and 16-13-30(a) as a conspirator because, while the uncorroborated testimony of one accomplice was insufficient under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the evidence sufficed to sustain the defendant's conviction when an additional accomplice provided testimony to corroborate that of the first accomplice. Both codefendants testified that the defendant was present from the robbery's inception through the robbery's execution, that the defendant was aware of the conspiracy to obtain the victim's money and cocaine by armed robbery, and that the defendant willingly participated in the crimes and shared the criminal intent of those who committed the crimes inside the victim's residence by supplying the defendant's car and acting as a get-away driver. Watson v. State, 308 Ga. App. 871, 708 S.E.2d 703 (2011).

Victim's testimony that the defendant was one of the two men who came into the victim's house, beat the victim with fists and a flashlight, and demanded the victim's keys and money authorized the jury to find the defendant guilty of burglary, aggravated battery, and criminal attempt to commit armed robbery. Garmon v. State, 317 Ga. App. 634, 732 S.E.2d 289 (2012).

Evidence was sufficient to convict the third defendant of first degree burglary because the evidence showed that the

third defendant was working in the vicinity of the burglarized residence, was seen walking near the back of the house just prior to the work-detail guard's arrival to investigate, and was in possession of a gold wristwatch later identified as belonging to the homeowner; and because the jury was entitled to reject, and did reject, the third defendant's explanation of having found the watch outside of the home when there was also testimony that the third defendant claimed that the watch was a gift from the third defendant's family. Jones v. State, 340 Ga. App. 142, 796 S.E.2d 765 (2017).

Evidence was sufficient to convict the second defendant of first degree burglary because the second defendant was seen suspiciously walking across a field near the residence, notwithstanding an assignment to work in another area; and, in light of the inconsistent statements the second defendant provided to law enforcement, the jury was entitled to reject as unreasonable the second defendant's explanation of having touched a bottle outside of the residence before another inmate took the empty bottle back inside, and the second defendant's denial of having consumed any alcohol when the second defendant's DNA was found on a bottle. Jones v. State, 340 Ga. App. 142, 796 S.E.2d 765 (2017).

Evidence of intent to steal sufficient. — See Duke v. State, 176 Ga. App. 125, 335 S.E.2d 400 (1985).

Evidence sufficient to convince rational trier of fact of existence of essential elements of crime. Alexander v. State, 166 Ga. App. 233, 303 S.E.2d 773 (1983).

Because someone pried open the glass sliding doors of defendant's love interest's house and stole only personal files, and defendant called the love interest and asked about the files, stating that they were gone, there was sufficient evidence to support a verdict of burglary beyond a reasonable doubt based on evidence of the couple's troubled relationship, that only files were stolen, and that defendant knew that the files were missing. Maskivish v. State, 276 Ga. App. 701, 624 S.E.2d 160 (2005).

Evidence sufficient for conviction of rape and burglary with intent to rape. — See Clark v. State, 249 Ga. App. 97, 547 S.E.2d 734 (2001).

Evidence sufficient for criminal attempt at burglary. — Sufficient evidence supported the defendant's conviction of criminal attempt to commit burglary since the defendant, who had a history of sexual assaults, went to a hotel alone, late at night, wearing a mask, since, after visiting the hotel parking lot once before in the evening, and following a hotel employee until the employee ran, the defendant approached the office door where that same lone hotel employee had returned to work, and attempted to open the locked door, since, when the locked door would not open, the defendant continued to shake the door violently, still wearing the mask, and since, when the defendant saw the hotel employee pick up the phone and dial 9-1-1, the defendant fled; in light of this evidence, the jury was authorized to conclude that the defendant took a substantial step toward entering the hotel office without authority to commit a sexual felony therein. Swint v. State, 279 Ga. App. 777, 632 S.E.2d 712 (2006).

Probation revocation; insufficient evidence for conviction of burglary. — Evidence was insufficient, under a preponderance of the evidence standard, to find that defendant committed the offense of burglary as the evidence showed only that defendant was present on the outside of the home on the date the crime allegedly occurred; no one saw defendant enter the residence, defendant was not seen or found inside, no one saw defendant remove any items from the house, no extrinsic evidence connecting defendant to the crime was discovered at the scene, none of the stolen items were recovered from defendant or from the residence, and others with equal opportunity to enter the dwelling were present on the date in question. Parker v. State, 275 Ga. App. 35, 619 S.E.2d 750 (2005).

2. Evidence Insufficient.

Circumstantial evidence insufficient. — Because all the evidence was circumstantial as a defendant was not seen removing anything from the alleged victim's barn, the defendant's conviction for burglary was inappropriate pursuant

Inferences and Sufficiency and Admissibility of Evidence (Cont'd)
2. Evidence Insufficient. (Cont'd)

to former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6) as the evidence did not exclude the reasonable hypothesis that the defendant was only at the victim's barn to drop off a saw the defendant wanted to sell to the victim based on a telephone message left by the defendant for the victim and eyewitness testimony. Parker v. State, 297 Ga. App. 384, 677 S.E.2d 345 (2009).

Finding property at defendant's home insufficient. — Several counts of the defendant's robbery and burglary convictions were reversed as was one count of criminal attempt to commit armed robbery because the finding of the proceeds of some of the robberies at an apartment did not show that the defendant was in possession of the property taken and no witness testified connecting the defendant with some of the home invasions; thus, the evidence did not exclude the reasonable possibility that the defendant did not participate in some of the crimes. Cisneros v. State, 334 Ga. App. 659, 780 S.E.2d 360 (2015), aff'd, 792 S.E.2d 326 (Ga. 2016).

Sentencing

Allowed in years and fractions thereof. — There is no inhibition against meting out a sentence measured in years and fractions thereof, so long as it falls within the statutory limits. Tift v. State, 132 Ga. App. 10, 207 S.E.2d 261 (1974).

Construction with other law. — Construing O.C.G.A. §§ 16-7-1(b) and 17-10-7(a) together, the Georgia General Assembly intends that a habitual burglar be given the benefit of the trial court's sentencing discretion, but it further intends that a habitual burglar who is also a habitual felon be subject to the imposition of the longest sentence prescribed for the subsequent offense for which he or she was convicted; because Mikell v. State, 270 Ga. 467 (510 SE2d 523) (1999) failed to consider O.C.G.A. § 17-10-7(e) and its effect on other recidivist sentencing provisions, it reached the erroneous result and is therefore overruled. Goldberg v. State, 282 Ga. 542, 651 S.E.2d 667 (2007), cert. denied, 128 S. Ct. 2932, 171 L. Ed. 2d 868 (2008).

Trial court did not abuse the court's discretion in sentencing a defendant as a recidivist under O.C.G.A. § 17-10-7 because the trial court imposed a modified sentence of 20 years to serve 10 upon the defendant; the sentence, as modified, was proper under O.C.G.A. § 16-7-1(b), the specific sentencing scheme applicable to a defendant convicted of burglary having two prior burglary convictions. Williams v. State, 297 Ga. App. 723, 678 S.E.2d 95 (2009).

In a case in which defendant appealed a 41-month sentence for violating 18 U.S.C. §§ 922(a) and (g), a district court did not err in calculating the defendant's U.S. Sentencing Guidelines sentence. Defendant's 2011 burglary conviction under O.C.G.A. § 16-7-1(a) (current version at O.C.G.A. § 16-7-1(b)) was for burglary of a dwelling within the meaning of U.S. Sentencing § 4B1.2(a), and the district court did not err in concluding that the defendant had a prior conviction for a crime of violence. United States v. Harris, No. 13-13674, 2014 U.S. App. LEXIS 11872 (11th Cir. June 24, 2014) (Unpublished).

Multiple convictions. — Because O.C.G.A. § 16-7-1(b) provides a specific sentencing scheme for defendants convicted more than once of burglary, the general recidivist scheme of O.C.G.A. § 17-10-7 does not apply. Norwood v. State, 249 Ga. App. 507, 548 S.E.2d 478 (2001).

Where defendant pled guilty to burglary and had a prior felony conviction for forgery in addition to a prior burglary conviction, defendant was, for sentencing purposes, a three-time felony offender under the general recidivist provisions of O.C.G.A. § 17-10-7(a) rather than a mere two-time burglary offender under the specific recidivist provisions of O.C.G.A. § 16-7-1(b); accordingly, the trial court properly found that it was required to sentence defendant as a recidivist under O.C.G.A. § 17-10-7 to the maximum period of confinement allowed for burglary, which was 20 years. Stephens v. State, 259 Ga. App. 564, 578 S.E.2d 179 (2003).

Since defendant had prior felonies in

addition to two prior burglary convictions, defendant was not subject to the exclusive sentencing provisions of O.C.G.A. § 16-7-1(b) after being convicted of a third felony burglary; the additional felonies subjected defendant to the general recidivist provisions of O.C.G.A. § 17-10-7(a), which gave the sentencing court discretion to suspend a portion of the sentence, and the state's appeal of defendant's 20 year sentence, which included suspension of 12 years of the sentence after defendant served 8 years, was rejected. State v. Chambers, 275 Ga. App. 666, 621 S.E.2d 588 (2005).

Because defendant had multiple prior convictions in addition to burglary convictions, the existence of said prior convictions in addition to those for burglary removed the case from the purview of O.C.G.A. § 16-7-1(b); thus, defendant was properly sentenced under O.C.G.A. § 17-10-7. Goldberg v. State, 280 Ga. App. 600, 634 S.E.2d 419 (2006), aff'd, 282 Ga. 542, 651 S.E.2d 667 (2007).

When O.C.G.A. §§ 16-7-1(b) and 17-10-7(a) are harmonized, the former specific recidivist statute applies when the defendant is a habitual burglar having only prior convictions for burglary, whereas the latter general recidivist statute applies when the defendant is a habitual felon with prior convictions for other crimes; O.C.G.A. § 17-10-7(e) provides that the general recidivist sentencing statute for habitual felons is supplemental to other recidivist sentencing statutes, such as § 16-7-1(b), and when the Georgia General Assembly enacted § 16-7-1(b), it did not provide that § 17-10-7 would not be applicable to subsequent convictions for burglary. Goldberg v. State, 282 Ga. 542, 651 S.E.2d 667 (2007), cert. denied, 128 S. Ct. 2932, 171 L. Ed. 2d 868 (2008).

Pursuant to O.C.G.A. § 16-7-1, the defendant completed a burglary when the defendant entered the victim's apartment without authority intending to commit a felony, before the defendant committed other offenses—false imprisonment, rape, armed robbery, aggravated sexual battery, hijacking a motor vehicle, aggravated sodomy, and aggravated assault. Accordingly, the trial court did not err by not merging those other crimes with the defendant's burglary conviction. Crawford v. State, 292 Ga. App. 463, 664 S.E.2d 820 (2008).

With regard to a defendant's conviction for burglary, the trial court properly sentenced the defendant under O.C.G.A. § 17-10-7 to 20 years, with 10 years to serve in prison without parole and the remainder of the sentence suspended on the condition that the defendant not violate any laws, as a result of three prior felony convictions because the defendant waived any claimed error by failing to challenge the sentence. However, even if the error had not been waived, the recidivist sentence was proper since the state proved all four of the convictions that were listed in the indictment and notices and, although the trial court stated that the court was not relying on the defendant's robbery convictions in imposing a sentence, there was no reason those convictions could not be used to support the sentence. Battise v. State, 295 Ga. App. 833, 673 S.E.2d 262 (2009), cert. denied, No. S09C0917, 2009 Ga. LEXIS 369 (Ga. 2009).

Under the facts, the trial court should have merged the defendant's criminal trespass conviction into the burglary conviction prior to sentencing because the offenses were based upon the same act; the evidence showed that the defendant only entered an apartment one time. Hawkins v. State, 302 Ga. App. 84, 690 S.E.2d 440 (2010).

Trial court did not err in sentencing the defendant as a recidivist because the records of an Alabama conviction showed that the defendant pled guilty to the offense of burglary in the third degree and received a sentence of four years imprisonment; the elements of the crime as charged in the Alabama indictment were similar to the elements required to commit the crime under O.C.G.A. § 16-7-1. Wells v. State, 313 Ga. App. 528, 722 S.E.2d 133 (2012).

Trial court did not err by correcting the court's written sentence to conform with the court's oral pronouncement because the trial court was authorized to correct the clerical error appearing in the court's written sentence as compared to the court's original oral pronouncement; the trial court, after reviewing the original

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transcript, determined that the court's original pronouncement and intent was for the aggravated battery and burglary counts to be served consecutive to each other as well as to the other aggravated battery count. Griggs v. State, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

Although both counts of burglary occurred in the same building, the trial court properly sentenced the defendant on both counts because the defendant entered two distinct businesses, operated and controlled by different individuals and separated by a wall, with the intent to commit theft inside each shop. Cordle v. State, No. A18A0903, 2018 Ga. App. LEXIS 240 (Apr. 30, 2018).

Rule of lenity inapplicable. — With regard to defendant's conviction for criminal attempt to commit burglary in the first degree, the trial court did not err in not applying the rule of lenity because the crimes of criminal trespass and criminal attempt to commit a burglary do not address the same criminal conduct and there was no ambiguity created by different punishments being set forth for the same crime, thus, the rule of lenity did not apply. Snow v. State, 318 Ga. App. 131, 733 S.E.2d 428 (2012).

Merger claim waived. — Due to the entry of a guilty plea over 20 years before the filing of a motion to correct alleged illegal sentences, the defendant's merger claim was waived, and since the sentences imposed were not void, the trial court lacked subject matter jurisdiction over said motion for correction. Sanders v. State, 282 Ga. App. 834, 640 S.E.2d 353 (2006).

Aggravated stalking did not merge with burglary. — Trial court did not err by not merging a defendant's aggravated stalking count into a burglary count based upon the defendant's contention that under the actual evidence test, the same factual evidence was used to prove both crimes; as to prove the burglary count, the state had to prove that the defendant entered the victim's residence without authority and with the intent to commit aggravated stalking, and to prove the aggravated stalking count, the state had to prove that the defendant surveilled and contacted the victim in violation of a condition of probation for the purpose of harassing and intimidating the victim. As such, the burglary statute required that the state show entry into the residence, which was not required by the aggravated stalking statute, and, on the other hand, the aggravated stalking statute required that the state prove that the defendant actually contacted the victim, which was not required by the burglary statute that only required that the defendant contact the victim when the defendant entered the residence. Williams v. State, 293 Ga. App. 193, 666 S.E.2d 703 (2008).

Restitution. — In a burglary case where a sawmill was stripped of copper wiring, there was a preponderance of evidence to support a restitution order when the defendant parked in the same location where burglars had parked the previous day, went to a main power room where tools needed for pulling wire and not owned by the sawmill had been left, and had similar tools in the defendant's pickup truck; the amount of a restitution order was not supported by the evidence, however, because the correct determination of the amount of restitution was the fair market value of the property and the witnesses for the state only testified as to replacement value. Hawthorne v. State, 285 Ga. App. 196, 648 S.E.2d 387 (2007).

Juveniles. — Defendant could not be found to be a recidivist under O.C.G.A. § 17-10-7(c) where one of defendant's prior felony convictions was invalid as it was for burglaries committed when defendant was 16 years of age; the superior court did not have concurrent jurisdiction with the juvenile court to find defendant guilty of a felony, under O.C.G.A. § 15-11-28(b)(1), because the punishment for burglary was neither death nor life imprisonment under O.C.G.A. § 16-7-1. Smith v. State, 266 Ga. App. 111, 596 S.E.2d 230 (2004).

Sentencing not excessive as matter of law. — Sentence of ten years upon conviction of the offense of burglary, being within the limits fixed for the offense by former Code 1933, § 26-2402 (one to 20 years), is as a matter of law not excessive. Whitfield v. State, 115 Ga. App. 231, 154 S.E.2d 294 (1967).

Rule of lenity did not apply. — Trial court did not err in not applying the rule of lenity with regard to defendant's conviction for criminal attempt to commit burglary because the crimes of criminal trespass and criminal attempt to commit a burglary did not address the same criminal conduct and there was no ambiguity created by different punishments being set forth for the same crime, thus, the rule of lenity did not apply. Snow v. State, 318 Ga. App. 131, 733 S.E.2d 428 (2012).

Consecutive sentences not void. — Denial of defendant's motion attacking the defendant's consecutive sentences for burglary as void was affirmed as under O.C.G.A. § 17-10-10 sentences were to be served "concurrently unless otherwise expressly provided therein." Jones v. State, 271 Ga. App. 830, 610 S.E.2d 570 (2005).

Same building, same date, meant one sentence. — One of two burglary convictions was vacated because both burglary counts charged the defendant with entering the same building, a restaurant, on the same date with the intent to commit the same crime of theft and the evidence showed that the acts were committed at the same location, were inspired by the same criminal intent, and were part of a continuous act spanning a matter of minutes. Lucas v. State, 328 Ga. App. 741, 760 S.E.2d 257 (2014).

Merger of sentences. — For separate offenses charged in one indictment to carry separate punishments, they must rest on distinct criminal acts. Two burglaries committed at the same time and place were part of a single continuous criminal act and therefore carry one punishment. McConnell v. State, 263 Ga. App. 686, 589 S.E.2d 271 (2003).

After the trial court merged defendant's burglary with intent to commit robbery conviction into the burglary with intent to commit rape for the purpose of sentencing, the burglary with the intent to commit robbery conviction was vacated by operation of law and defendant's contention that there was no evidence that the defendant intended to commit a theft was moot. Howard v. State, 266 Ga. App. 281, 596 S.E.2d 627 (2004).

Defendant's burglary convictions should have been merged because both counts charged the defendant with entering the same building without authority on the same date to commit a felony. Andrews v. State, 328 Ga. App. 344, 764 S.E.2d 553 (2014).

No merger with assault or kidnapping. — Burglary conviction did not merge with the armed robbery or aggravated assault convictions as a matter of law because each offense had distinct elements, nor did the convictions merge as a matter of fact; the crime of burglary was complete as soon as the defendant remained in the victims' home without authority and with the intent to commit a theft therein. Maddox v. State, 277 Ga. App. 580, 627 S.E.2d 166 (2006).

Defendant was properly sentenced as a recidivist under O.C.G.A. § 17-10-7 as O.C.G.A. § 16-7-1(b) was inapplicable since defendant was convicted of attempted burglary, which was subject to sentencing under O.C.G.A. § 16-4-6; further, defendant had been convicted of two other burglaries and two other felonies, so defendant was a four-time felony offender subject to the general recidivist sentencing scheme in O.C.G.A. § 17-10-7. Smith v. State, 273 Ga. App. 107, 614 S.E.2d 219 (2005).

Trial court properly dismissed a defendant's petition to correct a void sentence, which challenged the imposition of a 60-year recidivist sentence imposed against the defendant for burglary and arson, in violation of O.C.G.A. §§ 16-7-1(a) and 16-7-60(c), respectively, as the state gave notice of the state's intent to have the defendant sentenced as a recidivist under O.C.G.A. § 17-10-7(a) and (c) and no abuse of the trial court's discretion was shown. Marshall v. State, 294 Ga. App. 282, 668 S.E.2d 892 (2008).

Trial court did not commit cruel and unusual punishment in sentencing a defendant to two consecutive terms of 20 years to serve in confinement for two burglary convictions under O.C.G.A. § 16-7-1(a) based on the defendant's recidivism under O.C.G.A. § 17-10-7(c) because the sentence was within statutory limits. Hight v. State, 302 Ga. App. 826, 692 S.E.2d 69 (2010).

Recidivist sentencing appropriate. — Trial court did not err in sentencing the

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defendant under the general recidivist statute, which applied when the defendant was a habitual felon with prior convictions for crimes other than just burglary, rather than the specific recidivist statute, which applied only to prior convictions for burglary, because the defendant's federal conviction for conspiracy to transport stolen goods did not constitute a burglary conviction; thus, the defendant's conviction in the current case represented not only the defendant's third burglary conviction but also the defendant's fourth felony conviction, and the defendant fell squarely within the ambit of the general recidivist statute. Nordahl v. State, 344 Ga. App. 686, No. A17A1360, 2018 Ga. App. LEXIS 127 (2018).

Trial court did not err in sentencing the defendant as a recidivist due to the defendant's four prior felony convictions. Harvey v. State, 344 Ga. App. 761, No. A17A1789, 2018 Ga. App. LEXIS 133 (2018).

Defendant properly sentenced as an armed career criminal. — Defendant was properly sentenced under the Armed Career Criminal Act, 18 U.S.C. § 924(e), and U.S. Sentencing Guidelines Manual § 4B1.1(a) based upon a Georgia attempted burglary of a dwelling conviction under O.C.G.A. §§ 16-4-1 and 16-7-1 because the defendant failed to object to the factfindings at sentencing, which conclusively established that the defendant was in fact convicted of attempting to commit a generic burglary within the meaning of 18 U.S.C. § 924(e); thus, because that offense was an enumerated violent felony, the crime of attempting to commit that offense was also a violent felony, permitting the court to use the conviction as a predicate offense under the Armed Career Criminal Act after the defendant pled guilty to violating 18 U.S.C. § 922(g). United States v. Wade, 458 F.3d 1273 (11th Cir. 2006).

Upon defendant's conviction for being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1), prior burglary convictions under O.C.G.A. § 16-7-1(a) met the requirements of violent felonies under the Armed Criminal Career Act, 18 U.S.C. § 924(e) and U.S. Sentencing Guidelines Manual § 4B1.4, because the presentence report and the indictment for the prior conviction showed that defendant was charged and subsequently pled guilty to breaking into a residence to commit theft. United States v. Chaney, 2010 U.S. App. LEXIS 17100 (11th Cir. Aug. 16, 2010) (Unpublished).

It was not plain error to count the defendant's Georgia burglary conviction as an Armed Career Criminal Act (ACCA) predicate offense because: (1) the statute was divisible; (2) the crime qualified as an ACCA predicate offense under the modified categorical approach; and (3) the court could rely on undisputed facts in the presentence investigation report in applying that approach. United States v. Brundidge, No. 16-10571, 2017 U.S. App. LEXIS 17699 (11th Cir. Sept. 13, 2017), cert. denied, 2018 U.S. LEXIS 1410, 200 L. Ed. 2d 321 (U.S. 2018) (Unpublished).

Defendant properly sentenced as career criminal. — In a case in which the defendant appealed a 180-month sentence for violating 21 U.S.C. § 841(a)(1), the district court did not err in deeming the defendant a career offender under U.S. Sentencing Guidelines Manual § 4B1.1. The presentence investigation report (PSI) stated that the burglaries involved dwellings and, although the defendant objected before the district court to the PSI's characterization of the burglary convictions under O.C.G.A. § 16-7-1 as crimes of violence, the defendant did not argue specifically that the crimes did not involve a dwelling; the defendant qualified for the § 4B1.1 enhancement. United States v. Kicklighter, No. 09-10217, 2009 U.S. App. LEXIS 21393 (11th Cir. Sept. 28, 2009).

Correction of sentence required. — Trial court erred in sentencing the defendant by failing to comply with O.C.G.A. § 17-10-7(c) as the trial court was required to impose a 20 year sentence for each burglary count, the longest sentence prescribed in the burglary statute, O.C.G.A. § 16-7-1(b), which the court did not do since the court sentenced the defendant merely to 10 years on Count 1. Barney v. State, 333 Ga. App. 807, 777 S.E.2d 490 (2015).

Forfeiture order. — Forfeiture of a pickup truck and a trailer used to commit a burglary was upheld as: (1) the state's burden of proof was "by a preponderance of the evidence" and not "beyond a reasonable doubt" as alleged by the property owner; (2) the state was not required to prove a burglary conviction under O.C.G.A. § 16-7-1, or that charges were even filed; and (3) whether a burglary took place without the owner's knowledge or consent was a fact question to be resolved by the court which as the trier of fact was not obligated to believe a witness even if the testimony was uncontradicted. Walker v. State of Ga., 281 Ga. App. 526, 636 S.E.2d 705 (2006).

Court's comments at sentencing did not invalidate the sentence imposed. — As a result of a burglary conviction, the trial court did not err in mechanically sentencing the defendant to 20 years to serve as the court's comments did not show an inflexible policy or formula that required imposition of a particular kind of punishment for a particular offense or the rejection of an available sentencing option. Moreover, the court's statement that "a life was lost" as a result of the defendant's commission of a burglary did not somehow invalidate a sentence that was within the statutory limits. Valentine v. State, 289 Ga. App. 60, 656 S.E.2d 208 (2007).

Sentencing court could consider defendant's illegal alien status. — Trial court did not violate the defendant's constitutional rights by considering defendant's illegal alien status as a relevant factor in formulating an appropriate sentence within the statutory range for burglary under O.C.G.A. § 16-7-1(a); the trial court properly considered that the court could not order the defendant to work as a condition of probation. Trujillo v. State, 304 Ga. App. 849, 698 S.E.2d 350 (2010).

Immigration consequences to guilty plea. — Attorney's assistance was deficient when the attorney incorrectly advised the defendant that the defendant "may" face deportation as a result of the defendant's plea of guilty to burglary under O.C.G.A. § 16-7-1 because a burglary conviction was an aggravated felony, 8 U.S.C. § 1101(a)(43)(G), and would almost certainly lead to deportation under 8 U.S.C. § 1227(a)(2)(A)(iii). Encarnacion v. State, 295 Ga. 660, 763 S.E.2d 463 (2014).

OPINIONS OF THE ATTORNEY GENERAL

History of section. — See 1957 Op. Att'y Gen. p. 80.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Burglary, § 1 et seq.

C.J.S. — 12A C.J.S., Burglary, § 1 et seq.

ALR. — Conviction or acquittal of larceny as bar to prosecution for burglary, 19 A.L.R. 626.

Pendency in one county of charge of larceny as bar to subsequent charge in another county of offense which involves both felonious breaking and felonious taking of same property, 19 A.L.R. 636.

Necessity of naming owner of building in indictment or information for burglary, 20 A.L.R. 510; 169 A.L.R. 887.

Opening closed but unlocked door as breaking which will sustain charge of burglary or breaking and entering, 23 A.L.R. 112.

Burglary without breaking, 23 A.L.R. 288.

Necessity of alleging and proving in prosecution for larceny, embezzlement, or receiving stolen property that "owner" of property, if not a natural person, was incorporated or otherwise a legal entity capable of owning property, 88 A.L.R. 485.

Necessity and sufficiency of allegations in indictment or information for burglary as to value of property intended to be stolen which would make its theft a felony, 113 A.L.R. 1269.

Evidence of acquisition or possession of money, source of which is not traced, as

admissible against defendant in criminal case, 123 A.L.R. 119; 91 A.L.R.2d 1046.

Admissibility, in prosecution for burglary, of evidence that defendant, after alleged burglary, was in possession of burglarious tools and implements, 143 A.L.R. 1199.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statutes, 24 A.L.R.2d 1247.

Pardon as affecting consideration of earlier conviction in applying habitual criminal statute, 31 A.L.R.2d 1186.

Burglary: outbuildings or the like as part of "dwelling house," 43 A.L.R.2d 831.

Gambling or lottery paraphernalia as subject of larceny, burglary, or robbery, 51 A.L.R.2d 1396.

Burglary or breaking and entering of motor vehicle, 79 A.L.R.2d 286.

Propriety, under statute enhancing punishment for second or subsequent offense, of restricting new trial to issue of status as habitual criminal, 79 A.L.R.2d 826.

Sufficiency of showing that burglary was committed at night, 82 A.L.R.2d 643.

Stolen money or property as subject of larceny or robbery, 89 A.L.R.2d 1435.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 91 A.L.R.2d 1046.

Breaking and entering of inner door of building as burglary, 43 A.L.R.3d 1147.

Criminal prosecution based upon breaking into or taking money or goods from vending machine or other coin-operated machine, 45 A.L.R.3d 1286.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine, 50 A.L.R.3d 397.

Conviction under Dyer Act (18 U.S.C.S. §§ 2312, 2313) as ground for enhancement of penalty under state habitual criminal statutes, 65 A.L.R.3d 586.

What constitutes "money" within coverage or exclusion of theft or other crime policy, 68 A.L.R.3d 1179.

Entry through partly opened door or window as burglary, 70 A.L.R.3d 881.

Receiver of stolen goods as accomplice of thief for purposes of corroboration, 74 A.L.R.3d 560.

Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 A.L.R.3d 245.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 A.L.R.3d 280.

Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases, 2 A.L.R.4th 500.

Occupant's absence from residential structure as affecting nature of offense as burglary or breaking and entering, 20 A.L.R.4th 438.

Liability of person furnishing, installing, or servicing burglary or fire alarm system for burglary or fire loss, 37 A.L.R.4th 47.

Maintainability of burglary charge, where entry into building is made with consent, 58 A.L.R.4th 335.

What is "building" or "house" within burglary or breaking and entering statute, 68 A.L.R.4th 425.

Burglary, breaking, or entering of motor vehicle, 72 A.L.R.4th 710.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes, 7 A.L.R.5th 263.

Minor's entry into home of parent as sufficient to sustain burglary charge, 17 A.L.R.5th 111.

Use of fraud or trick as "constructive breaking" for purpose of burglary or breaking and entering offense, 17 A.L.R.5th 125.

Construction and application of enhanced sentencing provision of Armed Career Criminal Act (ACCA), 18 U.S.C.A. § 924(e) — United States Supreme Court cases, 67 A.L.R. Fed. 2d 1.

Comment note: Construction and application of "crime of violence" provision of U.S.S.G. § 2L1.2 pertaining to unlawfully entering or remaining in the United States after commission of felony offense, 68 A.L.R. Fed. 2d 55.

16-7-2. Smash and grab burglary; "retail establishment" defined; penalty.

(a) As used in this Code section, the term "retail establishment" means an establishment that sells goods or merchandise from a fixed location for direct consumption by a purchaser and includes establishments that prepare and sell meals or other edible products either for carry out or service within the establishment.

(b) A person commits the offense of smash and grab burglary when he or she intentionally and without authority enters a retail establishment with the intent to commit a theft and causes damage in excess of $500.00 to such establishment without the owner's consent.

(c) A person convicted of smash and grab burglary shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not less than two nor more than 20 years, by a fine of not more than $100,000.00, or both; provided, however, that upon a second or subsequent conviction, he or she shall be punished by imprisonment for not less than five nor more than 20 years, by a fine of not more than $100,000.00, or both. (Code 1981, § 16-7-2, enacted by Ga. L. 2010, p. 1147, § 6/HB 1104.)

JUDICIAL DECISIONS

Circumstantial evidence identifying defendant. — Defendant's convictions for burglary and smash and grab burglary under O.C.G.A. §§ 16-7-1(c) and 16-7-2(b) were supported by circumstantial evidence, including cell phone evidence that the defendant was near the scenes of the two burglaries and DNA evidence from a cigarette butt found in a very similar burglary days after the charged crimes. Nations v. State, 345 Ga. App. 92, No. A17A1444, 2018 Ga. App. LEXIS 176 (2018).

ARTICLE 1A

HOME INVASION

16-7-5. Home invasion in the first and second degree.

(a) As used in this Code section, the term "dwelling" shall have the same meaning as provided in Code Section 16-7-1.

(b) A person commits the offense of home invasion in the first degree when, without authority and with intent to commit a forcible felony therein and while in possession of a deadly weapon or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury, he or she enters the dwelling house of another while such dwelling house is occupied by any person with authority to be present therein.

(c) A person commits the offense of home invasion in the second degree when, without authority and with intent to commit a forcible misdemeanor therein and while in possession of a deadly weapon or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury, he or she enters the dwelling house of another while such dwelling house is occupied by any person with authority to be present therein.

(d) A person convicted of the offense of home invasion in the first degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for life or imprisonment for not less than ten nor more than 20 years and by a fine of not more than $100,000.00. A person convicted of the offense of home invasion in the second degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five nor more than 20 years and by a fine of not more than $100,000.00.

(e) Adjudication of guilt or imposition of sentence for home invasion in any degree may be probated at the discretion of the judge; provided, however, that such sentence shall not be suspended, deferred, or withheld.

(f) A sentence imposed under this Code section may be imposed separately from and consecutive to a sentence for any other offense related to the act or acts establishing the offense under this Code section. (Code 1981, § 16-7-5, enacted by Ga. L. 2014, p. 426, § 3/HB 770.)

Law reviews. — For annual survey of criminal law, see 67 Mercer L. Rev. 31 (2015).

ARTICLE 2

CRIMINAL TRESPASS AND DAMAGE TO PROPERTY

Cross references. — Civil action for injury to real estate, T. 51, C. 9.

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982).

PART 1

GENERAL PROVISIONS

RESEARCH REFERENCES

ALR. — Occupant's absence from residential structure as affecting nature of offense as burglary or breaking and entering, 20 A.L.R.4th 349.

16-7-20. Possession of tools for the commission of crime.

(a) A person commits the offense of possession of tools for the commission of crime when he has in his possession any tool, explosive, or other device commonly used in the commission of burglary, theft, or other crime with the intent to make use thereof in the commission of a crime.

(b) A person convicted of the offense of possession of tools for the commission of crime shall be punished by imprisonment for not less than one nor more than five years. (Ga. L. 1910, p. 135, §§ 1, 2; Code 1933, § 26-2701; Code 1933, § 26-1602, enacted by Ga. L. 1968, p. 1249, § 1.)

Law reviews. — For annual survey on criminal law and procedure, 42 Mercer L. Rev. 141 (1990).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 26-2701 are included in the annotations for this Code section.

Section not unconstitutional for vagueness. — Language of the statute conveys sufficiently definite warning as to the conduct forbidden, measured by common understanding and practice. Thus, the statute establishes a reasonably certain standard of conduct and is not unconstitutional for vagueness. Hogan v. Atkins, 224 Ga. 358, 162 S.E.2d 395 (1968).

Firearm as tool. — Evidence that defendant unlawfully entered the victim's residence with intent to commit aggravated assault therein, and was in possession of a gun while doing do, was sufficient to uphold convictions for aggravated assault, burglary, and possession of a firearm/knife during the commission of a felony. Simmons v. State, 262 Ga. App. 164, 585 S.E.2d 93 (2003).

Elements of crime. — Two elements are required for conviction: (1) possession of the tools and implements, and (2) intent to use these tools and implements in the commission of a crime or knowing that the same are intended to be so used. Hogan v. Atkins, 224 Ga. 358, 162 S.E.2d 395 (1968).

Offense not necessary element in or part of burglary. — Offense of possessing burglary tools is not a necessary element in, and does not constitute an essential part of, the offense of burglary. Shelly v. State, 107 Ga. App. 736, 131 S.E.2d 135 (1963).

Merger of offenses. — Even though the crimes of conspiracy and possession of tools for the commission of a crime do not merge as a matter of law, where the form of the indictment required proof of the possession of tools in order to prove the conspiracy, the offenses merged as a matter of fact. Green v. State, 240 Ga. App. 377, 523 S.E.2d 581 (1999).

Even though a two-by-four was not the kind of tool, the possession of which O.C.G.A. § 16-7-20 was meant to penalize, defendant's improper conviction was harmless since the possession of criminal tools conviction was merged with the armed robbery convictions for purposes of sentencing. Garrett v. State, 263 Ga. App. 310, 587 S.E.2d 794 (2003).

Rule of lenity applied. — In a prosecution for the possession of tools for the commission of a crime, which was a felony, while the evidence presented against the defendant was sufficient to support the jury's verdict, because the defendant's conduct could also have been charged as a misdemeanor offense of possession of a

drug related object, pursuant to O.C.G.A. § 16-13-32.2(a) and the rule of lenity, the felony conviction was reversed, and the matter was remanded for a resentencing on the misdemeanor offense. Washington v. State, 283 Ga. App. 570, 642 S.E.2d 199 (2007).

Probable cause found for arrest. — After stopping a car which was driving slowly in a shopping center parking lot because the car had a defective headlight, officers found a screwdriver in a pat down of one of the defendants, and the defendants made misleading claims as to how long the defendants had been in the parking lot, the officers had probable cause to arrest the defendants for loitering and prowling and for possession of tools for the commission of a crime. Evans v. State, 216 Ga. App. 21, 453 S.E.2d 100 (1995).

Conviction for burglary cannot support plea of autrefois convict to indictment for possessing burglary tools. Shelly v. State, 107 Ga. App. 736, 131 S.E.2d 135 (1963).

Possession of burglary tools and burglary are separate and distinct offenses, and conviction of one is not an essential part of conviction of the other. Butler v. State, 130 Ga. App. 469, 203 S.E.2d 558 (1973); McKinney v. State, 155 Ga. App. 930, 273 S.E.2d 888 (1980).

Evidence was sufficient to support defendant's conviction for possession of tools for the commission of a crime in violation of O.C.G.A. § 16-7-20 since bolt cutters and a crow bar were found in a truck containing a four-wheeler that had been stolen from a car dealership; further, evidence indicated that the defendant was with the truck that had the four-wheeler, pry marks on the dealership doors were found, and the two implements were introduced into evidence. Norwood v. State, 265 Ga. App. 862, 595 S.E.2d 537 (2004).

Crime not completed until intent shown. — Crime of possessing burglary tools is not completed until the intent to use or employ them in the commission of a crime is shown. Croker v. State, 101 Ga. App. 742, 115 S.E.2d 413 (1960).

Intent is matter of fact for jury. — Intent in a prosecution under former Code 1933, § 26-2701 (see now O.C.G.A. § 16-7-20) was not a presumption of law, but was a matter of fact for the jury. Farlow v. State, 59 Ga. App. 881, 2 S.E.2d 500 (1939).

Ken of average juror. — In the vast majority of cases construing O.C.G.A. § 16-7-20, whether a tool is commonly used in the commission of a crime is within the ken of the average juror and, in such cases, expert testimony is not required; jurors are entitled to use the jurors' knowledge and experience to decide both elements set out in the Code section, common use and intent. Kenemer v. State, 329 Ga. App. 330, 765 S.E.2d 21 (2014).

Inference of possession with criminal intent. — In prosecution under former Code 1933, § 26-2701 (see now O.C.G.A. § 16-7-20), the fact that the defendant was in possession of the named tools, and the further fact that defendant had on two other occasions used similar tools in committing a burglary, will authorize an inference that defendant's possession was with criminal intent. Farlow v. State, 59 Ga. App. 881, 2 S.E.2d 500 (1939).

Electronic scales and baggies found in the defendant's apartment were tools commonly used in the commission of the crime of possession of marijuana with intent to distribute. Russell v. State, 243 Ga. App. 378, 532 S.E.2d 137 (2000).

Cell phones as instrumentalities to commit crime. — Defendant's conviction for possession of cell phones as instrumentalities to commit a crime was supported by sufficient evidence based on finding the defendant with two cell phones, an officer testifying that based upon experience and training the possession of multiple cell phones was consistent with someone involved in drug distribution and, at the time of the defendant's arrest, the defendant also possessed 27 rocks of crack cocaine, over $272 in U.S. currency, and a digital scale. Bryant v. State, 320 Ga. App. 838, 740 S.E.2d 772 (2013).

Possession is possession of all in conspiracy. — When two or more persons enter into a conspiracy to commit burglary, and in attempting to carry out such felonious design either one of them has in the defendant's possession burglary tools, such possession is the possession of all, and each is guilty of a violation of

former Code 1933, § 26-2701, prohibiting and punishing the possession of such tools. Kryder v. State, 57 Ga. App. 200, 194 S.E. 890 (1938).

Possession of burglary tools by one conspirator is possession by all. — When two or more persons enter into a conspiracy to commit burglary, and in attempting to carry out such felonious design either of the people has in their possession burglary tools, such possession is the possession of all, and each is guilty of a violation of O.C.G.A. § 16-7-20, prohibiting and punishing the possession of such tools. Solomon v. State, 180 Ga. App. 636, 350 S.E.2d 35 (1986).

Possession of burglary tools. — When there was evidence that the defendant and a codefendant committed the burglary, each was responsible for the acts of the others in carrying out the common purpose; thus, there was sufficient evidence to support the defendant's conviction for possession of tools for the commission of burglary. Jones v. State, 261 Ga. App. 698, 583 S.E.2d 546 (2003).

Evidence that the defendant's sibling possessed the tools used in the attempted burglary was sufficient to support the defendant's conviction for possession of tools for the commission of a crime since each was responsible for the acts of the other in carrying out the common purpose as if that person personally had committed the act. Flanagan v. State, 265 Ga. App. 122, 592 S.E.2d 894 (2004).

Discovery of a hammer outside the shattered glass of the front door of a car dealership that the defendant was caught burglarizing, together with the defendant's admission that the defendant used a hammer to break the glass, was sufficient to support a conviction for possession of tools for the commission of a crime. Johnson v. State, 291 Ga. App. 253, 661 S.E.2d 642 (2008).

While tools such as a hammer, pair of pliers, screwdriver, hatchet, and chisel could be used in the commission of a burglary, these tools are not "commonly used in the commission of burglary" as required by O.C.G.A. § 16-7-20(a). Burnette v. State, 168 Ga. App. 578, 309 S.E.2d 875 (1983).

Evidence of defendant's previous use of similar tools. — In the trial of one accused of possessing burglary tools with intent to commit a crime therewith, it was not error to allow evidence that the defendant had sometimes previously used similar tools in the commission of other burglaries. Shelly v. State, 107 Ga. App. 736, 131 S.E.2d 135 (1963).

Body armor was insufficient evidence for conviction. — Trial court erred in denying the defendant's motion for directed verdict of acquittal because the evidence was insufficient to support the defendant's conviction for possession of tools for the commission of a crime for lack of evidence showing that body armor was a tool commonly used in the commission of attempted armed robbery pursuant to O.C.G.A. § 16-7-20(a). Nyane v. State, 306 Ga. App. 591, 703 S.E.2d 53 (2010), cert. denied, No. S11C0420, 2011 Ga. LEXIS 538 (Ga. 2011).

Fuel equipment used in theft not subject to forfeiture. — Because fuel equipment used in the defendant's crime of theft of diesel fuel did not constitute contraband per se, and there was no statutory authority supporting retention by the sheriff of the equipment after the defendant was discharged, the equipment was ordered returned to the defendant pursuant to O.C.G.A. § 17-5-54(a)(1), (d). Although possession of burglary tools was criminalized by O.C.G.A. § 16-7-20, the statute did not declare those tools subject to forfeiture. Norman v. Yeager, 335 Ga. App. 470, 781 S.E.2d 580 (2016).

Admission of testimony of state's witnesses as to the defendant's admissions, voluntarily made by the defendant (after the defendant pled guilty and had been brought into court for the purpose of having sentence passed upon the defendant), of defendant's commission of burglaries in Ohio and other states, was proper in a trial for possession of burglary tools held after a guilty plea had been withdrawn. Heller v. State, 60 Ga. App. 552, 4 S.E.2d 413 (1939).

Evidence was sufficient to support conviction where the testimony established that the defendant possessed a ring of keys, several of which fitted various Coca-Cola vending machines, and that defendant was using one of the keys to open one of the machines and to extract

money from it when apprehended. Cunningham v. State, 128 Ga. App. 789, 197 S.E.2d 871 (1973).

Evidence of defendant's unexplained presence in possession of tools behind a closed business office was sufficient to support conviction. Kennon v. State, 232 Ga. App. 494, 502 S.E.2d 330 (1998).

Evidence that defendant had a shank, which he held next to his wife as he had forcible intercourse with her, authorized the jury to convict him of this crime. Garcia v. State, 240 Ga. App. 53, 522 S.E.2d 530 (1999).

Evidence that defendant had a flashlight when arrested and an accomplice's testimony that defendant took the flashlight with defendant when defendant and the accomplice entered the house to commit the burglary was sufficient to sustain defendant's conviction for possession of tools for the commission of a crime, but the conviction had to be vacated and the case had to be remanded to the trial court for it to determine whether defendant validly waived defendant's right to a jury trial before being tried on that charge. Jenkins v. State, 259 Ga. App. 47, 576 S.E.2d 44 (2002).

Testimony from an eyewitness at the scene that the eyewitness heard suspicious noises in the adjacent government offices, which were closed for business for the day, then saw defendant flee from police while removing items from defendant's pocket, when coupled with the discovery of 169 quarters which were found in the immediate vicinity of the tree where defendant was apprehended, the presence of tools at the crime scene, visible pry marks on the door which defendant attempted to open, and the destroyed gum ball machines, authorized the jury to infer that although defendant did not have the tools in defendant's possession, defendant used them to break into the offices, steal the money from the destroyed machines, and attempt to flee the police and avoid apprehension; thus, defendant's convictions for burglary, possession of tools for the commission of a crime, interference with government property, and obstruction of an officer were all affirmed. Harris v. State, 263 Ga. App. 866, 589 S.E.2d 631 (2003).

Defendant was properly convicted under O.C.G.A. § 16-7-20 after being seen exiting a new, unoccupied home still under construction because defendant's vehicle contained numerous tools that were characterized as being of the type commonly used for burglaries and the evidence was sufficient based on the time of night, defendant's effort to misrepresent defendant's ownership of the vehicle, the vehicle's opened rear door, defendant's incongruous explanation for defendant's presence, and the unauthorized entry of the house. Anderson v. State, 264 Ga. App. 362, 590 S.E.2d 729 (2003).

Trial court properly allowed the jury to determine whether defendant should be convicted of possession of tools for the commission of a crime, possession of amphetamine, and possession of cocaine with intent to distribute because other people in a car defendant drove had equal access to drugs and scales that police found, and the appellate court found that the evidence was sufficient to sustain defendant's convictions. Dowdy v. State, 267 Ga. App. 598, 600 S.E.2d 684 (2004).

Evidence was sufficient to support defendant's conviction for possession of tools for the commission of a crime where a store employee testified that the employee encountered defendant in the store in the early morning hours trying to pry open the lock on a jewelry counter with a knife, and a police officer testified that knives were sometimes used to commit burglaries. Standfill v. State, 267 Ga. App. 612, 600 S.E.2d 695 (2004).

Jury was authorized to find defendant guilty of possession of tools for the commission of a crime where defendant's accomplice testified that defendant removed an automatic teller machine from a bank with a crowbar, and this testimony was sufficiently corroborated by defendant's possession of crow bars, a sledgehammer, a screwdriver, a flashlight, and a ski mask found in defendant's car, the fact that defendant was found near the scene of the bank burglary covered in grease that could have come from a bank machine, the fact that defendant was sweaty, as if defendant had been working, and the fact that pine straw similar to pine straw in front of burglarized bank was found in

defendant's car. McNair v. State, 267 Ga. App. 872, 600 S.E.2d 830 (2004).

Evidence that defendant had in a pocket a screwdriver, a flashlight, and a pair of cloth gloves at the time police arrived to find the house owner holding defendant at gunpoint after finding that defendant had attempted to break into the house in order to steal valuable construction tools inside was sufficient to support defendant's conviction for possession of tools for the commission of a crime; the state did not have to show that defendant actually held the tools, as the fact that they were on defendant's person was sufficient to show that defendant possessed them. Weeks v. State, 274 Ga. App. 122, 616 S.E.2d 852 (2005).

Evidence was sufficient for a jury to find defendant guilty of possessing tools for the commission of a crime, as defendant leased a house in which a widespread methamphetamine manufacturing operation took place, which created a strong chemical smell immediately apparent upon entering the house, and defendant tested positive for methamphetamine, circumstantially linking defendant to the manufacturing process and undermining the claim that defendant was unaware of the activity. Kirby v. State, 275 Ga. App. 216, 620 S.E.2d 459 (2005).

Because witnesses saw the defendant come and go from an empty mobile home and heard the defendant brag about a burglary, and the mobile home's back door had pry marks on the door that were consistent with the defendant's knife, there was sufficient evidence to convict the defendant of burglary and possession of criminal tools under O.C.G.A. §§ 16-7-1(a) and 16-7-20(a). Barrow v. State, 275 Ga. App. 522, 621 S.E.2d 537 (2005).

While the defendant, a passenger in a pick-up truck seen at a burglary scene, and the truck driver both claimed that the defendant was passed out while the driver committed the burglary without the defendant's knowledge, another witness saw the truck outside the dock and two people cutting the chain, an officer heard two car doors shut and an engine start at the scene right before the officers arrived, and the defendant was not passed out when the officers intercepted the truck; in light of the evidence that the bolt cutters were used in the burglary and the bolt cutters were found in the front seat of the truck in which the defendant and the driver were intercepted, the evidence was sufficient to convict the defendant of possession of tools for the commission of a crime. Spradlin v. State, 279 Ga. App. 638, 631 S.E.2d 828 (2006).

Along with items found in the defendant's vehicle, which items had been stolen from the victims' vehicles, and the defendant's presence at the crime scene where cars were broken into with the kind of tools found in the defendant's vehicle, the evidence was sufficient to sustain a conviction for possession of tools for the commission of a crime. Walker v. State, 281 Ga. App. 94, 635 S.E.2d 577 (2006).

Given the evidence connecting the drug paraphernalia found on the defendant's person to the use and distribution of cocaine, the jury was authorized to find the defendant guilty of possessing tools for committing a crime. Lipsey v. State, 287 Ga. App. 835, 652 S.E.2d 870 (2007).

With regard to a defendant's convictions for burglary and possession of tools for the commission of a crime, there was sufficient evidence to support the convictions based on the trial testimony of two accomplices, who testified that the defendant directly participated in the burglaries with the accomplices as such evidence was sufficient and established corroboration. Dyer v. State, 298 Ga. App. 327, 680 S.E.2d 177 (2009).

There was sufficient evidence to support convictions for trafficking in cocaine and possession of tools for the commission of a crime, O.C.G.A. §§ 16-7-20 and 16-13-31, when narcotics and an electronic scale were found in the defendant's residence, and although the defendant did not own the residence, the defendant resided there for the previous five years and there was a lack of evidence at the home of any other persons residing therein. Further, the items were well hidden within the premises, the defendant used a closed circuit surveillance system to monitor the home, and the defendant possessed a substantial amount of cash at the time of the search. Brown v. State, 307 Ga. App. 99, 704 S.E.2d 227 (2010).

There was sufficient evidence to support the defendant's conviction for possessing tools for the commission of a crime based on eyewitness testimony and a videotape showing the defendant with a baby stroller filled with contents taken from a store. Fitzpatrick v. State, 317 Ga. App. 873, 733 S.E.2d 46 (2012).

Circumstantial evidence, including the defendant's unusual behavior before the traffic stop, the fact that the defendant was wearing socks over shoes and inexplicably removed both while handcuffed during the transport to jail, the contradictory statements to police, and the defendant's prior convictions for burglary and possession of tools for the commission of a crime, along with the tools found in the defendant's possession, supported a conviction for possession of tools for the commission of burglary. Sutton v. State, 338 Ga. App. 724, 791 S.E.2d 618 (2016).

Evidence sufficient to convince rational trier of fact of existence of essential elements of crime. Alexander v. State, 166 Ga. App. 233, 303 S.E.2d 773 (1983); Manous v. State, 205 Ga. App. 804, 423 S.E.2d 721 (1992); Cook v. State, 226 Ga. App. 113, 485 S.E.2d 595 (1997).

Evidence insufficient to support conviction. — State failed to prove beyond a reasonable doubt that the defendant possessed the methamphetamine with intent to distribute, thereby making it clear that the state also failed to establish beyond a reasonable doubt that the defendant possessed the digital scale with the intent to commit the crime of possession of methamphetamine with intent to distribute and requiring reversal of the conviction for possession of tools for the commission of a crime. Muttalib v. State, 335 Ga. App. 514, 782 S.E.2d 300 (2016).

Evidentiary issues did not warrant new trial. — Because the state's evidence sufficiently showed the first defendant's joint constructive possession of methamphetamine beyond mere spatial proximity, and the first's defendant's act of testifying for the state without a promise of leniency or immunity did not unfairly prejudice the second defendant at the expense of that defendant's constitutional right not to testify, their convictions for trafficking in methamphetamine and possession of tools for the commission of a crime were upheld on appeal; thus, the trial court did not err in denying both defendants a new trial. Herberman v. State, 287 Ga. App. 635, 653 S.E.2d 74 (2007).

Cited in DePalma v. State, 228 Ga. 272, 185 S.E.2d 53 (1971); Nicholson v. State, 125 Ga. App. 24, 186 S.E.2d 287 (1971); Herrin v. State, 230 Ga. 476, 197 S.E.2d 734 (1973); Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973); Walker v. State, 130 Ga. App. 860, 205 S.E.2d 49 (1974); Delvers v. State, 139 Ga. App. 119, 227 S.E.2d 844 (1976); Fennell v. State, 159 Ga. App. 194, 283 S.E.2d 72 (1981); Upton v. Johnson, 282 Ga. 600, 652 S.E.2d 516 (2007); Cox v. State, 300 Ga. App. 109, 684 S.E.2d 147 (2009); Lucas v. State, 328 Ga. App. 741, 760 S.E.2d 257 (2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Burglary, § 67 et seq.

C.J.S. — 12A C.J.S., Burglary, § 56 et seq.

ALR. — Admissibility, in prosecution for burglary, of evidence that defendant, after alleged burglary, was in possession of burglarious tools and implements, 143 A.L.R. 1199.

Validity, construction, and application of statutes relating to burglars' tools, 33 A.L.R.3d 798.

16-7-21. Criminal trespass.

(a) A person commits the offense of criminal trespass when he or she intentionally damages any property of another without consent of that other person and the damage thereto is $500.00 or less or knowingly and maliciously interferes with the possession or use of the property of another person without consent of that person.

(b) A person commits the offense of criminal trespass when he or she knowingly and without authority:

(1) Enters upon the land or premises of another person or into any part of any vehicle, railroad car, aircraft, or watercraft of another person for an unlawful purpose;

(2) Enters upon the land or premises of another person or into any part of any vehicle, railroad car, aircraft, or watercraft of another person after receiving, prior to such entry, notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant that such entry is forbidden; or

(3) Remains upon the land or premises of another person or within the vehicle, railroad car, aircraft, or watercraft of another person after receiving notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant to depart.

(c) For the purposes of subsection (b) of this Code section, permission to enter or invitation to enter given by a minor who is or is not present on or in the property of the minor's parent or guardian is not sufficient to allow lawful entry of another person upon the land, premises, vehicle, railroad car, aircraft, or watercraft owned or rightfully occupied by such minor's parent or guardian if such parent or guardian has previously given notice that such entry is forbidden or notice to depart.

(d) A person who commits the offense of criminal trespass shall be guilty of a misdemeanor.

(e) A person commits the offense of criminal trespass when he or she intentionally defaces, mutilates, or defiles any grave marker, monument, or memorial to one or more deceased persons who served in the military service of this state, the United States of America or any of the states thereof, or the Confederate States of America or any of the states thereof, or a monument, plaque, marker, or memorial which is dedicated to, honors, or recounts the military service of any past or present military personnel of this state, the United States of America or any of the states thereof, or the Confederate States of America or any of the states thereof if such grave marker, monument, memorial, plaque, or marker is privately owned or located on land which is privately owned. (Ga. L. 1882-83, p. 121, § 1; Penal Code 1895, § 220; Penal Code 1910, § 217; Code 1933, § 26-3002; Ga. L. 1959, p. 173, § 1; Ga. L. 1960, p. 142, § 1; Code 1933, § 26-1503, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 5; Ga. L. 1979, p. 764, § 1; Ga. L. 1985, p. 484, § 1; Ga. L. 1985, p. 1491, § 1; Ga. L. 1997, p. 526, § 1; Ga. L. 2001, p. 1153, § 1.)

Cross references. — Justifiable use of force in defense of property, §§ 16-3-23, 16-3-24. Requirement of written permission to hunt on lands belonging to another, § 27-3-1. Prohibition against unauthorized fishing in waters or from lands belonging to another, § 27-4-2. Trespassing upon armory, military camp, or other military property, § 38-2-306.

Law reviews. — For article, "Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System," see 8 Ga. St. U.L. Rev. 539 (1992). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

JUDICIAL DECISIONS

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General Consideration

Constitutionality. — Former Code 1933, § 26-1503 was constitutional. Daniel v. State, 231 Ga. 270, 201 S.E.2d 393 (1973); Alonso v. State, 231 Ga. 444, 202 S.E.2d 37 (1973), appeal dismissed, 417 U.S. 938, 94 S. Ct. 3062, 41 L. Ed. 2d 661 (1974).

Statutory vagueness and ambiguity. — Former Code 1933, § 26-1503 was not so indefinite, vague, or uncertain as to fail to give a person of ordinary intelligence fair notice that the person's contemplated conduct was forbidden. Mixon v. State, 226 Ga. 869, 178 S.E.2d 189 (1970).

Former Code 1933, § 26-1503 (see now O.C.G.A. § 16-7-21(b)(2)) was neither vague nor ambiguous; nor was it drawn in words that are not capable of understanding by persons of ordinary intelligence. Starkly similar wording was employed by the General Assembly in former Code 1933, § 26-1503 (see now O.C.G.A. § 16-7-21 (b)(3)), which previously had been upheld against such attacks. State v. Raybon, 242 Ga. 858, 252 S.E.2d 417 (1979).

O.C.G.A. §§ 16-7-21 and 16-7-23 define identical crimes except for the amount of damage required for conviction and the former is a lesser included offense of the latter. Merrell v. State, 162 Ga. App. 886, 293 S.E.2d 474 (1982); Williams v. State, 180 Ga. App. 854, 350 S.E.2d 837 (1986).

Strict construction. — As a criminal statute, O.C.G.A. § 16-7-21 is subject to strict construction. McGonagil v. Treadwell, 216 Ga. App. 850, 456 S.E.2d 260 (1995).

Criminal trespass is location crime and its purpose is to keep defendant off property of others. Williamson v. State, 134 Ga. App. 583, 215 S.E.2d 518 (1975).

Moral turpitude not involved. — Misdemeanor offense of criminal trespass does not involve moral turpitude and therefore the trial court properly refused to admit the conviction thereof to impeach a witness's testimony at trial. Barker v. State, 211 Ga. App. 279, 438 S.E.2d 649 (1993).

O.C.G.A. § 16-7-21 not preempted by § 16-11-35. — Appellants who were charged under the general criminal trespass statute, O.C.G.A. § 16-7-21, for knowingly and without authority remaining on the premises of a junior college could not get their convictions overturned by arguing that the charge should have been brought under a specific trespass statute dealing with disruptive activity on college campuses, O.C.G.A. § 16-11-35, since the latter statute was not intended to preempt the general criminal trespass

statute. Brooks v. State, 170 Ga. App. 440, 317 S.E.2d 552 (1984).

Accusation not required to specify instrumentality used. — Accusation for battery, family violence, and criminal trespass that alleged that the defendant injured the victim by striking the victim, causing a visibly bloody lip, and that the defendant knocked a hole in the victim's closet door, was sufficient under O.C.G.A. § 17-7-71(c). There was no requirement that the accusation state the instrumentality used by the defendant because the instrumentality was not an element of any of the charged crimes. State v. Leatherwood, 326 Ga. App. 730, 757 S.E.2d 434 (2014).

Charging instrument defective. — Trial court's denial of a defendant's special demurrer to a charge of criminal trespass, in violation of O.C.G.A. § 16-7-21(a), was error as the accusation failed to identify with particularity the property of the victim that the defendant allegedly interfered with and damaged. Newsome v. State, 296 Ga. App. 490, 675 S.E.2d 229 (2009).

Pretrial intervention program on related charges did not bar prosecution. — Prosecution of the defendants for theft by taking and criminal trespass in Calhoun County, O.C.G.A. §§ 16-7-21(b) and 16-8-2, was not prohibited by double jeopardy based on their prior entry into a pretrial intervention program under O.C.G.A. § 15-18-80(b) following charges of theft by receiving stolen property, O.C.G.A. § 16-8-7(a), in Irwin County because there was no prosecution in Irwin County within the meaning of O.C.G.A. §§ 16-1-3(14) and 16-1-8(a)(1)-(2). Palmer v. State, 341 Ga. App. 433, 801 S.E.2d 300 (2017).

Multiple prosecutions for same conduct. — When the defendant is convicted of criminal damage to property in the second degree (a felony) and criminal trespass (a misdemeanor) and when the offenses were committed at different apartments under different tenancies, such convictions do not fall within the purview of the burglary statute. Hiatt v. State, 133 Ga. App. 111, 210 S.E.2d 22 (1974).

Denial of motion to sever. — In a prosecution on two counts of attempting to hijack a motor vehicle, four counts of aggravated assault, possession of a firearm during the commission of a crime, and criminal trespass, because the offenses committed by a defendant and a codefendant amounted to a series of continuous acts connected together both in time and the area in which committed, and there was no likelihood of confusion, the trial court did not abuse the court's discretion in denying the defendant's motion to sever the trial from that of the codefendant; furthermore, the mere fact that the codefendants' defenses were antagonistic was insufficient in itself to warrant separate trials. Diaz v. State, 280 Ga. App. 413, 634 S.E.2d 160 (2006).

Defendant claiming that defendant did not damage property. — Criminal defendant cannot legitimately raise the issue of criminal trespass by means of intentionally damaging another person's property without consent when the defendant claimed to not have damaged the property. Elder v. State, 180 Ga. App. 295, 349 S.E.2d 30 (1986).

Malicious prosecution action based on arrest for criminal trespass. — In an action for malicious prosecution, where an employee of an apartment complex had given notice to the plaintiff that the plaintiff was forbidden to enter the property, even though the plaintiff entered as the guest of a tenant, the employee had probable cause to arrest the plaintiff for malicious trespass when the plaintiff deviated from the purpose for which the plaintiff was invited and entered upon a portion of the premises unrelated to the invitation. Arbee v. Collins, 219 Ga. App. 63, 463 S.E.2d 922 (1995).

Church officials had probable cause to have former pastor arrested for criminal trespass when the pastor had been warned not to come on church premises. United Baptist Church, Inc. v. Holmes, 232 Ga. App. 253, 500 S.E.2d 653 (1998).

Applicability to civil cases. — Transportation company's action against quarry for negligent hiring and retention failed because, although the quarry employee had a criminal history, that history did not involve the employee's experience working with heavy equipment; even considering the employee's criminal history, it was

General Consideration (Cont'd)

not natural and probable that the employee would violate O.C.G.A. § 16-7-21 and trespass on the company's railroad tracks using quarry equipment, and damage to the tracks was accidental, resulting from, at worst, a lapse in judgment. CSX Transp., Inc. v. Pyramid Stone Indus., Inc., No. 08-12694, 2008 U.S. App. LEXIS 20001 (11th Cir. Sept. 17, 2008) (Unpublished).

In a case in which a car buyer appealed a district court's entry of summary judgment in favor of a lender, the Georgia criminal statutes for trespassing and theft, O.C.G.A. §§ 16-7-21, 16-8-2, and 16-8-3, did not expressly provide for a civil remedy and, thus, a civil remedy could not arise from a violation of those statutes. Goia v. Citifinancial Auto, 499 Fed. Appx. 930 (11th Cir. Dec. 3, 2012) (Unpublished).

Cited in Rose v. State, 128 Ga. App. 370, 196 S.E.2d 683 (1973); Steffel v. Thompson, 415 U.S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974); Hudgens v. Retail, Whsle. & Dep't Store Local 315, 231 Ga. 669, 203 S.E.2d 478 (1974); Hudgens v. Retail, Whsle. & Dep't Store Local 315, 133 Ga. App. 329, 210 S.E.2d 821 (1974); M.J.W. v. State, 133 Ga. App. 350, 210 S.E.2d 842 (1974); Burton v. State, 137 Ga. App. 686, 224 S.E.2d 876 (1976); Rowles v. State, 143 Ga. App. 553, 239 S.E.2d 164 (1977); Williams v. State, 144 Ga. App. 72, 240 S.E.2d 591 (1977); Loury v. State, 147 Ga. App. 152, 248 S.E.2d 291 (1978); Favors v. State, 149 Ga. App. 563, 254 S.E.2d 886 (1979); State v. Moore, 243 Ga. 594, 255 S.E.2d 709 (1979); Bradford v. State, 149 Ga. App. 839, 256 S.E.2d 84 (1979); Huffman v. State, 153 Ga. App. 203, 265 S.E.2d 603 (1980); Giddens v. State, 156 Ga. App. 258, 274 S.E.2d 595 (1980); Septum, Inc. v. Keller, 614 F.2d 456 (5th Cir. 1980); Motes v. State, 159 Ga. App. 255, 283 S.E.2d 43 (1981); Sizemore Sec. Int'l, Inc. v. Lee, 161 Ga. App. 332, 287 S.E.2d 782 (1982); Walls v. State, 161 Ga. App. 625, 288 S.E.2d 769 (1982); Lemon v. State, 161 Ga. App. 692, 289 S.E.2d 789 (1982); Joiner v. State, 163 Ga. App. 521, 295 S.E.2d 219 (1982); Sellers v. State, 164 Ga. App. 637, 298 S.E.2d 623 (1982); Henderson v. State, 169 Ga. App. 615, 314 S.E.2d 677 (1984); Jones v. State, 169 Ga. App. 872, 315 S.E.2d 305 (1984); Raymond v. State, 170 Ga. App. 676, 318 S.E.2d 71 (1984); Cave v. State, 171 Ga. App. 22, 318 S.E.2d 689 (1984); Taylor v. State, 177 Ga. App. 624, 340 S.E.2d 263 (1986); Stover v. Watson, 180 Ga. App. 16, 348 S.E.2d 463 (1986); McLeroy v. State, 184 Ga. App. 62, 360 S.E.2d 631 (1987); Allison v. State, 184 Ga. App. 294, 361 S.E.2d 271 (1987); In re A.W.G., 184 Ga. App. 343, 361 S.E.2d 510 (1987); Butler v. State, 196 Ga. App. 706, 396 S.E.2d 916 (1990); State v. Seignious, 197 Ga. App. 766, 399 S.E.2d 559 (1990); Groom v. State, 212 Ga. App. 133, 441 S.E.2d 259 (1994); Brownlee v. City of Atlanta, 212 Ga. App. 174, 441 S.E.2d 492 (1994); Williams v. State, 214 Ga. App. 834, 449 S.E.2d 532 (1994); Harris v. State, 222 Ga. App. 56, 473 S.E.2d 229 (1996); Holmes v. Achor Ctr. Inc., 242 Ga. App. 887, 531 S.E.2d 773 (2000); Holmes v. Achor Ctr., Inc., 260 Ga. App. 882, 581 S.E.2d 390 (2003); State v. Perry, 261 Ga. App. 886, 583 S.E.2d 909 (2003); English v. State, 282 Ga. App. 552, 639 S.E.2d 551 (2006); Griffin v. State, 291 Ga. App. 618, 662 S.E.2d 171 (2008); Johnson v. State, 293 Ga. App. 32, 666 S.E.2d 452 (2008); Georgiacarry.Org, Inc. v. Atlanta Botanical Garden, Inc., 299 Ga. 26, 785 S.E.2d 874 (2016).

Elements of Crime

Remaining on land without authority is essential element in crime of criminal trespass. Davis v. State, 147 Ga. App. 107, 248 S.E.2d 181 (1978).

State was required to prove that the defendants had actual knowledge that the defendants were on private premises even though the defendants knowingly remained on the property after being asked to depart. Bowman v. State, 258 Ga. 829, 376 S.E.2d 187 (1989).

Criminal intent and entry without authority. — Former Code 1933, §§ 26-401(r) (see now O.C.G.A. § 16-1-3(18)) and 26-1503(b)(2) (see now O.C.G.A. § 16-7-21(b)(2)) require that a person accused of its violation shall have entered "knowingly and without authority" after having been told that such entry is forbidden. Thus, criminal intent and

entry "without legal right or privilege or without permission of a person legally entitled to withhold the right" are elements of the crime. State v. Raybon, 242 Ga. 858, 252 S.E.2d 417 (1979).

Former Code 1933, § 26-1503(a) and (b)(1) delineate two completely separate criteria for misdemeanor of criminal trespass. Pittman v. State, 139 Ga. App. 661, 229 S.E.2d 135 (1976).

Notice is essential element of criminal trespass and must be proven by state beyond reasonable doubt at trial. Rayburn v. State, 250 Ga. 657, 300 S.E.2d 499 (1983).

An apartment complex security guard's testimony that a defendant had told the guard that the defendant was at the complex to buy drugs from a friend and that the guard then warned the defendant to stay off the premises was relevant, although the testimony incidentally put the defendant's character in issue, because the testimony showed that the defendant had notice to stay away from the property, an essential element of the offense of criminal trespass under O.C.G.A. § 16-7-21(b)(3). Love v. State, 302 Ga. App. 106, 690 S.E.2d 246 (2010).

Reasonable and sufficiently explicit notice required. — Inherent in O.C.G.A. § 16-7-21 notice provision is a requirement that notice be reasonable under the circumstances, as well as sufficiently explicit to apprise the trespasser what property the trespasser is forbidden to enter. Rayburn v. State, 250 Ga. 657, 300 S.E.2d 499 (1983).

Because the trial court could have concluded that the state failed to prove beyond a reasonable doubt that the defendant had been given the requisite notice to not return to a train station without facing the risk of an arrest, some evidence supported the trial court's conclusion that the arrest, which was based solely on the violation of an invalid criminal trespass warning, lacked probable cause; hence, the suppression order was not disturbed on appeal. State v. Morehead, 285 Ga. App. 320, 646 S.E.2d 308 (2007).

Notice not to enter to be given by owner or rightful occupant. — Evidence failed to establish an essential element of criminal trespass when a police officer notified the defendant not to enter the apartment based on a conversation the officer had with the manager of the apartment complex, however, the manager did not testify, the substance of the conversation was not in evidence, and there was no evidence that, when the officer gave the notice to the defendant, the officer was acting as the authorized representative of the owner or rightful occupant of the apartment. Jackson v. State, 242 Ga. App. 113, 528 S.E.2d 864 (2000).

Defendant's conviction for criminal trespass was reversed even though the evidence was that, pursuant to a divorce decree, defendant was prohibited from being on the property of the ex-spouse's work place until further order of the court because there was no evidence that the ex-spouse was the rightful occupant of the premises or that the rightful owner gave defendant prior notice. Sheehan v. State, 314 Ga. App. 325, 723 S.E.2d 724 (2012).

Locked door as notice not to enter. — Locked door to the residence provided reasonable and sufficiently explicit notice to the defendant that entry into the complainant's residence was forbidden and, thus, to support a finding of guilt for criminal trespass. State v. Harper, 810 S.E.2d 484, No. S17G0199, 2018 Ga. LEXIS 105 (2018).

Difference between offenses described in former Code 1933, § 26-1503(b)(2) and (b)(3); the latter deals with a lawful entry and remaining on the premises after having been directed to leave while the former applies when notice forbidding entry is given before the accused goes upon the premises. Scott v. State, 130 Ga. App. 75, 202 S.E.2d 201 (1973).

Meaning of Terms

Premises. — Term "premises" has varying meanings, but it is inclusive enough generally to mean land and the buildings thereon. Williamson v. State, 134 Ga. App. 583, 215 S.E.2d 518 (1975).

Premises of another person. — Phrase "premises of another" in subdivision (b)(3) was broad enough to include and embrace property owned by and used for public school purposes by a city or a

Meaning of Terms (Cont'd)

county. Kitchens v. State, 221 Ga. 839, 147 S.E.2d 509 (1966).

Phrase "premises of another person" found in subdivision (b)(3) included property owned or used for public purposes. E.P. v. State, 130 Ga. App. 512, 203 S.E.2d 757 (1973).

Unlawful purpose. — Words "unlawful purpose" mean a purpose to violate a criminal law. Mixon v. State, 226 Ga. 869, 178 S.E.2d 189 (1970).

An intent to commit a felony or theft is always an unlawful purpose. Williamson v. State, 134 Ga. App. 583, 215 S.E.2d 518 (1975).

Driver's argument that a city employee was acting outside the scope of employment at the time of an accident was without merit because the employee's act of crossing a private shopping center before pulling onto the road was not unlawful under O.C.G.A. § 40-6-20(e) (disregard of a traffic signal) or O.C.G.A. § 16-7-21(b)(1) (criminal trespass) because no unlawful purpose was shown; the employee was, therefore, immune from suit and liability based on O.C.G.A. § 36-92-3. Guice v. Brown, 334 Ga. App. 199, 778 S.E.2d 823 (2015).

Authority with Regard to Property

Authority to forbid entry. — Officer who acts under the direction of the director of public safety at the University of Georgia has the authority to forbid entry on University of Georgia property. Singer v. State, 156 Ga. App. 416, 274 S.E.2d 612 (1980).

Possession of weapon on premises. — Private property owners could forbid the possession of a weapon on their premises, as property law, tort law, and criminal law, such as that later codified in O.C.G.A. §§ 16-7-21(b)(3), 51-3-1 to 51-3-2, and 51-9-1, provided the canvas on which the Second Amendment was drafted, illustrated that the basis of the Second Amendment did not include protection for a right to carry a firearm in a place of worship against the church owner's wishes. GeorgiaCarry.Org, Inc v. Georgia, 687 F.3d 1244 (11th Cir. 2012).

Defense of "entering with permission". — Defendant established a defense to the charge of criminal trespass by showing that defendant entered the apartment with the permission of the tenant and rightful occupant of the apartment. Jackson v. State, 242 Ga. App. 113, 528 S.E.2d 864 (2000).

The 15-year-old daughter was a "rightful occupant" of her parent's home and her invitation conveyed authority to the defendant to disregard an earlier notice that the defendant was barred from the home. Hutson v. State, 220 Ga. App. 609, 469 S.E.2d 825 (1996).

Minor's authority to allow entrance on property. — Juvenile was properly convicted of criminal trespass under O.C.G.A. § 16-7-21(b)(2) as the juvenile's minor friend did not have the authority to override the mother's warnings that the juvenile was not permitted to enter their property. In re J. B. M., 294 Ga. App. 545, 669 S.E.2d 523 (2008).

Tenant's authority to be on property. — When the defendant has a legal and binding contract to remain at a site, and nothing in the contract allows either party to rescind the contract unilaterally, and there is no judicial determination that the contract is void or breached, an offer by a landlord to refund part of the rent does not negate the contract when the refund is not accepted, and the defendant does not agree to any cancellation. In such a case, there is no authority for a landlord to revoke the defendant's authority to be or remain on the land, and the defendant is not shown beyond a reasonable doubt to be in violation of former Code 1933, § 26-1503. Davis v. State, 147 Ga. App. 107, 248 S.E.2d 181 (1978).

Protection of life tenant's interests. — Witness's testimony that subject property passed to the witness after the end of a life estate, and that the life tenant's guardian had given the witness authority to protect the life tenant's interests, including getting defendant off the property, was proof of ownership and authority under O.C.G.A. § 16-7-21. Wigley v. State, 194 Ga. App. 7, 389 S.E.2d 769, cert. denied, 194 Ga. App. 913, 389 S.E.2d 769 (1989).

Ownership of property. — State did not have to prove the actual ownership of

a door damaged by the defendant; it was only necessary to prove that the door belonged to someone other than the defendant. Jones v. State, 236 Ga. App. 716, 513 S.E.2d 254 (1999).

Former resident. — Once the victim withdrew the defendant's authority to enter the victim's house, the fact that the defendant once lived there did not give the defendant subsequent authority to enter; further, the jury was authorized to find that the defendant entered the home at least once with the intent to assault the victim. Bilow v. State, 279 Ga. App. 509, 631 S.E.2d 743 (2006).

Home builder's right to exclude others from property. — Home builder had the right to exclude a home inspector from trespassing on the builder's properties and properly exercised that right by instructing the inspector not to enter the builder's properties. Pope v. Pulte Home Corp., 246 Ga. App. 120, 539 S.E.2d 842 (2000).

Bank's authority over patron refusing to leave premises. — Despite the plaintiff patron's claim that summary judgment was improperly granted to defendant bank on the patron's false arrest claim in light of conflicting evidence as to whether the patron was loud and hostile in the bank's premises, the bank was properly granted summary judgment regardless of whether the patron was loud and hostile because: (1) it was undisputed that the patron refused to leave the bank after being repeatedly asked by bank representatives to do so; (2) such refusal clearly provided probable cause for the patron's arrest for criminal trespass under O.C.G.A. § 16-7-21(b); and (3) such probable cause defeated an element of the false arrest claim. Mohamud v. Wachovia Corp., 260 Ga. App. 612, 580 S.E.2d 259 (2003).

Evidence and Corroboration

Evidence as to amount of property damage. — When there is no evidence as to whether the amount of damage done is more or less than $100.00, no conviction can stand under O.C.G.A. § 16-7-21(a). Johnson v. State, 156 Ga. App. 411, 274 S.E.2d 778 (1980), cert. denied, 451 U.S. 989, 101 S. Ct. 2327, 68 L. Ed. 2d 848 (1981); Matthews v. State, 224 Ga. App. 407, 481 S.E.2d 235 (1997).

No corroboration of accomplice's testimony required. — Corroboration rule requiring independent corroborative evidence supporting the testimony of an accomplice does not apply to a misdemeanor. J.B.L. v. State, 144 Ga. App. 223, 241 S.E.2d 40 (1977).

Res gestae. — Evidence of a female defendant's actions in knocking on hotel room doors and allegedly soliciting for prostitution would have been admissible at a trial as part of a course of criminal conduct because it was part of the res gestae of the charged crime; thus, the evidence could be admitted in a sentencing hearing. The hotel owner's testimony regarding the hotel guests' complaints, while not admissible to prove solicitation, would have been admissible to explain the owner's conduct in giving defendant notice to depart the hotel premises. Ansley v. State, 197 Ga. App. 765, 399 S.E.2d 558 (1990).

Evidence sufficient for conviction. — Evidence was sufficient to prove that a juvenile appellant committed criminal trespass since, even though there was no direct evidence that the appellant was at the crime scene, the appellant was with three other juveniles when the others were seen driving and riding in vehicles that were later discovered to have been stolen from a repair shop storage facility, since a witness testified that the vehicles exited a driveway near the shop shortly before one of the of the vehicles broke down, that the vehicle broke down a few hundred feet from the shop, and that the second vehicle circled back, since the juveniles gave conflicting stories about the owner of the broken down vehicle, and since the key to the second vehicle was found in the appellant's pocket; the juvenile court could have inferred from the location of the broken down vehicle that both vehicles had just been taken from the shop by the four juveniles. In the Interest of R.F., 279 Ga. App. 708, 632 S.E.2d 452 (2006).

An adjudication on a charge of criminal trespass was not reversed on appeal, despite a claim that the evidence adduced at trial varied from the facts alleged in the

Evidence and Corroboration (Cont'd)

delinquency petition, because the undisputed evidence showed that the juvenile came onto school property after having been advised against doing so, and the juvenile failed to show that the variance between the petition and the proof was misleading, led to surprise, impaired a defense, or would have resulted in a double jeopardy violation. In the Interest of R.C., 289 Ga. App. 293, 656 S.E.2d 914 (2008).

There was sufficient evidence to support a defendant's convictions for false imprisonment, simple assault, and criminal trespass with regard to actions the defendant took toward the victim, who was a prior romantic friend, as the evidence established that the defendant went to the victim's home uninvited and entered the home; as the victim exited the bathroom, the defendant was standing in the hallway in front of the victim; alarmed, the victim attempted to flee into an adjacent room at which time the victim and the defendant struggled as the defendant attempted to prevent the victim from passing the defendant; once in the adjacent room, the defendant took the telephone from the victim as the victim tried to call 9-1-1; and the victim ultimately pushed out the screen and successfully exited the residence through an open window despite the defendant's attempt to pull the victim back inside. Port v. State, 295 Ga. App. 109, 671 S.E.2d 200 (2008).

Evidence that the defendant, despite the victim's insistence that the defendant not do so, drove to the victim's house, knocked over the victim's mailbox, kicked in the glass panes of the victim's door, and refused to leave the premises was sufficient to convict the defendant of criminal trespass in violation of O.C.G.A. § 16-7-21(a). Bradley v. State, 298 Ga. App. 384, 680 S.E.2d 489 (2009).

Evidence was sufficient to convict the defendant of criminal trespass and theft by taking because the defendant was found at a recycling facility trying to sell pieces of the victim's aluminum awning, which the defendant had previously been told was not trash, but belonged to a laundry establishment. Jackson v. State, 301 Ga. App. 863, 690 S.E.2d 195 (2010).

Because there was evidence to support each fact necessary to make out the state's case, the jury was authorized to find that the defendant was guilty beyond a reasonable doubt of family violence battery, O.C.G.A. § 16-5-23.1, criminal trespass, O.C.G.A. § 16-7-21, and abuse of an elder person, O.C.G.A. § 30-5-8; the victim's recollection of what occurred on the night at issue was contradicted by the victim's contemporaneous statements to neighbors and the police, as well as the victim's statements to the daughter the next morning that the defendant had grabbed the victim by the arm and twisted the arm, thereby causing the wound and other bruises. Laster v. State, 311 Ga. App. 360, 715 S.E.2d 768 (2011).

Evidence that a defendant possessed a cell phone, a debit card, and women's jewelry, all of which had been stolen a day earlier, while the defendant attempted to climb into a stranger's home, along with evidence that the defendant attempted to flee when caught climbing in the window, was sufficient to support convictions for criminal trespass and felony theft by receiving stolen property in violation of O.C.G.A. §§ 16-7-21(b)(1) and 16-8-7(a). Reese v. State, 313 Ga. App. 746, 722 S.E.2d 441 (2012).

Evidence was sufficient to support defendant's criminal trespass conviction when the victim testified that the defendant snapped the victim's cell phone in half, rendering the cell phone inoperable, and that the cell phone was worth less than $500. Although there was no evidence of the specific monetary amount of damage done to the cell phone, the jurors were authorized to draw from the jurors' own experience in forming an estimate of the damage to the cell phone, which was an everyday object. Feagin v. State, 317 Ga. App. 543, 731 S.E.2d 778 (2012).

Evidence that the victim's daughter saw the defendant back a truck onto the victim's property, the defendant fled in the truck and abandoned it, and the defendant's explanation that the truck had broken down was inconsistent with the tire tracks on the victim's property, as well as witness testimony was sufficient to support the defendant's conviction for criminal trespass. Dowda v. State, 341 Ga. App. 295, 799 S.E.2d 807 (2017).

Although the evidence was insufficient to convict the defendant of second-degree damage to property, the evidence was sufficient to convict the defendant of criminal trespass to property as there was clear evidence that the defendant intentionally damaged the property of another without consent of that other person and the damage to the property was $500 or less because the property owner testified to the extent of the damage to the air-conditioning units, and the jury viewed a surveillance video of the defendant inflicting such damage. Wynn v. State, 344 Ga. App. 554, No. A17A1389, 2018 Ga. App. LEXIS 66 (2018).

Evidence insufficient. — Victim's statement to defendant, made when they were living in the marital residence, that he did not want to see her again was not sufficient notice to support a conviction of criminal trespass based on defendant's knocking on the victim's door at a different residence nearly three years later. Wood v. State, 227 Ga. App. 677, 490 S.E.2d 179 (1997).

Defendant's convictions for terroristic acts, aggressive driving, and criminal trespass were reversed on appeal since the only evidence identifying the defendant as the perpetrator of a roadway situation wherein the victim was tailgated and an object was thrown at the victim's car, causing a dent, was a police officer's hearsay testimony that the officer spoke to the defendant's mother, who indicated that the defendant had not been home, and the hearsay statement of the defendant admitting to the tailgating and honking; this evidence was inadmissible hearsay and therefore, relying on the remaining evidence, insufficient evidence existed to support the defendant's convictions. Patterson v. State, 287 Ga. App. 100, 650 S.E.2d 770 (2007).

Included Crimes

Unlawful assembly for the purpose of committing criminal trespass is included in the crime of criminal trespass. Kerr v. State, 193 Ga. App. 165, 387 S.E.2d 355, cert. denied, 193 Ga. App. 910, 387 S.E.2d 355 (1989).

Merger with or inclusion within burglary. — When the intent to steal was proved, the crime of criminal trespass then merged with or was included within former Code 1933, § 26-1601. Williamson v. State, 134 Ga. App. 583, 215 S.E.2d 518 (1975); Deese v. State, 137 Ga. App. 476, 224 S.E.2d 124 (1976); Varnes v. State, 159 Ga. App. 452, 283 S.E.2d 673 (1981); Poole v. State, 205 Ga. App. 652, 423 S.E.2d 52 (1992); Vaughan v. State, 210 Ga. App. 381, 436 S.E.2d 19 (1993).

Defendant could properly be sentenced to serve consecutive terms on defendant's convictions of criminal damage to property in the second degree and criminal trespass, where the latter crime had been charged as the lesser offense of burglary. Williams v. State, 180 Ga. App. 854, 350 S.E.2d 837 (1986), cert. denied, 198 Ga. App. 899, 400 S.E.2d 709 (1991).

When the defendant was convicted of burglary, but the evidence also could have supported a conviction of criminal trespass, the trial court erred in denying the defendant's request to charge on the lesser offense. Echols v. State, 222 Ga. App. 598, 474 S.E.2d 766 (1996).

Trial court must give a requested charge on criminal trespass as a lesser included offense of burglary where the testimony of the accused, if believed, would negate an element of the crime of burglary, i.e., entry with intent to commit a felony or theft. Hiley v. State, 245 Ga. App. 900, 539 S.E.2d 530 (2000).

Defendant did not meet the defendant's burden to show through the record that the trial court did not consider criminal trespass under O.C.G.A. § 16-7-21(b) as a lesser included offense of burglary under O.C.G.A. § 16-7-1 in light of the fact that both the defendant and defense counsel put forth the theory of criminal trespass, and the trial court explicitly stated that the court believed the victim's testimony over that of defendant. Joyner v. State, 267 Ga. App. 309, 599 S.E.2d 286 (2004).

Under the facts, the trial court should have merged the defendant's criminal trespass conviction into the burglary conviction prior to sentencing because the offenses were based upon the same act; the evidence showed that the defendant only entered an apartment one time. Hawkins v. State, 302 Ga. App. 84, 690 S.E.2d 440 (2010).

Included Crimes (Cont'd)

Rule of lenity did not apply. — Trial court did not err in not applying the rule of lenity with regard to the defendant's conviction for criminal attempt to commit burglary because the crimes of criminal trespass and criminal attempt to commit a burglary did not address the same criminal conduct and there was no ambiguity created by different punishments being set forth for the same crime, thus, the rule of lenity did not apply. Snow v. State, 318 Ga. App. 131, 733 S.E.2d 428 (2012).

Not included offense of aggravated assault. — Criminal trespass is not a lesser included offense of aggravated assault as a matter of law, and, since the indictment for aggravated assault alleged that the defendant committed an assault by shooting a deadly weapon "at, toward, and in the direction of" the victim, the state was not required to prove that the defendant interfered with the victim's property, and criminal trespass was not an included offense as a matter of fact. Robinson v. State, 217 Ga. App. 832, 459 S.E.2d 588 (1995).

Included offense of second degree criminal damage to property. — Trial court did not err in instructing the jury on criminal trespass after granting a directed verdict of acquittal on a charge of second degree criminal damage to property because criminal trespass is a lesser included offense of the latter crime. Jennings v. State, 226 Ga. App. 461, 486 S.E.2d 693 (1997).

Defendant, who shot and damaged three out-of-service power transformers and was convicted of second degree criminal damage to property, was entitled to jury charge on criminal trespass, a lesser included offense, because the state failed to prove that the value of the transformers was over $500. Waldrop v. State, 231 Ga. App. 164, 498 S.E.2d 337 (1998).

Because it was undisputed that the victim failed to testify regarding the value of the damage to the subject property, an adjudication for the offense of second-degree criminal damage to property entered against a juvenile was vacated; however, given evidence that the juvenile intentionally damaged the property of another without consent, and the damage was $500 or less, an adjudication could be entered on a charge of criminal trespass, which did not violate the juvenile's due process right to be notified of the charges. In the Interest of J.T., 285 Ga. App. 465, 646 S.E.2d 523 (2007).

Although the state failed to provide any evidence regarding the value of a broken window and, thus, a juvenile court erred in finding that a juvenile committed criminal damage to property in the second degree, the juvenile court did not err in finding that the juvenile participated in the act of breaking the victim's window in an attempt to burglarize the house; thus, the evidence was sufficient to support an adjudication of delinquency for committing an act which would support a conviction for the offense of criminal trespass to property as a lesser included offense of criminal damage to property in the second degree. The result of reducing the offense did not violate the juvenile's due process right to be notified of the charges against the juvenile since the juvenile, as a defendant, is on notice of all lesser crimes which are included in the crime charged as a matter of law. In the Interest of J. S., 296 Ga. App. 144, 673 S.E.2d 645 (2009).

Criminal damage to property. — When an adjudication of delinquency based on criminal damage to property in the second degree was vacated, remand for an adjudication of delinquency for committing an act which would support a conviction for the offense of criminal trespass to property where the defendant was charged as an adult was appropriate, since this is a lesser offense included within criminal damage to property in the second degree. In re A.F., 236 Ga. App. 60, 510 S.E.2d 910 (1999).

Jury Charges

Failure to charge criminal trespass. — It is not error to fail to charge the lesser included offense of criminal trespass within the offense of attempt to commit burglary where it is not requested and where there is no evidence as to the amount of damage done, and whether it was more or less than $100.00 for which reason no conviction could stand under former Code 1933, § 26-1503 (see

O.C.G.A. § 16-7-21(a)), and there is no evidence of entry, for which reason the defendant must no less have been acquitted under former Code 1933, § 26-1503 (see O.C.G.A. § 16-7-21(b)(1)). Fullewellen v. State, 127 Ga. App. 568, 194 S.E.2d 275 (1972).

When an accused is charged with theft by taking, the judge is not required to charge a jury on criminal trespass, a lesser offense, in the absence of a specific request by defense counsel. Martin v. State, 143 Ga. App. 875, 240 S.E.2d 231 (1977).

Trial court did not err in refusing to give the defendant's criminal trespass jury instruction as no competent evidence showed that the defendant's daughters told the police officers to leave the daughter's residence and the officers had a right to remain long enough to arrest the defendant and the defendant's daughter after a scuffle broke out and the defendant pushed the officers. Poe v. State, 254 Ga. App. 767, 563 S.E.2d 904 (2002).

Trial court did not err when the court declined to give the defendant's written instruction on criminal trespass as a lesser included offense of criminal attempt to commit burglary as the evidence did not support giving the requested instruction and the instruction was not an accurate statement of the law. Snipes v. State, 257 Ga. App. 713, 572 S.E.2d 62 (2002).

Based on testimony that the defendant entered a business for a lawful purpose, and the state showed that the defendant entered the building with the intent to commit theft, no evidence was presented that the defendant entered the premises for any other unlawful purpose; hence, the defendant was not entitled to a jury instruction of criminal trespass under O.C.G.A. § 16-7-21(b)(1) as a lesser included offense of burglary. Moore v. State, 280 Ga. App. 894, 635 S.E.2d 253 (2006).

When the defendant was charged with burglary but denied entering the premises, it was not error to refuse to instruct on the lesser included offense of criminal trespass; trespass instructions were not appropriate when the defendant denied entering the burglarized premises. Adams v. State, 284 Ga. App. 534, 644 S.E.2d 426 (2007).

Trial court erred in convicting the defendants of burglary in violation of O.C.G.A. § 16-7-1(a) for entering property with intent to take electrical wiring and copper piping because the trial court should have charged the jury on the lesser included offense of criminal trespass, O.C.G.A. § 16-7-21(b)(1), when the jury could have concluded that the defendants were guilty of criminal trespass since the jury could have found that the defendants entered a house with the intent to loiter there; the defendants were on the property without permission, one of the defendants stated that the defendants were not there to steal anything but rather to "look around," and the defendants thought the house was about to be bulldozed, police officers did not find any tools in the building or in the immediate possession of either of the defendants, and the defendants were not found in immediate possession of any purported stolen items. Waldrop v. State, 300 Ga. App. 281, 684 S.E.2d 417 (2009).

Trial court's error in failing to charge the jury on the lesser included offense of criminal trespass, O.C.G.A. § 16-7-21(b)(1), in the defendants' trial for burglary in violation of O.C.G.A. § 16-7-1(a) was not harmless because there was evidence that a home had been burglarized previously, and there was very little evidence linking the damage in the house to the defendants. Waldrop v. State, 300 Ga. App. 281, 684 S.E.2d 417 (2009).

Because the evidence was sufficient to convict the defendant of entering a motor vehicle with intent to commit theft since: (1) the victim found the defendant going through a box of personal items in the victim's truck, and (2) when the victim questioned the defendant, the defendant fled and barricaded up in a nearby gas station bathroom, the defendant was not entitled to a lesser included offense charge of criminal trespass; the defendant did not tailor the instruction to the applicable portion of the statute, and, in any event, a criminal trespass charge was not warranted since the evidence showed that the defendant entered the truck with the intent to commit theft. Woods v. State, 302 Ga. App. 891, 691 S.E.2d 913 (2010).

Jury Charges (Cont'd)

Defendant was not entitled to an instruction on criminal trespass as a lesser included offense of burglary because, if the jury believed the state's evidence, the defendant was guilty of burglary and if the jury accepted the defendant's defense to the crime, the defendant was guilty of no offense. Stillwell v. State, 329 Ga. App. 108, 764 S.E.2d 419 (2014).

Trial court did not commit plain error by failing to charge the jury on criminal trespass as a lesser included offense of burglary because the defendant did not testify at trial or present any other evidence negating any element of the crime of burglary; the state presented evidence from which the jury could infer an intent to steal; and there was no evidence that the defendant was merely seeking shelter from the cold when the defendant tried to break into the area of the victims' house containing valuables. Daniel v. State, 338 Ga. App. 389, 787 S.E.2d 281 (2016).

Failure to request instruction on specific type of burglary. — Because the defendant did not submit a written request to charge the jury on the specific method of criminal trespass intended under O.C.G.A. § 16-7-21(a), (b)(1), (b)(3), and because the evidence defendant sought to introduce without the state's motion in limine was admitted at trial through testimony of other witnesses, the defendant's burglary conviction was upheld. Herbert v. State, 298 Ga. App. 826, 681 S.E.2d 245 (2009).

Charge inconsistent with evidence. — When in prosecution for burglary the defendant steadfastly maintained that the defendant had neither entered nor had even been near the building where the burglary took place, having denied being there, the defendant was not entitled to a charge to the effect that if the jury disbelieved the defendant the jury could still come back with a verdict of guilty on the lesser offense of criminal trespass. Johnson v. State, 164 Ga. App. 429, 296 S.E.2d 775 (1982).

Defendant's trial counsel was not ineffective for failing to request a jury charge on criminal trespass as a lesser included offense of burglary since such a charge would not have been warranted by the evidence, which showed that the defendant harbored either the unlawful purpose of committing theft or the lawful purpose of going back to sleep in a friend's house. Dillard v. State, 323 Ga. App. 333, 744 S.E.2d 863 (2013).

Charge on circumstantial evidence unwarranted. — While the prosecution against the defendant on charges of burglary, theft by taking, and criminal trespass included both direct and circumstantial evidence, convictions on those charges were not reversed merely because the trial court failed to charge former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6) as the defendant failed to request that charge. Rodriguez v. State, 283 Ga. App. 752, 642 S.E.2d 705 (2007).

Charge supported by evidence. — In an action for criminal trespass, the trial court did not err by charging the jury on the custody of children who have not been legitimated because whether the defendant was authorized to enter the premises based on a legal right the defendant had to the proprietor's child was raised by the evidence, the charge given was a correct principle of law, and the charge was not likely to confuse the jury regarding the defendant's guilt or innocence of criminal trespass. Hudson v. State, 321 Ga. App. 702, 742 S.E.2d 516 (2013).

Justification defense charge not warranted. — With regard to the defendant's convictions for criminal trespass, simple assault, and battery, the trial court did not err in failing to give jury charges on the affirmative defense of justification because the evidence was insufficient to support such a defense as the defendant admitted that in the time it took the defendant to rip an air conditioning unit from the window and break in, the allegedly pursuing assailants had stopped chasing the defendant and had gone home. Miller v. State, 335 Ga. App. 58, 778 S.E.2d 424 (2015).

Application

Entering parking facility without payment or permission. — Person who knowingly and without authority enters a parking facility without payment of the required parking fee or the owner's per-

mission may commit criminal trespass. Reinertsen v. Porter, 242 Ga. 624, 250 S.E.2d 475 (1978).

Delinquency based on criminal trespass. — Testimony of owner of house at which the defendant was accused of throwing eggs that some damage had been done was sufficient evidence of damage to support adjudication of delinquency based on a charge of criminal trespass. B.L. v. State, 156 Ga. App. 14, 274 S.E.2d 67 (1980).

In a juvenile delinquency case, even though the state conceded that the state failed to establish venue, a defendant juvenile could be retried on a trespass allegation because the defendant did not challenge the juvenile court's trespass finding, and the evidence showed that the defendant entered school property without permission after receiving notice to stay away in violation of O.C.G.A. § 16-7-21(b)(2). In the Interest of M.S., 292 Ga. App. 127, 664 S.E.2d 240 (2008).

Lawful entry by licensed bondsmen. — Licensed bondsmen could not be found guilty of criminal trespass where they entered the complainant's home so as to execute a pickup order and arrest warrant for the complainant's daughter and thus had a lawful purpose for entering complainant's home. Mease v. State, 165 Ga. App. 746, 302 S.E.2d 429 (1983).

Possibility that a damaged fence infringed upon city's sidewalk right-of-way did not entitle defendant to take the law into defendant's own hands and step on the fence, rather than reporting the problem fence to the appropriate regulatory division of the city. Williams v. State, 181 Ga. App. 902, 354 S.E.2d 184, cert. denied, 484 U.S. 803, 108 S. Ct. 47, 98 L. Ed. 2d 12 (1987).

When a protester maintained an around-the-clock vigil on the portico of a federal office building, and maintained a bedroll and slept on the premises, the protestor's continued use of the property as a residence, after receiving notice to leave, was unlawful and constituted a trespass under Georgia law. United States v. Gilbert, 720 F. Supp. 1554 (N.D. Ga. 1989), modified on other grounds, 920 F.2d 878 (11th Cir. 1991).

Warrantless arrest legal. — After the defendant was arrested by an off-duty police officer working as a security guard in whose presence the defendant appeared to have committed the offense of criminal trespass, the warrantless arrest was legal. Amason v. Kroger Co., 204 Ga. App. 695, 420 S.E.2d 314 (1992).

Two dents in door of operable motor vehicle sufficient. — Under the doctrine of transferred intent, the jury could have found that the defendant had the requisite criminal intent to commit the crime of criminal trespass to property when the defendant unintentionally struck the vehicle with the knife the defendant intentionally threw at a former lover. Furthermore, jurors may draw from the jurors' own experience in forming estimates of damage to everyday objects and two dents in the door of an operable vehicle had monetary value. Burrell v. State, 293 Ga. App. 540, 667 S.E.2d 394 (2008).

Evidence of damage to victim's door. — There was evidence that a defendant "busted down" the door to the victim's apartment and that the chain lock on the door was broken. Because the chain lock was an everyday object, and the victim's testimony authorized the jury to estimate the amount of damage done to the lock, sufficient evidence existed for the jurors to determine the door was damaged and to draw on the jurors' own experiences to decide the amount of damage to the front door in rendering the jury's verdict that the defendant was guilty of criminal trespass. Pierce v. State, 301 Ga. App. 167, 687 S.E.2d 185 (2009), cert. denied, No. S10C0549, 2010 Ga. LEXIS 244 (Ga. 2010).

Reasonable suspicion to conduct investigatory stop. — Because law enforcement officers were given permission to enter a landowner's land in order to investigate the presence of possible trespassers for engaging in other illegal activity on that property, and found the defendant and a cohort, the officers gained a reasonable and articulable suspicion that the two individuals were involved in some form of criminal activity, the very least of which was criminal trespass, and therefore had the authority to detain the individuals in a brief investigative stop. Burgess v. State, 290 Ga. App. 24, 658 S.E.2d 809 (2008).

Application (Cont'd)

Officer arresting restaurant invitee. — Summary judgment was properly granted to a police officer on a restaurant invitee's false imprisonment claim under O.C.G.A. § 51-7-20. The officer, who was told by the restaurant manager that the invitee refused an order to leave the premises, had probable cause to arrest the invitee without a warrant for criminal trespass under O.C.G.A. § 16-7-21. Kline v. KDB, Inc., 295 Ga. App. 789, 673 S.E.2d 516 (2009).

Warrantless arrest of hotel guest proper. — Exigent circumstances authorized an officer's warrantless arrest of a hotel guest for criminal trespass because the offense was committed in the officer's presence when the guest refused the officer's request to leave the hotel. Thus, the guest's false imprisonment claim against the hotel was properly dismissed on summary judgment. Lewis v. Ritz Carlton Hotel Co., LLC, 310 Ga. App. 58, 712 S.E.2d 91 (2011).

Probable cause to arrest hotel guest. — As a police officer, acting with the authority and direction of a hotel, notified a guest to depart the hotel due to the guest's unruly behavior, but the guest did not depart, the officer had probable cause to arrest the guest for criminal trespass. Therefore, the guest's false imprisonment claim against the hotel was properly dismissed on summary judgment. Lewis v. Ritz Carlton Hotel Co., LLC, 310 Ga. App. 58, 712 S.E.2d 91 (2011).

Probable cause for arrest following accident. — Even assuming that the plaintiff was arrested rather than detained when the plaintiff was placed in the backseat of a patrol car at the scene of an accident, the officer was entitled to qualified immunity as the plaintiff failed to set forth a claim that the plaintiff's clearly established Fourth Amendment rights were violated. Even if the officer was mistaken, the officer was entitled to rely on a victim's allegations at the scene of the accident and, thus, the officer had reason to believe that the plaintiff damaged the property of another person without consent in violation of Georgia law; further, because the warrantless arrest was supported by at least arguable probable cause, the officer was entitled to search the plaintiff incident to that arrest. Moreno v. Turner, 572 Fed. Appx. 852 (11th Cir. July 22, 2014) (Unpublished).

Value of property. — Conviction for damage to property in the second degree was vacated and one for criminal trespass to property entered as the opinion of the victim's network manager that the victim incurred $1,929 in labor expenses for repairs to cut telephone wire was not competent evidence as it was not based on personal knowledge and the only competent evidence showed $384 was spent to replace materials. Clement v. State, 324 Ga. App. 39, 749 S.E.2d 41 (2013).

Evidence sufficient to support delinquency. — There was sufficient evidence to support an adjudication of delinquency based on criminal trespass. Although the defendant, a juvenile, argued that the defendant did not intentionally damage a kitchen wall, but accidentally kicked a hole in the wall while trying to kill a roach, the trial court was not required to accept this explanation. In the Interest of B.B., 298 Ga. App. 432, 680 S.E.2d 497 (2009).

While the evidence was insufficient under O.C.G.A. § 16-7-23(a)(1) to conclude that a juvenile damaged property at a mobile home park in excess of $500, the evidence was sufficient to support a conviction for criminal trespass to property under O.C.G.A. § 16-7-21(a) as a lesser-included offense of second-degree criminal damage to property. In re A. C. R-M, 311 Ga. App. 848, 717 S.E.2d 344 (2011).

Evidence sufficient for conviction of trespassing on school grounds. — As it was undisputed that the defendant was on school property despite previously having been banned, and there was no testimony that the defendant received written authorization to be present on the property, the evidence was sufficient to support a criminal trespass conviction. Isenhower v. State, 324 Ga. App. 380, 750 S.E.2d 703 (2013).

Evidence sufficient for conviction. — See Johnson v. State, 172 Ga. App. 333, 323 S.E.2d 255 (1984); Kerr v. State, 193

Ga. App. 165, 387 S.E.2d 355 (1989); Hope v. State, 193 Ga. App. 202, 387 S.E.2d 414 (1989); Daniel v. State, 260 Ga. 555, 397 S.E.2d 286 (1990); Moore v. State, 197 Ga. App. 9, 397 S.E.2d 477 (1990); Kesler v. State, 215 Ga. App. 553, 451 S.E.2d 496 (1994). But see Hanifa v. State, 269 Ga. 797, 505 S.E.2d 731 (1998); McCrosky v. State, 223 Ga. App. 537, 478 S.E.2d 586 (1996); Reid v. State, 224 Ga. App. 524, 481 S.E.2d 259 (1997); Smith v. State, 226 Ga. App. 150, 485 S.E.2d 538 (1997); Thomas v. State, 227 Ga. App. 469, 489 S.E.2d 561 (1997); Carter v. State, 231 Ga. App. 42, 497 S.E.2d 812 (1998), but see Ga. 350 (2013); Bain v. State, 239 Ga. App. 696, 521 S.E.2d 832 (1999); Cox v. State, 243 Ga. App. 582, 532 S.E.2d 697 (2000); Barnett v. State, 244 Ga. App. 585, 536 S.E.2d 263 (2000); Kier v. State, 247 Ga. App. 431, 543 S.E.2d 801 (2000).

Defendant contended that, since the complaining witness lived in an apartment with common entrance ways, halls, etc., the evidence did not show that the defendant was on the premises of another from which the defendant was required to leave. However, the witness stated that the defendant was on the witness's property when the witness made repeated requests for the defendant to leave. The evidence was sufficient for a rational trier of fact to find the defendant guilty of criminal trespass beyond a reasonable doubt. Strozier v. State, 187 Ga. App. 16, 369 S.E.2d 504 (1988).

Defendant's conviction for trespassing at a dentist's office was affirmed, even though defendant had been given an appointment by the receptionist, where there had been repeated and unequivocal notices to defendant that defendant should stay away from any premises occupied by the dentist. Stockwell v. State, 198 Ga. App. 206, 400 S.E.2d 709 (1990).

Once a disgruntled customer refused to leave the shoe store's premises after being told to go by the owner, and after being informed by a police officer in the officer's official capacity of possible criminal charges if the customer did not comply with the owner's request to leave, the customer became a criminal trespasser. Rembert v. Arthur Schneider Sales, Inc., 208 Ga. App. 903, 432 S.E.2d 809 (1993).

Evidence of a marked survey and history of a property line dispute between defendant and defendant's neighbor authorized finding that defendant knowingly ignored the property line when defendant sheared neighbor's hedge. Haygood v. State, 225 Ga. App. 81, 483 S.E.2d 302 (1997).

When the defendant had been warned that the defendant could not enter university property for the purpose of sleeping after a prior incident in which the defendant activated an alarm in the university library after falling asleep and finding that the defendant was locked in late one night, the defendant was properly convicted of criminal trespass after the defendant was found asleep on a couch in the student center around midnight. Hammond v. State, 237 Ga. App. 238, 515 S.E.2d 183 (1999).

Trial court's admission of recall evidence that defendant threatened a witness, a neighbor of the victims, when the defendant was leaving the stand was not error; even if the admission of the recall testimony was in error, it was harmless as the evidence was overwhelming to support a conviction for child molestation, burglary, and criminal trespass since: (1) two victims and one mother of a victim, all with a sufficient opportunity to observe the defendant, identified the defendant in a pre-trial photographic lineup and at trial; (2) the neighbor also identified the defendant; (3) a victim and the neighbor knew the defendant by first name preceding the incident; (4) a victim and the neighbor noticed the defendant wearing the clothes discovered in a victim's home the night of the incident; and (5) the state presented evidence that the defendant had committed similar acts previously. Rubi v. State, 258 Ga. App. 815, 575 S.E.2d 719 (2002).

State's evidence was sufficient to find the juvenile defendant committed criminal trespass, obstructed a police officer, and interfered with government property, and the juvenile court properly adjudicated the juvenile delinquent; the juvenile threw an egg at an officer's car damaging a plastic strip on the car window, broke at least two windows in the police substation, and obstructed an officer by fleeing

Application (Cont'd)

after the officer was identified and ordered the defendant to stop. In the Interest of M.M., 265 Ga. App. 381, 593 S.E.2d 919 (2004).

Evidence supported a criminal trespass conviction as there was videotaped evidence of defendant driving over the top of a mail box and destroying it during a high speed flight from law enforcement officers. McCullough v. State, 268 Ga. App. 445, 602 S.E.2d 181 (2004).

When the defendant, according to the defendant's love interest, drove a stolen vehicle onto the victim's property through a locked gate, parked near a building where objects were stolen, and got into the vehicle and drove away, and the owner testified that the owner had not given the defendant permission to take the objects that were stolen, there was sufficient evidence to convict the defendant of criminal trespass in violation of O.C.G.A. § 16-7-21(a), burglary in violation of O.C.G.A. § 16-7-1(a), and theft by taking in violation of O.C.G.A. § 16-8-2. Sexton v. State, 268 Ga. App. 736, 603 S.E.2d 66 (2004).

Evidence supported defendant's rape, aggravated sodomy, aggravated assault, criminal trespass, misdemeanor obstruction of a law enforcement officer, felony obstruction of a law enforcement officer, and possession of marijuana conviction because: (1) a victim testified that defendant choked the victim, slammed the victim around a room, and raped and sodomized the victim, then drank a beer, took the victim's BC powder packets, and a cell phone, and left; (2) defendant fled from the police, kicked two officers, and had marijuana, BC packets, and a cell phone on the defendant's person; (3) defendant's DNA matched the DNA on the beer can; (4) a nurse testified that the victim's bruise was consistent with strangulation; and (5) a doctor testified that the victim's injuries were consistent with rape and sodomy. Lewis v. State, 271 Ga. App. 744, 611 S.E.2d 80 (2005).

Sufficient evidence supported convictions of aggravated assault, criminal trespass, and obstruction of a 9-1-1 call as the defendant became irate after a demand for a refund was denied by a store, a store manager told the defendant to leave, but the defendant refused, when the manager picked up the phone to call 9-1-1, the defendant grabbed the phone and slammed it on the counter, the defendant pushed the bag of brass plates the defendant was trying to return in the manager's face, cutting the manager, and punched the manager in the face. Hooker v. State, 278 Ga. App. 382, 629 S.E.2d 74 (2006).

Because the defendant, accused of committing acts which disabled two cars, testified that the defendant's spouse's parent gave both cars to the spouse and that both were registered in the spouse's name, and there was no evidence that either car belonged exclusively to the defendant, the victim had interests in each car, so the defendant's two convictions for criminal trespass were supported by the evidence. Jones v. State, 278 Ga. App. 616, 629 S.E.2d 546 (2006).

There was sufficient evidence supporting the defendant's convictions of armed robbery, burglary, possession of a firearm during the commission of a felony, and criminal trespass; the evidence included a custodial statement in which the defendant admitted participating in the crimes and testimony by a witness as to the preparations for the robbery, the clothing worn by the defendant and by the accomplice, and the defendant's disposal of a gun. Medlin v. State, 285 Ga. App. 709, 647 S.E.2d 392 (2007).

Sufficient evidence supported convictions of aggravated assault, aggravated assault on a peace officer, obstruction of a law enforcement officer, interference with government property, and criminal trespass after the defendant admitted obstructing officers and damaging a patrol car and the victim's vehicle; although the defendant denied assaulting the victim and responding officer, the jury was authorized to reject the defendant's testimony in favor of the victim's and officer's testimony. Gartrell v. State, 291 Ga. App. 21, 660 S.E.2d 886 (2008).

Evidence that the victim told the defendant that the defendant had no business coming to the victim's property and that an officer told the defendant not to go onto

the victim's property was sufficient to support the conviction for criminal trespass. Austin v. State, 335 Ga. App. 521, 782 S.E.2d 308 (2016).

Evidence insufficient for conviction. — Defendant's criminal trespass conviction was reversed since the evidence did not support allegations that the defendant entered another person's premises for the unlawful purpose of driving metal spikes into a private roadway. Feagin v. State, 198 Ga. App. 460, 402 S.E.2d 80 (1991).

Since there was no evidence of a continuing trespass, and since a housing authority had an adequate remedy at law, summary judgment granting an injunction barring entry on the housing authority's property by a husband and wife was reversed. Strange v. Hous. Auth. of Summerville, 268 Ga. App. 403, 602 S.E.2d 185 (2004).

Despite the fact that the evidence presented at trial sufficiently proved a violation of O.C.G.A. § 16-7-21(b)(2), the defendant's criminal trespass conviction, based on a charge alleged in the accusation of violating § 16-7-21(b)(3), could not be upheld on appeal because the evidence presented at trial failed to support that conviction. Roach v. State, 289 Ga. App. 23, 656 S.E.2d 165 (2007).

Because the state's evidence presented in support of a criminal trespass charge failed to show that the defendant entered the subject premises after entry was expressly forbidden by the owner, the rightful occupant, or authorized representative of either the owner or occupant, insufficient evidence supported a criminal trespass conviction. Osborne v. State, 290 Ga. App. 188, 665 S.E.2d 1 (2008).

Because all the evidence was circumstantial as a defendant was not seen removing anything from the alleged victim's barn, the defendant's conviction for criminal trespass under O.C.G.A. § 16-7-21 was inappropriate pursuant to former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6) because, although the defendant was on the victim's property without permission, it was not proven that the defendant was there for a criminal purpose as the evidence indicated that the defendant was at the barn to drop off a saw that the defendant wanted to sell to the victim. Parker v. State, 297 Ga. App. 384, 677 S.E.2d 345 (2009).

Excessive penalty imposed. — Imposition of the maximum misdemeanor punishment upon conviction for criminal trespass exceeded constitutional bounds against cruel and unusual punishment where the trespass involved defendant's trimming of a neighbor's hedge. Haygood v. State, 225 Ga. App. 81, 483 S.E.2d 302 (1997).

Excessive sentence not imposed. — Sentence of six months imprisonment and six months probation for trespass at a university was not cruel and unusual punishment since the defendant had a prior conviction for trespassing at the university and an ordinance violation for picketing at the university. McCrosky v. State, 234 Ga. App. 321, 506 S.E.2d 400 (1998).

Rule of lenity inapplicable. — With regard to defendant's conviction for criminal attempt to commit burglary in the first degree, the trial court did not err in not applying the rule of lenity because the crimes of criminal trespass and criminal attempt to commit a burglary do not address the same criminal conduct and there was no ambiguity created by different punishments being set forth for the same crime, thus, the rule of lenity did not apply. Snow v. State, 318 Ga. App. 131, 733 S.E.2d 428 (2012).

Mistrial properly denied despite allegation that the defendant's character was put in evidence, given the overwhelming evidence of guilt, and the fact that the defendant's counsel declined to offer a curative instruction regarding the witness's statement; moreover, given the nature of the character statement, such was non-responsive to the state's questioning and unintentional. Ivey v. State, 284 Ga. App. 232, 644 S.E.2d 169 (2007).

Theater patron pursuing civil remedies against officer. — Because after speaking with defendant first theater security officer, defendant second security officer reasonably believed the first officer had banned the plaintiff arrestee from the theater, the second officer had probable cause to believe that the arrestee, by returning to the theater, had committed criminal trespass under O.C.G.A.

Application (Cont'd)

§ 16-7-21, and the arrestee's false arrest and First Amendment claims properly failed on summary judgment; the fact that the conviction was later reversed because the first officer lacked authority from the theater's owner, rightful occupant, or an authorized representative of the owner or rightful occupant as required by § 16-7-21(b)(2) to ban the arrestee from the theater did not affect the analysis since probable cause did not require the same type of specific evidence of each element of the offense as needed for a conviction. Osborne v. Am. Multi Cinema, Inc., No. 08-16802; No. 09-10500, 2009 U.S. App. LEXIS 22152 (11th Cir. Oct. 8, 2009) (Unpublished).

Failure to obey request to leave jail premises insufficient for arrest. — No reasonable officer in the same circumstances and possessing the deputy's knowledge could have believed that probable cause existed to arrest the plaintiff for criminal trespass, when and where the plaintiff was arrested. The scope of the deputy's warning to "leave" or "get the hell out of here" issued on the sidewalk immediately outside the jail building did not extend definitely and reasonably to the entirety of the jail property over 1000 feet away or to property beyond the sidewalk and beyond the bounds of the jail parking lot; the lack of the needed explicitness of the notice to depart was not debatable. Kopperud v. Mabry, 573 Fed. Appx. 828 (11th Cir. July 28, 2014) (Unpublished).

Proof of damages for broken window. — Sufficient evidence supported the defendant's conviction for criminal trespass because the evidence showed that a window was broken in the victim's apartment and that the defendant had glass in the defendant's hair when loading the victim's furniture onto a truck; although there was no evidence of the specific monetary amount of damage done to the window, the jurors were authorized to draw from the jurors' own experience in forming an estimate of the damage to the window, which was an everyday object. Pullins v. State, 323 Ga. App. 664, 747 S.E.2d 856 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Unauthorized anchoring of boats in state park constitutes trespass punishable as misdemeanor. 1962 Op. Att'y Gen. p. 402.

Crime information center records. — Georgia Crime Information Center is authorized to maintain records of reported crime and, in some instances, to record information identifying persons charged with the commission of crime; however, the center is not authorized to maintain records identifying persons charged with disorderly conduct except when the charge is directly connected with or directly related to certain statutory offenses, including criminal trespass. 1976 Op. Att'y Gen. No. 76-33.

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Mischief, § 1 et seq. 75 Am. Jur. 2d, Trespass, §§ 70, 72 et seq.

C.J.S. — 87 C.J.S., Trespass, § 154 et seq.

ALR. — Criminal offense of forcible detainer or trespass, where entry was peaceable, 49 A.L.R. 597.

Refusing admission to, or ejecting from place of amusement, 60 A.L.R. 1089.

Validity, construction, and application of statutes or ordinances penalizing one who enters or remains in dwelling after having been forbidden to do so, 146 A.L.R. 655.

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 A.L.R.3d 551.

Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 A.L.R.3d 340.

Propriety of exclusion of persons from

horseracing tracks for reasons other than color or race, 90 A.L.R.3d 1361; 64 A.L.R.5th 769.

Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned, 6 A.L.R.4th 1030.

Trespass: state prosecution for unauthorized entry or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 A.L.R.4th 773.

Entry on private lands in pursuit of wounded game as criminal trespass, 41 A.L.R.4th 805.

Validity, construction, and operation of statute or regulation forbidding, regulating, or limiting peaceful residential picketing, 113 A.L.R.5th 1.

16-7-22. Criminal damage to property in the first degree.

(a) A person commits the offense of criminal damage to property in the first degree when he:

(1) Knowingly and without authority interferes with any property in a manner so as to endanger human life; or

(2) Knowingly and without authority and by force or violence interferes with the operation of any system of public communication, public transportation, sewerage, drainage, water supply, gas, power, or other public utility service or with any constituent property thereof.

(b) A person convicted of the offense of criminal damage to property in the first degree shall be punished by imprisonment for not less than one nor more than ten years. (Code 1933, § 26-1501, enacted by Ga. L. 1968, p. 1249, § 1.)

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article, "Legal Remedies for Computer Abuse," see 21 Ga. St. B.J. 100 (1985).

JUDICIAL DECISIONS

O.C.G.A. § 16-7-22 was inapplicable to persons seeking own destruction or engaging in self-mutilation in manner which interferes with private property. Loethen v. State, 158 Ga. App. 469, 280 S.E.2d 878 (1981).

Firing a weapon into a dwelling is an act which is inherently dangerous to the lives of others. Carthern v. State, 238 Ga. App. 670, 519 S.E.2d 490 (1999), aff'd, 272 Ga. 378, 529 S.E.2d 617 (2000).

Firing a weapon onto roadways. — Person who fires gunshots into an inhabited dwelling where people are likely to be present endangers human life within the meaning of O.C.G.A. § 16-7-22; the fact that the occupants of the house are not physically present does not lessen the risk of danger to others or the recklessness of the behavior. Carthern v. State, 272 Ga. 378, 529 S.E.2d 617 (2000).

Evidence was sufficient to convict the defendant of first degree criminal damage to property as the defendant shot a gun in the direction of a five-lane road that had a steady flow of traffic, and, thus, the defendant recklessly endangered the lives of people on the road. Wilson v. State, 344 Ga. App. 285, 810 S.E.2d 303 (2018).

Scope of "human life." — Criminal damage to property in the first degree is a crime against the state involving the unauthorized interference with property in a manner that endangers human life.

O.C.G.A. § 16-7-22(a) does not expressly or impliedly qualify or limit in any way the scope of the term "human life" as used therein; therefore, defendant's claim that the endangered life must be that of the owner of the property was clearly without support and utterly without merit. Carter v. State, 212 Ga. App. 139, 441 S.E.2d 100 (1994).

Felony murder conviction supported. — Criminal damage to property in the first degree is a felonious act which is inherently dangerous or life-threatening and that felony can support a felony murder conviction. Waugh v. State, 263 Ga. 691, 437 S.E.2d 297 (1993), cert. denied, 511 U.S. 1090, 114 S. Ct. 1850, 128 L. Ed. 2d 474 (1994).

Application of transferred intent doctrine. — First-degree criminal damage to property conviction was upheld on appeal as supported by sufficient evidence based on the doctrine of transferred intent, given that the defendant could not take advantage of the wrong established by shooting at a police officer, and the intent to harm incident therein, transferred to an apartment building that was struck and damaged in the exchange of gunfire. Birt v. State, 285 Ga. App. 105, 645 S.E.2d 596 (2007).

Proper predicate for possession of a firearm during the commission of a felony. — Offense of criminal damage to property in the first degree, pursuant to O.C.G.A. § 16-7-22(a)(1), involves a person, and thus may serve as a predicate for a conviction for possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b)(1). Craft v. State, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

First and second degree criminal damage to property do not merge. — Trial court did not err in failing to merge the defendant's convictions for the criminal damage to property charges because criminal damage to property in the first degree required evidence that the defendant acted in a manner that endangered human life, whereas criminal damage to property in the second degree required evidence that the damage to property exceeded $500, neither of which was required in the other. Sullivan v. State, 331 Ga. App. 592, 771 S.E.2d 237 (2015).

Lesser included offenses. — After the defendant was convicted of felony murder based on the underlying felony of criminal damage to property in the first degree, the trial court's refusal to charge on reckless conduct and involuntary manslaughter as lesser included offenses was not error and there was no evidence to support a charge of criminal trespass as a lesser included offense. Waugh v. State, 263 Ga. 691, 437 S.E.2d 297 (1993), cert. denied, 511 U.S. 1090, 114 S. Ct. 1850, 128 L. Ed. 2d 474 (1994).

Because charges alleging aggravated assault did not amount to lesser-included offenses as a matter of fact of a charge of first-degree criminal damage to property, and the property offense was not a lesser-included offense of any aggravated assault offense, merger of the offenses was unwarranted. Louis v. State, 290 Ga. App. 106, 658 S.E.2d 897 (2008).

Kicking in front door sufficient. — Evidence that the defendant kicked in the front door of the victim's apartment with a measure of force sufficient that the life of anyone struck by the door could have been jeopardized and that the victim was struck in the head causing swelling, supported the defendant's conviction for criminal damage to property in the first degree. Taylor v. State, 344 Ga. App. 122, 809 S.E.2d 76 (2017).

Evidence properly admitted. — Trial court's admission of the victim's prior inconsistent statement to a police investigator regarding the events surrounding the first-degree criminal damage to property offense charged was proper as the prosecutor questioned the victim at considerable length regarding the statement, a tape recording of the victim's 9-1-1 call was played, and then, the prosecutor questioned the victim in detail regarding the contents of the earlier statement which the victim denied making. Gooch v. State, 289 Ga. App. 74, 656 S.E.2d 214 (2007).

Evidence sufficient to support conviction. — On appeal from the defendant's aggravated assault, possession of a firearm during the commission of a crime, and first-degree criminal damage to property convictions, the court held that the testimony provided by two of the victims

identifying the defendant as one of the perpetrators was sufficient to uphold the conviction as: (1) the testimony of a single witness was generally sufficient to establish a fact; and (2) under under former O.C.G.A. § 24-9-80 (see now O.C.G.A. § 24-6-620), the credibility of a witness was a matter to be determined by the jury under proper instructions from the court. Reid v. State, 281 Ga. App. 640, 637 S.E.2d 62 (2006).

When the facts demonstrated that the defendant threatened to burn down a restaurant and then proceeded to pour gasoline onto the restaurant's tables and carpet in front of numerous eyewitnesses, such was sufficient evidence to allow a rational jury to convict the defendant of attempt to commit arson and terroristic threats; moreover, the defendant's act of damaging the tables and carpet by pouring gasoline on them was sufficient to support a conviction of first-degree criminal damage to property. Robinson v. State, 288 Ga. App. 219, 653 S.E.2d 810 (2007).

Because criminal damage to either marital or family property partially owned by another was sufficient to establish the commission of an offense under either O.C.G.A. § 16-7-22(a)(1) or O.C.G.A. § 16-7-23(a)(1), sufficient evidence was presented by the state to support the defendant's conviction under the former, as charged. Gooch v. State, 289 Ga. App. 74, 656 S.E.2d 214 (2007).

Evidence supported the defendant's conviction for criminal damage to property in the first degree, O.C.G.A. § 16-7-22(a), as the defendant intentionally fired several shots into the victim's residence at a time when the residence was obviously inhabited; although only one bullet entered the residence, the fact that nine empty shell casings were scattered in the street outside the victim's residence showed that the defendant specifically targeted the victim's residence such that the defendant's acts were reckless, rather than negligent. Wheeler v. State, 307 Ga. App. 585, 705 S.E.2d 686 (2011), overruled on other grounds, 322 Ga. App. 811 (2013).

Evidence was insufficient to show that the juvenile was a party to first degree criminal damage to property when shots were fired into the victim's car even though the evidence was sufficient to convict the defendant of aggravated assault for shooting into the house where the owner of the car was visiting; there was no evidence to suggest that the car was likely to be occupied at the time of the shooting or that the car was positioned relative to the gunmen in such a way that bullets fired into the car could be expected to enter the house, and the fact that the car was moved before police arrived and there was no testimony about where the car had been parked at the time of the shooting or how far the car was from the house or any other buildings would require pure speculation to say that the same shots that were fired at the car were the shots that struck the house. In the Interest of M.D.L., 271 Ga. App. 738, 610 S.E.2d 687 (2005).

Cited in Leggett v. State, 132 Ga. App. 815, 209 S.E.2d 257 (1974); Simmons v. State, 138 Ga. App. 554, 227 S.E.2d 70 (1976); McCarty v. State, 157 Ga. App. 336, 277 S.E.2d 259 (1981); Kitchens v. State, 159 Ga. App. 94, 282 S.E.2d 730 (1981); Staton v. State, 165 Ga. App. 572, 302 S.E.2d 126 (1983); Williams v. State, 263 Ga. 135, 429 S.E.2d 512 (1993); Robinson v. State, 217 Ga. App. 832, 459 S.E.2d 588 (1995); Louis v. State, 230 Ga. App. 897, 497 S.E.2d 824 (1998); Price v. State, 281 Ga. App. 844, 637 S.E.2d 468 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Mischief, § 1 et seq.

C.J.S. — 54 C.J.S., Malicious or Criminal Mischief or Damage to Property, § 1 et seq. 86 C.J.S., Telecommunications, § 188.

ALR. — Interference during labor dispute with performance by common carrier or other public utility of its duties to the public as ground for injunctive relief, 149 A.L.R. 1243.

Liability of one other than electric

power or light company or its employee for interruption, failure, or inadequacy of electric power, 15 A.L.R.4th 1148.

16-7-23. Criminal damage to property in the second degree.

(a) A person commits the offense of criminal damage to property in the second degree when he:

(1) Intentionally damages any property of another person without his consent and the damage thereto exceeds $500.00; or

(2) Recklessly or intentionally, by means of fire or explosive, damages property of another person.

(b) A person convicted of the offense of criminal damage to property in the second degree shall be punished by imprisonment for not less than one nor more than five years. (Code 1933, § 26-1502, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1985, p. 484, § 2; Ga. L. 1985, p. 1491, § 2; Ga. L. 2008, p. 444, § 2/SB 400.)

Law reviews. — For article surveying legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979).

JUDICIAL DECISIONS

Analysis

General Considerations
Application
Merger of Offenses

General Considerations

O.C.G.A. §§ 16-7-21 and 16-7-23 define identical crimes except for the amount of damage required for conviction and the former is a lesser included offense of the latter. Merrell v. State, 162 Ga. App. 886, 293 S.E.2d 474 (1982); Williams v. State, 180 Ga. App. 854, 350 S.E.2d 837 (1986).

Construction with § 16-7-22(a)(1). — Because criminal damage to either marital or family property partially owned by another was sufficient to establish the commission of an offense under either O.C.G.A. § 16-7-22(a)(1) or O.C.G.A. § 16-7-23(a)(1), sufficient evidence was presented by the state to support the defendant's conviction under the former as charged. Gooch v. State, 289 Ga. App. 74, 656 S.E.2d 214 (2007).

"Damage" construed. — In a popular sense, the word "damage" frequently means depreciation in value, whether such depreciation is caused by a wrongful or a lawful act, but in statutes the word always refers to some actionable wrong — some loss, injury, or harm which results from the unlawful act, omission, or negligence of another. Bembry v. State, 155 Ga. App. 847, 273 S.E.2d 208 (1980).

Damage to personal property means all injuries which one may sustain in respect to that person's ownership of personal property. Bembry v. State, 155 Ga. App. 847, 273 S.E.2d 208 (1980).

Application

Probable cause for arrest. — Arrestee showed no Fourth Amendment violations because the arrest under O.C.G.A. § 16-7-23 had been based on probable cause; thus, the claim for malicious prosecution under 42 U.S.C. § 1983 was properly dismissed on summary judg-

ment. The claim was also properly analyzed under the Fourth Amendment rather than the Fourteenth Amendment in that the claims flowed from the allegedly unlawful arrest. Jordan v. Mosley, No. 07-15526, 2008 U.S. App. LEXIS 18667 (11th Cir. Aug. 28, 2008) (Unpublished).

No probable cause to arrest. — When an arrestee refused to allow a guest back into the arrestee's home and removed the guest's things, officers were not entitled to qualified immunity as to the arrestee's claims under the Fourth and Fourteenth Amendments, because the officers did not show that the officers had probable cause to arrest the arrestee for criminal damage to property under O.C.G.A. § 16-7-23 since the arrestee alleged that the arrestee did not damage any of the guest's property and that an officer knew that at least some of the property was not actually damaged. Gray v. City of Roswell, No. 12-10817, 2012 U.S. App. LEXIS 16852 (11th Cir. Aug. 13, 2012) (Unpublished).

Even assuming that the plaintiff was arrested rather than detained when the plaintiff was placed in the backseat of a patrol car at the scene of an accident, the officer was entitled to qualified immunity as the plaintiff failed to set forth a claim that the plaintiff's clearly established Fourth Amendment rights were violated. Even if the officer was mistaken, the officer was entitled to rely on a victim's allegations at the scene of the accident and, thus, the officer had reason to believe that the plaintiff damaged the property of another person without consent in violation of Georgia law; further, because the warrantless arrest was supported by at least arguable probable cause, the officer was entitled to search the plaintiff incident to that arrest. Moreno v. Turner, 572 Fed. Appx. 852 (11th Cir. July 22, 2014) (Unpublished).

Defendant failed to show deportable status and ineffective assistance. — Judgment finding that the defendant was rendered ineffective assistance of counsel for counsel's alleged failure to advise of deportation consequences for a destruction of property offense was reversed because the defendant's date of admission was not within five years of the date of the commission of the crime in 2002; thus, the defendant failed to prove that the defendant was deportable by virtue of having committed a crime of moral turpitude. State v. Addaquay, 302 Ga. 412, 807 S.E.2d 413 (2017).

Defendant's former wife had legal occupancy of damaged house, where her divorce decree awarded her "use" of the house, even though the defendant had not yet complied with an order to give her a quitclaim deed. Rash v. State, 182 Ga. App. 655, 356 S.E.2d 719 (1987).

Multiple prosecutions for same conduct. — When the defendant is convicted of criminal damage to property in the second degree (a felony) and criminal trespass (a misdemeanor) and when the offenses were committed at different apartments under different tenancies, such convictions do not fall within the purview of former Code 1933, § 26-506 (see now O.C.G.A. § 16-1-7(a)). Hiatt v. State, 133 Ga. App. 111, 210 S.E.2d 22 (1974) (see O.C.G.A. § 16-1-7(a)).

Only possession by victim required. — Because the state was not required to prove that the victim's damaged van was titled in the victim's name, but only needed to show that the victim had lawful possession of the property, the defendant's criminal damage to property conviction was upheld; thus, the defendant was not entitled to a directed verdict of acquittal as to that charge. Self v. State, 288 Ga. App. 77, 653 S.E.2d 787 (2007).

Burglary based on intent to commit criminal damage. — There was sufficient evidence to support a burglary conviction, which was based on the intent to commit second-degree criminal damage to property under O.C.G.A. § 16-7-23, when the defendant entered the victim's home, broke glass, attempted to kick down the victim's bedroom door, and caused $13,540 in damage to the victim's home. Jones v. State, 291 Ga. App. 296, 661 S.E.2d 651 (2008).

State was not required to prove lack of consent. — Trial court charged the jury on criminal damage to property as a lesser included offense of arson under O.C.G.A. § 16-7-23(a)(2), which did not require a showing of lack of consent, un-

Application (Cont'd)

like paragraph (a)(1). Therefore, the state was not required to prove that the owner of a mobile home that the defendant damaged by lighting the defendant's girlfriend in flames did not consent to the act. Brown v. State, 288 Ga. 364, 703 S.E.2d 609 (2010), cert. denied, 131 S. Ct. 2454, 179 L. Ed. 2d 1221, 2011 U.S. LEXIS 3708 (U.S. 2011).

Evidence of property value. — Testimony of the owner of property as to the owner's opinion of the value of the property, without giving the owner's reasons therefor, is inadmissible in evidence as the testimony has no probative value. Johnson v. State, 156 Ga. App. 411, 274 S.E.2d 778 (1980), cert. denied, 451 U.S. 989, 101 S. Ct. 2327, 68 L. Ed. 2d 848 (1981).

Trial court erred in failing to direct verdict of acquittal on charge of criminal damage to property where there was no competent evidence of value of damages in excess of $100.00. Porter v. State, 163 Ga. App. 511, 295 S.E.2d 179 (1982).

Testimony of the owner of property as to the owner's opinion of the value of the property, without giving the owner's reasons therefor, is inadmissible in evidence as it has no probative value. However, when the witness pays the monetary amount necessary to make the owner's property whole again, the owner thereafter is not stating the owner's opinion as to the value, but is stating a fact. Holbrook v. State, 168 Ga. App. 380, 308 S.E.2d 869 (1983); In re M.C., 239 Ga. App. 767, 521 S.E.2d 900 (1999).

Testimony of victim's husband as to the value of a damaged waterbed and carpet, along with his canceled check for $1,900, sufficiently established the ownership and present value of the items within the contemplation of the statute. Russell v. State, 188 Ga. App. 167, 372 S.E.2d 445, cert. denied, 188 Ga. App. 912, 372 S.E.2d 445 (1988).

When the state offered no proof of any amounts paid for repair of the property damaged and presented no photographs depicting the property damaged, there was no competent evidence from which the jury could determine that the value of the damage for which the defendant was responsible was in excess of $500.00, an essential element of the indicted crime. Hildebrand v. State, 209 Ga. App. 507, 433 S.E.2d 443 (1993); Bereznak v. State, 223 Ga. App. 584, 478 S.E.2d 386 (1996).

Owner's opinion of the value of a piece of property, uncorroborated by evidence, has no probative value. Waldrop v. State, 231 Ga. App. 164, 498 S.E.2d 337 (1998).

When the only evidence of damage in excess of $500 was the victim's testimony regarding an estimate for repairs to the victim's van from a dealer and the victim's acknowledgment that the victim did not get the van repaired for this price, the testimony about the estimate was inadmissible hearsay, and the adjudication of delinquency for committing an act which would have supported a conviction for the offense of criminal damage to property in the second degree were the defendant charged as an adult was vacated. In re A.F., 236 Ga. App. 60, 510 S.E.2d 910 (1999).

Police officer's testimony that the damage to a car was "about $500" did not show the damage "exceeds $500" as required by O.C.G.A. § 16-7-23(a)(1). Mack v. State, 255 Ga. App. 210, 564 S.E.2d 799 (2002).

Defendant's convictions for armed robbery, possession of a firearm during the commission of a crime, robbery by intimidation, and criminal damage to property in the second degree were supported by sufficient evidence because, inter alia, defendant's sibling let the defendant and two others into a restaurant after hours, the defendant pointed a gun at the sibling's co-worker, and then beat on a safe and pried open the cash registers looking for money; all four co-conspirators involved, including the defendant, gave statements to police implicating themselves and their codefendants, and a bill was introduced showing that repair of the safe damaged during the robbery attempt cost $1,000.00. Polite v. State, 273 Ga. App. 235, 614 S.E.2d 849 (2005).

Defendant's conviction of criminal damage to property in the second degree in violation of O.C.G.A. § 16-7-23 was supported by sufficient evidence despite allegedly conflicting evidence on whether the damage exceeded the $500 threshold; the damage estimate relied on by the defen-

dant to create a conflict was hearsay and had no probative value, and there was competent evidence showing that the damage to the vehicle exceeded $500. Leeks v. State, 281 Ga. App. 274, 635 S.E.2d 878 (2006).

Because it was undisputed that the victim failed to testify regarding the value of the damage to the subject property, an adjudication for the offense of second-degree criminal damage to property entered against a juvenile was vacated; however, given evidence that the juvenile intentionally damaged the property of another without consent, and the damage was $500 or less, an adjudication could be entered on a charge of criminal trespass which did not violate the juvenile's due process right to be notified of the charges. In the Interest of J.T., 285 Ga. App. 465, 646 S.E.2d 523 (2007).

Opinion by a network manager for the victim that the victim incurred $1,929 in labor expenses for repairs to the cut telephone wire was not competent evidence to support the defendant's conviction for criminal damage to property in the second degree as it was not based on personal knowledge, and the only competent evidence showed $384 was spent to replace materials, which was sufficient for a conviction for criminal trespass to property. Clement v. State, 324 Ga. App. 39, 749 S.E.2d 41 (2013).

Insufficient evidence of property value. — Defendant was entitled to reversal of a conviction for criminal damage to property in the second degree because there was no competent evidence from which the jury could determine that the value of the damage for which the defendant was responsible was in excess of $500, an essential element of the offense. Lenoir v. State, 322 Ga. App. 583, 745 S.E.2d 824 (2013).

State failed to prove that the defendant caused at least $500 of damage to a Jeep as charged in the indictment because the victim's testimony about the damage discussed the cost as to the Jeep and another vehicle and, thus, failed to prove that the defendant committed criminal damage to personal property in the second degree with regard to that vehicle. Frey v. State, 338 Ga. App. 583, 790 S.E.2d 835 (2016).

Evidence was insufficient to support the defendant's convictions for 10 counts of second-degree damage to property as the state did not prove that the fair market value of the property damage exceeded $500 because the property owner provided no testimony as to the original price of the 10 air-conditioning units, their exact ages, or their condition when the units were vandalized; the evidence did not show that the damage to each of the 10 units individually exceeded $500; and, although evidence of the cost to repair an item could suffice, the owner testified that no repairs had actually been performed, and an estimate of repair costs alone was inadmissible hearsay that was insufficient to prove the fair market value of damage to property. Wynn v. State, 344 Ga. App. 554, No. A17A1389, 2018 Ga. App. LEXIS 66 (2018).

Evidence sufficient for conviction. — See Masters v. State, 186 Ga. App. 795, 368 S.E.2d 557 (1988); Watkins v. State, 191 Ga. App. 325, 382 S.E.2d 107, cert. denied, 191 Ga. App. 923, 382 S.E.2d 107 (1989); Key v. State, 213 Ga. App. 556, 445 S.E.2d 349 (1994).

Sufficient circumstantial evidence supported the conviction for second degree damage to property as the defendant took credit for keying two of the spouse's vehicles; furthermore, the defendant was actually seen spray painting the vehicle two days earlier. Johnson v. State, 260 Ga. App. 413, 579 S.E.2d 809 (2003).

Defendant's statements to police and the victim's prior inconsistent statements were sufficient to support the defendant's conviction for criminal damage to property in the second degree despite the fact that the victim recanted at trial; the fact that the victim chose not to repair the hood of the victim's car did not eliminate the fact that the defendant damaged the hood, so the cost of repair of the hood was properly added to the total for purposes of criminal damage to property, and the testimony of the mechanic was sufficient to prove the value of the damage to the car. Wyche-Hinkle v. State, 268 Ga. App. 898, 602 S.E.2d 902 (2004).

Deputy was entitled to qualified immunity for plaintiff's Fourth Amendment claim under 42 U.S.C. § 1983 because it

Application (Cont'd)

was objectively reasonable for the deputy to believe that the plaintiff intentionally caused damage to a backhoe, giving probable cause for arrest under O.C.G.A. § 16-7-23(a), a general intent crime that required no specific evidence of intent. Jordan v. Mosley, 487 F.3d 1350 (11th Cir. 2007).

Juvenile court properly denied a juvenile's motion for a new trial with regard to the juvenile's delinquency adjudication finding the juvenile guilty for aggravated assault, criminal property damage, cruelty to children, and reckless conduct arising from the shooting of a BB gun at a passing car. The juvenile was the only Caucasian identified in the group of youth; the juvenile admitted to hiding the BB gun; the juvenile did not dispute that the juvenile encouraged another youth to shoot the gun; and the judge was the final arbiter of the credibility and witness issues and had the province to reject the testimony of the juvenile and a parent that the juvenile did not shoot the gun. In the Interest of A.A., 293 Ga. App. 827, 668 S.E.2d 323 (2008).

When the owner of the facility was able to testify as to the building's condition before and after the burglary, and the owner also observed wires hanging with a shackle on them which were missing the following day; and then when approximately 70 to 75 feet of wire and a chain hook were found at the defendant's residence, and this was sufficient to establish that the defendant damaged the property under O.C.G.A. § 16-7-23. Adams v. State, 300 Ga. App. 294, 684 S.E.2d 404 (2009).

Juvenile court did not err in finding the defendant juvenile delinquent for committing the offense of criminal damage to property in violation of O.C.G.A. § 16-7-23(a)(1) because the evidence presented including the extent of the damage and the defendant's admission that the defendant and others kicked and pushed on the door to a rental home was sufficient. In the Interest of C.H., 306 Ga. App. 834, 703 S.E.2d 407 (2010).

Evidence was sufficient to sustain the defendant's conviction for second-degree criminal damage to property based on the victim's testimony that the defendant was wearing a dark shirt when the defendant fled through the back door after hearing the knock of the victim's friends, and the male friend testified that moments later, that witness saw a man in a dark shirt shooting at the victim's car parked outside the victim's house, thus, that evidence showed that the defendant was the person who shot at the male friend's car. Jones v. State, 320 Ga. App. 26, 739 S.E.2d 43 (2013).

Evidence was sufficient to convict the defendant of criminal damage to property based on the damage to a neighbor's vehicle parked on the street because the jury was authorized to find that, as a result of the defendant's flight from the intentional criminal actions of firing a firearm into the home of the complainant's mother, the defendant damaged the neighbor's vehicle. Brown v. State, 325 Ga. App. 237, 750 S.E.2d 453 (2013).

Evidence that the defendant threw a brick at the victim's truck and caused more than $500 in damages was sufficient to support the defendant's conviction for criminal damage to property in the second degree. Fleming v. State, 324 Ga. App. 481, 749 S.E.2d 54 (2013).

Evidence that the victim discovered damage to the victim's home after the defendant had been there supported the criminal damage conviction. Slaughter v. State, 327 Ga. App. 593, 760 S.E.2d 609 (2014).

Jury instruction. — Trial court did not err by declining defendant's requests to charge on arrest by a private person, interference with government property, criminal damage to property in the second degree, and criminal trespass as the evidence did not support the charges. During an argument in which defendant's girlfriend threatened to tear up defendant's study papers for a peace officer training program, defendant grabbed his girlfriend by one arm, pulled her into the living room, threw her chest first against the back of a couch, handcuffed her hands behind her back, and did not release her from the handcuffs despite her requests to release her. Turner v. State, 307 Ga. App. 376, 705 S.E.2d 177 (2010).

Merger of Offenses

Former Code 1933, § 26-1502 was not lesser included offense of crime of burglary. Christian v. State, 130 Ga. App. 582, 203 S.E.2d 914 (1974).

First and second degree criminal damage to property do not merge. — Trial court did not err in failing to merge the defendant's convictions for the criminal damage to property charges because criminal damage to property in the first degree required evidence that the defendant acted in a manner that endangered human life, whereas criminal damage to property in the second degree required evidence that the damage to property exceeded $500, neither of which was required in the other. Sullivan v. State, 331 Ga. App. 592, 771 S.E.2d 237 (2015).

Arson and criminal damage to property. — When the evidence establishes without conflict that arson in the first degree occurred, and the defendant simply denies being the one who committed the arson, the crime of criminal damage to property merges with the crime of arson, and no charge on the lesser crime is required. Walker v. State, 193 Ga. App. 100, 386 S.E.2d 925 (1989).

Criminal damage to property is included crime in first-degree arson. — Anyone who commits first-degree arson necessarily has also committed criminal damage to property, provided that the property damaged belongs to another person. Since the criminal damage to property, however, is established by proof of the same conduct as first-degree arson, but requires proof of a less culpable mental state, it is an included crime in first-degree arson; and a defendant may not be convicted of both. Corson v. State, 144 Ga. App. 559, 241 S.E.2d 454 (1978).

One who commits first-degree arson has also committed criminal damage to property when the property in question belongs to another, but while the latter crime is established by the same conduct as the former, it requires proof of a "less culpable mental state" under the Criminal Code. Bryant v. State, 188 Ga. App. 505, 373 S.E.2d 289 (1988).

Statute is lesser offense within ambit of arson in second degree. — Words used in former Code 1933, § 26-1502 (see now O.C.G.A. § 16-7-23(a)(2)), "recklessly, or intentionally, by means of fire or explosive, damages property of another," constitute a lesser offense within the ambit of former Code 1933, § 26-1402 (see now O.C.G.A. § 16-7-61). D.C.A. v. State, 135 Ga. App. 234, 217 S.E.2d 470 (1975).

Trial court properly merged a conviction of criminal damage to property in the second degree, in violation of O.C.G.A. § 16-7-23(a)(1), into a conviction for arson in the second degree, in violation of O.C.G.A. § 16-7-61, as the arson was not a lesser included offense of the criminal damage offense pursuant to O.C.G.A. § 16-1-6(1); arson required the higher mentally culpable state of knowingly, rather than the criminal damage scienter requirement of intentionally, and arson required that the damage to the property have been caused by fire or explosive. Youmans v. State, 270 Ga. App. 832, 608 S.E.2d 300 (2004).

Criminal trespass is lesser included offense. — Trial court did not err in instructing the jury on criminal trespass after granting a directed verdict of acquittal on a charge of second degree criminal damage to property, because criminal trespass is a lesser included offense of the latter crime. Jennings v. State, 226 Ga. App. 461, 486 S.E.2d 693 (1997).

Defendant, who shot and damaged three out-of-service power transformers and was convicted of second degree criminal damage to property, was entitled to jury charge on criminal trespass, a lesser included offense, because the state failed to prove that the value of the transformers was over $500. Waldrop v. State, 231 Ga. App. 164, 498 S.E.2d 337 (1998).

Trial court did not err when it reduced a charge of criminal damage to property in the second degree to criminal trespass when the state failed to prove damages in excess of $500, instead of granting defendant's motion for acquittal on the charge. The evidence showed that defendant broke the windshield and at least one other window on defendant's spouse's car during an argument and therefore was sufficient to sustain defendant's conviction for criminal trespass. Hill v. State, 259 Ga. App. 363, 577 S.E.2d 61 (2003).

Although the state failed to provide any

Merger of Offenses (Cont'd)

evidence regarding the value of a broken window and, thus, a juvenile court erred in finding that a juvenile committed criminal damage to property in the second degree, the juvenile court did not err in finding that the juvenile participated in the act of breaking the victim's window in an attempt to burglarize the house, thus, the evidence was sufficient to support an adjudication of delinquency for committing an act which would support a conviction for the offense of criminal trespass to property as a lesser included offense of criminal damage to property in the second degree. The result of reducing the offense did not violate the juvenile's due process right to be notified of the charges against the juvenile since the juvenile, as a defendant, is on notice of all lesser crimes which are included in the crime charged as a matter of law. In the Interest of J. S., 296 Ga. App. 144, 673 S.E.2d 645 (2009).

While the evidence was insufficient under O.C.G.A. § 16-7-23(a)(1) to conclude that a juvenile damaged property at a mobile home park in excess of $500, the evidence was sufficient to support a conviction for criminal trespass to property under O.C.G.A. § 16-7-21(a) as a lesser-included offense of second-degree criminal damage to property. In re A. C. R-M, 311 Ga. App. 848, 717 S.E.2d 344 (2011).

Cited in Loethen v. State, 158 Ga. App. 469, 280 S.E.2d 878 (1981); Brinson v. State, 163 Ga. App. 567, 295 S.E.2d 536 (1982); In re G.G., 177 Ga. App. 639, 341 S.E.2d 13 (1986); Gunder v. State, 183 Ga. App. 122, 358 S.E.2d 284 (1987); In re A.W.G., 184 Ga. App. 343, 361 S.E.2d 510 (1987); Lovett v. State, 184 Ga. App. 478, 361 S.E.2d 863 (1987); Smith v. State, 186 Ga. App. 303, 367 S.E.2d 573 (1988); Carthern v. State, 272 Ga. 378, 529 S.E.2d 617 (2000); Williams v. State, 293 Ga. App. 193, 666 S.E.2d 703 (2008); Lucas v. State, 328 Ga. App. 741, 760 S.E.2d 257 (2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arson and Related Offenses, §§ 3, 5, 11 et seq. 52 Am. Jur. 2d, Malicious Mischief, § 1 et seq.

C.J.S. — 35 C.J.S., Explosives, § 95 et seq. 36A C.J.S., Fires, § 1 et seq. 54 C.J.S., Malicious or Criminal Mischief or Damage to Property, § 1 et seq.

ALR. — Prejudicial effect of argument or comment that accused, if acquitted on ground of insanity, would be released from institution to which committed, 44 A.L.R.2d 978.

16-7-24. Interference with government property.

(a) A person commits the offense of interference with government property when he destroys, damages, or defaces government property and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

(b) A person commits the offense of interference with government property when he forcibly interferes with or obstructs the passage into or from government property and, upon conviction thereof, shall be punished as for a misdemeanor. (Code 1933, § 26-2613, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Destruction or defacement of county buildings or other property, § 36-9-11. Damaging or destroying of military property by persons subject to Georgia Code of Military Justice, § 38-2-1108. Defacing or injuring capitol

building, property therein, or capitol grounds, § 50-16-5.

Law reviews. — For survey article on constitutional law, see 34 Mercer L. Rev. 53 (1982). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

JUDICIAL DECISIONS

Policy reasons underlying and justifying section's classification. — Damage to public buildings from which government serves the citizens affects adversely each and every citizen, both in delivery of services and in cost of repair. The government also has an interest in keeping the government's buildings open to the public simply so that the government's processes may be observed. Hence, damage to government property impairs public accessibility as well as government operation itself. Similarly, defacement necessitates repair and repair decreases access and increases costs. Moreover, since public property is generally more accessible than private property, it is necessary to provide more protection. Since this classification is neither arbitrary nor unreasonable and there is a fair and substantial relationship between the classification and the purpose of the law, former Code 1933, § 26-2613 did not unconstitutionally deprive the defendant of equal protection of the law. Sabel v. State, 248 Ga. 10, 282 S.E.2d 61 (1981), overruled on other grounds, Pruitt v. Keenan, 264 Ga. 279, 443 S.E.2d 842 (1994), cert. denied, 454 U.S. 973, 102 S. Ct. 524, 70 L. Ed. 2d 393 (1981).

Included crimes. — Elements of interference with government property are not included in the elements required for aggravated assault. Hyman v. State, 222 Ga. App. 419, 474 S.E.2d 243 (1996).

Defendant failed to show that the charge against the defendant for obstructing an officer by becoming verbally combative, refusing repeated orders, and resisting restraint under O.C.G.A. § 16-10-24, for which defendant was acquitted, was a lesser included offense under O.C.G.A. § 16-1-6 of the charge against the defendant of interfering with government property by kicking the sink off the wall and flooding the defendant's jail cell under O.C.G.A. § 16-7-24, for which defendant was convicted; a comparison of these two offenses shows that each offense has entirely different elements and requires proof of entirely different facts. Carter v. State, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

Proof of ownership in state, not particular agency, is essential. — When an accused is indicted for criminal interference with property of the State of Georgia, ownership of the property is an essential element of the crime; but it is proof of ownership in the State of Georgia, not any particular agency thereof, that is essential. State v. Williams, 246 Ga. 788, 272 S.E.2d 725 (1980).

Damage to automobile. — When the state presents evidence that a county sheriff's automobile suffered damage when the automobile locked bumpers with the defendant's car during a high-speed chase and the deputy sheriff who was driving the sheriff's car at the time of the incident testifies that the vehicle was a completely marked county sheriff's car, the evidence is sufficient to authorize the jury to convict the defendant of the crime specified in O.C.G.A. § 16-7-24. Fields v. State, 167 Ga. App. 400, 306 S.E.2d 695 (1983).

Evidence that the defendant hit patrol cars while making a U-turn and appeared to be in full control of the defendant's vehicle just prior to the impact was sufficient for the jury to find that the defendant attempted to commit a violent injury to another's person and interfered with government property. Black v. State, 222 Ga. App. 80, 473 S.E.2d 186 (1996).

Evidence that the defendant, during a high-speed motor vehicle chase, directly and deliberately ran the defendant's car into a patrol car was sufficient to support the defendant's conviction for criminal interference with government property. Arnold v. State, 262 Ga. App. 61, 584 S.E.2d 662 (2003).

Damaging a police vehicle by kicking and butting one's head against the door

and window until the door was dented and the window frame was broken was sufficient evidence to support the defendant's conviction of interference with government property pursuant to O.C.G.A. § 16-7-24(a). Weldon v. State, 262 Ga. App. 854, 586 S.E.2d 741 (2003).

Given the evidence provided by law enforcement that: (1) the defendant hindered and obstructed one officer in the lawful discharge of that officer's duties while the officer went to check on the welfare of the defendant's wife; (2) the defendant's act of resisting the other officer while that officer was arresting the defendant; and (3) the defendant's act of breaking off the interior door handle of the patrol vehicle and forcing the vehicle's window off the window's frame, the defendant's convictions for both felony and misdemeanor obstruction of an officer and a felony count of interfering with government property were upheld on appeal. Meeker v. State, 282 Ga. App. 77, 637 S.E.2d 806 (2006).

Given evidence that after arrest, the defendant continued to resist detention by kicking out one of the windows of a sheriff's patrol car, sufficient evidence supported the conviction as well as denial of the defendant's motions for an acquittal and for a new trial. Helton v. State, 284 Ga. App. 777, 644 S.E.2d 896 (2007).

Because the trial court did not err in charging the jury on the crime of destruction of government property using language that was identical to that found in O.C.G.A. § 16-7-24(a), and the evidence showing that the defendant collided with a patrol car owned by the Athens-Clarke County Unified Government was sufficient to allow the jury to find the essential elements of the crime charged; thus, a new trial as to this charge was properly denied. Knox v. State, 290 Ga. App. 49, 658 S.E.2d 819 (2008).

Sufficient evidence supported convictions of aggravated assault, aggravated assault on a peace officer, obstruction of a law enforcement officer, interference with government property, and criminal trespass after the defendant admitted obstructing officers and damaging a patrol car and the victim's vehicle; although the defendant denied assaulting the victim and responding officer, the jury was authorized to reject defendant's testimony in favor of theirs. Gartrell v. State, 291 Ga. App. 21, 660 S.E.2d 886 (2008).

Evidence that while attempting to flee from the police, a defendant who had stopped the vehicle the defendant was driving and then accelerated and struck a patrol car, causing damage to the vehicle, supported the defendant's conviction for interference with government property. Branton v. State, 292 Ga. App. 104, 663 S.E.2d 414 (2008), cert. denied, No. S08C1771, 2008 Ga. LEXIS 873 (Ga. 2008).

Evidence that after being arrested, the defendant head-butted the patrol car window was sufficient to convict the defendant of interference with government property in violation of O.C.G.A. § 16-7-24(a). Bradley v. State, 298 Ga. App. 384, 680 S.E.2d 489 (2009).

Evidence sufficient for conviction. — When a correctional officer who worked at the Youthful Offender Correctional Institution testified that, while watching a closed circuit television monitor, the officer saw the defendant, an inmate, breaking light fixtures and light bulbs with a stick, the evidence was sufficient to find the defendant guilty of interference with government property. Robinson v. State, 188 Ga. App. 553, 373 S.E.2d 825 (1988).

Evidence supported conviction when testimony showed that the defendants were the only ones with access to the damaged portions of a locked cell at the time of the incident. Davis v. State, 263 Ga. App. 841, 589 S.E.2d 603 (2003).

Testimony from an eyewitness at the scene that the eyewitness heard suspicious noises in the adjacent government offices, which were closed for business for the day, then saw the defendant flee from police while removing items from the defendant's pocket, when coupled with the discovery of 169 quarters which were found in the immediate vicinity of the tree where the defendant was apprehended, the presence of tools at the crime scene, visible pry marks on the door which the defendant attempted to open, and the destroyed gum ball machines, authorized the jury to infer that although the defendant did not have the tools in the defen-

dant's possession, the defendant used the tools to break into the offices, steal the money from the destroyed machines, and attempt to flee the police and avoid apprehension; thus, the defendant's convictions for burglary, possession of tools for the commission of a crime, interference with government property, and obstruction of an officer were all affirmed. Harris v. State, 263 Ga. App. 866, 589 S.E.2d 631 (2003).

When the defendant, who was not in custody at the time, volunteered an explanation as to why the defendant possessed a weapon without authority, no Miranda warning was necessary and the evidence was sufficient to show that the defendant shot the defendant in a government building with a weapon that the defendant took from police custody in violation of O.C.G.A. §§ 16-8-2 and 16-7-24(a); therefore, the trial court's findings were not clearly erroneous. McClendon v. State, 264 Ga. App. 174, 590 S.E.2d 189 (2003).

Evidence was sufficient to support the defendant's conviction of three counts of interference with government property, a felony, after the defendant was observed tearing the padding off the isolation cell walls, the defendant admitted breaking the observation window on the isolation cell, and the defendant was observed with a rope that turned out to be the lining from the defendant's suicide gown and that was long enough to reach the surveillance camera, which had been torn from the camera's mounting bracket and was hanging by the camera's electrical wiring. Taylor v. State, 267 Ga. App. 588, 600 S.E.2d 675 (2004).

Throwing eggs at government property. — State's evidence was sufficient to find that the juvenile defendant committed criminal trespass, obstructed a police officer, and interfered with government property, and the juvenile court properly adjudicated the juvenile delinquent; the juvenile threw an egg at an officer's car damaging a plastic strip on the car window, broke at least two windows in the police substation, and obstructed an officer by fleeing after the officer was identified and ordered the defendant to stop. In the Interest of M.M., 265 Ga. App. 381, 593 S.E.2d 919 (2004).

Placing feces on government property. — Evidence was sufficient for the jury to find the elements of interference with government property because the fact that the camera and cell surfaces could be cleaned and restored to their previous appearance did not preclude the jury from finding that the defendant defaced the surfaces by wiping feces on the surfaces. Harper v. State, 337 Ga. App. 57, 785 S.E.2d 691 (2016).

Damage to water meter. — Evidence was sufficient to support the defendant's conviction for interference with government property because the defendant was a party to the act of damaging the locks to the water meter for the rental home in which the defendant was staying since the testimony of the rental company's principal and the meter reader established that the locks were damaged and removed by someone living in the house for the purpose of accessing the water meter, and according to an eyewitness, the defendant was in the yard while another person who also lived in the house was "messing with the meter"; since there was evidence that the defendant was present when the crime was committed, and the jury could infer from the defendant's conduct before, during, and after the crime that the defendant shared the criminal intent of the actual perpetrators, the evidence was sufficient to authorize the defendant's conviction as a party to the crime. Jackson v. State, 301 Ga. App. 406, 687 S.E.2d 666 (2009).

Jury charge on proximate cause proper. — In a defendant's trial for interference with government property in violation of O.C.G.A. § 16-7-24(a), a trial court did not err in instructing the jury on proximate cause because the statute had no requirement that the defendant intend to cause the damage to the property. That a police officer may fall into the water and damage the officer's equipment was a reasonably probable consequence of the defendant's resisting arrest and struggling with the officer at the side of a swimming pool. Harrison v. State, 313 Ga. App. 861, 722 S.E.2d 774 (2012).

Sentence not cruel or unusual. — Defendant's five-year sentence for interfering with government property was not

cruel and unusual punishment within the meaning of U.S. Const., amend. 8 as: (1) the sentence was within the sentencing range specified by O.C.G.A. § 16-7-24(a); (2) the sentence was not so disproportionate to the act as to shock the conscience; (3) the sentence was not retaliatory; and (4) there was no support for the defendant's claim that, although convicted of a felony offense, the defendant should have received a misdemeanor sentence because the defendant committed the offense while in jail for a probation violation. Carter v. State, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

Cited in Porter v. State, 163 Ga. App. 511, 295 S.E.2d 179 (1982); Dickerson v. State, 180 Ga. App. 852, 350 S.E.2d 835 (1986); Groom v. State, 212 Ga. App. 133, 441 S.E.2d 259 (1994); Key v. State, 213 Ga. App. 556, 445 S.E.2d 349 (1994); Tate v. State, 289 Ga. App. 479, 657 S.E.2d 531 (2008).

OPINIONS OF THE ATTORNEY GENERAL

State employees cannot strike or otherwise interfere with performance of state employment. — State employees have the right, either singularly or collectively, to express or communicate complaints or opinions relating to state employment including freedom to enter into organizations created for like purposes; the only limitation upon such activities of state employees would prevent their striking, or otherwise interfering with proper performance of the duties of state employment, or obstructing access to or egress from state property. 1969 Op. Att'y Gen. No. 69-379.

Department of Transportation has no power to take steps to prevent any labor activity short of strikes and other obstructions to the performance of the duties of employment. 1969 Op. Att'y Gen. No. 69-379.

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Mischief, § 2.

C.J.S. — 54 C.J.S., Malicious or Criminal Mischief or Damage to Property, § 1 et seq.

16-7-25. Damaging, injuring, or interfering with property of public utility companies, municipalities, or political subdivisions.

(a) It shall be unlawful for any person intentionally and without authority to injure or destroy any meter, pipe, conduit, wire, line, post, lamp, or other apparatus belonging to a company, municipality, or political subdivision engaged in the manufacture or sale of electricity, gas, water, telephone, or other public services; intentionally and without authority to prevent a meter from properly registering the quantity of such service supplied; in any way to interfere with the proper action of such company, municipality, or political subdivision; intentionally to divert any services of such company, municipality, or political subdivision; or otherwise intentionally and without authority to use or cause to be used, without the consent of the company, municipality, or political subdivision, any service manufactured, sold, or distributed by the company, municipality, or political subdivision.

(b) Where there is no evidence to the contrary, the person performing any of the illegal acts set forth in subsection (a) of this Code section and the person who with knowledge of such violation receives the benefit of such service without proper charge as a result of the improper action shall be presumed to be responsible for the act of tampering or diversion.

(c) This Code section shall be cumulative to and shall not prohibit the enactment of any other general and local laws, rules, and regulations of state or local authorities or agencies and local ordinances prohibiting such activities which are more restrictive than this Code section.

(d) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1897, p. 69, § 1; Penal Code 1910, § 783; Ga. L. 1916, p. 153, § 1; Code 1933, §§ 26-3801, 26-3802; Ga. L. 1957, p. 490, §§ 1-5; Code 1933, § 26-1507, enacted by Ga. L. 1976, p. 773, § 1; Ga. L. 1978, p. 1658, § 1.)

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

JUDICIAL DECISIONS

Primary purpose of O.C.G.A. § 16-7-25, while the statute includes destruction of an electrical meter belonging to a municipality, is to prohibit or inhibit causing of damage to a meter which is directly related to efforts to modify proper registering of amount of service, or unlawfully obtaining, diverting, or tampering with services or equipment (i.e., theft of public utility services). Kitchens v. State, 159 Ga. App. 94, 282 S.E.2d 730 (1981).

Separate offenses in multicount indictment. — When the averments of each count of a multicount indictment for meter tampering refer to a different period of time, the specific period of time is made an essential averment of each transaction, and each count of the indictment is distinguishable and constitutes a separate offense. Hamilton v. State, 167 Ga. App. 370, 306 S.E.2d 673 (1983).

Cited in Dougherty v. State, 145 Ga. App. 718, 244 S.E.2d 638 (1978); O'Bear v. State, 156 Ga. App. 100, 274 S.E.2d 54 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Mischief and Related Offenses, § 11 et seq. 74 Am. Jur. 2d, Telecommunications, § 195 et seq.

C.J.S. — 29 C.J.S., Electricity, § 137. 86 C.J.S., Telecommunications, § 188.

ALR. — Liability of one other than electric power or light company or its employee for interruption, failure, or inadequacy of electric power, 15 A.L.R.4th 1148.

16-7-26. Vandalism to a place of worship.

(a) A person commits the offense of vandalism to a place of worship when he maliciously defaces or desecrates a church, synagogue, or other place of public religious worship.

(b) A person convicted of the offense of vandalism to a place of worship shall be punished by imprisonment for not less than one nor more than five years. (Ga. L. 1967, p. 457, § 1; Code 1933, § 26-1505, enacted by Ga. L. 1968, p. 1249, § 1.)

RESEARCH REFERENCES

ALR. — Validity and construction of statute or ordinance prohibiting desecration of church, 90 A.L.R.3d 1128.

16-7-27. Injuring, tearing down, or destroying mailboxes; injuring, defacing, or destroying mail.

(a) It shall be unlawful for any person willfully or maliciously to injure, tear down, or destroy any mailbox or receptacle intended or used for the receipt or delivery of mail or willfully or maliciously to injure, deface, or destroy any mail deposited therein.

(b) Any person who violates this Code section shall be guilty of a misdemeanor. (Code 1933, § 26-1508, enacted by Ga. L. 1979, p. 619, § 1.)

Law reviews. — For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Postal Service and Offenses Against Postal Laws, § 81.

16-7-28. Redesignated.

Editor's notes. — Ga. L. 2008, p. 444, § 3, effective July 1, 2008, redesignated former Code Section 16-7-28 as present Code Section 16-7-63.

16-7-29. Interference with electronic monitoring devices; "electronic monitoring device" defined; penalty.

(a) For purposes of this Code section, the term "electronic monitoring device" shall include any device that is utilized to track the location of a person.

(b) It shall be unlawful for any person to knowingly and without authority remove, destroy, or circumvent the operation of an electronic monitoring device which is being used for the purpose of monitoring a person who is:

(1) Complying with a home arrest program as set forth in Code Section 42-1-8;

(2) Wearing an electronic monitoring device as a condition of bond or pretrial release;

(3) Wearing an electronic monitoring device as a condition of probation;

(4) Wearing an electronic monitoring device as a condition of parole; or

(5) Wearing an electronic monitoring device as required in Code Section 42-1-14.

(c) It shall be unlawful for any person to knowingly and without authority request or solicit any other person to remove, destroy, or circumvent the operation of an electronic monitoring device which is being used for the purposes described in subsection (b) of this Code section.

(d) Any person who violates this Code section shall be guilty of the offense of tampering with the operation of an electronic monitoring device and shall be punished by imprisonment for not less than one nor more than five years. (Code 1981, § 16-7-29, enacted by Ga. L. 2004, p. 761, § 2; Ga. L. 2005, p. 60, § 16/HB 95; Ga. L. 2006, p. 72, § 16/SB 465; Ga. L. 2010, p. 168, § 4/HB 571.)

Cross references. — Terms and conditions of probation, § 42-8-35.

Editor's notes. — This Code section formerly pertained to criminal trespass by motor vehicles. The former Code section was based on Ga. L. 1987, p. 837, § 1 and Ga. L. 1990, p. 881, § 1. For similar provisions, see Code Section 40-6-252.

Ga. L. 2004, p. 761, § 1, not codified by the General Assembly, provides that: "The General Assembly finds that the safety of the public is a paramount concern and that prison and jail overcrowding and the high cost of incarceration demand a cost effective and innovative approach to protecting communities from dangerous offenders while at the same time providing alternatives to, or bridges to and from incarceration. Under appropriate conditions and limitations, electronic monitoring devices provide the criminal justice system with a tool that should be considered under proper circumstances. Electronic monitoring devices offer effective means to track individuals and may reduce criminal recidivism as well as provide the state with monetary savings since the cost of an electronic monitoring device is far less than the cost of incarcerating an individual and an individual may be able to pay for the device. The criminal penalties provided by this Act are designed to encourage the use of electronic monitoring devices while at the same time discourage interference with these devices."

JUDICIAL DECISIONS

Juvenile disposition to restrictive custody not an abuse of discretion. — Juvenile court did not abuse the court's discretion in ordering a juvenile to serve 36 months in restrictive custody because the court's findings authorized the court to find that the juvenile's criminal history, repeated violations of probation, removal of the electronic tether, and frequent use of marijuana demonstrated that restrictive custody was in the juvenile's best interests, as well as the community's, and outweighed the absence of any physical harm to the victim of the theft by receiv-

ing incident. In the Interest of D. C., 324 Ga. App. 95, 748 S.E.2d 514 (2013).

Delinquency for tampering with ankle monitoring. — Evidence that the defendant's broken ankle monitor was found in the defendant's former residence after the defendant moved with the defendant's mother to another county supported the finding of delinquency for tampering with the operation of an electronic monitoring device. In the Interest of E. B., 343 Ga. App. 823, 806 S.E.2d 272 (2017).

Part 2

Littering Public and Private Property

Administrative rules and regulations. — Clean Community Challenge Litter Prevention Grant Program, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Community Affairs, Ch. 110-30-1.

16-7-40. Short title.

Reserved. Repealed by Ga. L. 2006, p. 275, § 2-1, effective July 1, 2006.

Editor's notes. — This Code section was based on Ga. L. 1970, p. 494, § 1; Ga. L. 1990, p. 8, § 16.

16-7-41. Legislative intent.

Reserved. Repealed by Ga. L. 2006, p. 275, § 2-1, effective July 1, 2006.

Editor's notes. — This Code section was based on Ga. L. 1970, p. 494, § 2.

16-7-42. Definitions.

As used in this part, the term:

(1) "Litter" means any discarded or abandoned:

(A) Refuse, rubbish, junk, or other waste material; or

(B) Dead animals that are not subject to the provisions of Code Section 4-5-4.

(2) "Public or private property" means the right of way of any road or highway; any body of water or watercourse or the shores or beaches thereof; any park, playground, building, refuge, or conservation or recreation area; residential or farm properties, timberlands, or forests; or any commercial or industrial property. (Ga. L. 1970, p. 494, § 3; Ga. L. 1990, p. 8, § 16; Ga. L. 1993, p. 496, § 1; Ga. L. 2006, p. 275, § 2-1/HB 1320.)

Editor's notes. — Ga. L. 2006, p. 275, § 1-1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.' "

Ga. L. 2006, p. 275, § 5-1, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

Law reviews. — For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 100 (1993).

16-7-43. Littering public or private property or waters; enforcing personnel.

(a) It shall be unlawful for any person or persons to dump, deposit, throw, or leave or to cause or permit the dumping, depositing, placing, throwing, or leaving of litter on any public or private property in this state or any waters in this state, unless:

(1) The area is designated by the state or by any of its agencies or political subdivisions for the disposal of litter and the person is authorized by the proper public authority to so use such area;

(2) The litter is placed into a nondisposable litter receptacle or container designed for the temporary storage of litter and located in an area designated by the owner or tenant in lawful possession of the property; or

(3) The person is the owner or tenant in lawful possession of such property or has first obtained consent of the owner or tenant in lawful possession or unless the act is done under the personal direction of the owner or tenant, all in a manner consistent with the public welfare.

(b)(1) Any person who violates subsection (a) of this Code section shall be guilty of a misdemeanor.

(2) In addition to the punishment provided under paragraph (1) of this subsection:

(A) In the sound discretion of the court, the person may be directed to pick up and remove from any public street or highway or public right of way for a distance not to exceed one mile any litter the person has deposited and any and all litter deposited thereon by anyone else prior to the date of execution of sentence; or

(B) In the sound discretion of the judge of the court, the person may be directed to pick up and remove from any public beach, public park, private right of way, or, with the prior permission of the legal owner or tenant in lawful possession of such property, any private property upon which it can be established by competent evidence that the person has deposited litter, any and all litter

deposited thereon by anyone prior to the date of execution of sentence.

(c) The court may publish the names of persons convicted of violating subsection (a) of this Code section.

(d) Any county, municipality, consolidated government, or law enforcement agency thereof of this state which is empowered by Code Section 16-7-45 or other law to enforce the provisions of this Code section or local littering ordinances may, in its discretion, appoint any person who is a citizen of the United States, is of good moral character, and has not previously been convicted of a felony to enforce the provisions of this Code section or local littering ordinances within the county, municipality, or consolidated government in which the appointing agency exercises jurisdiction. Each person appointed pursuant to this Code section shall take and subscribe an oath of office as prescribed by the appointing authority. Any person appointed and sworn pursuant to this subsection shall be authorized to enforce the provisions of this Code section or local littering ordinances in the same manner as any employee or law enforcement officer of this state or any county, municipality, or consolidated government of this state subject to the limitations provided in subsections (e) and (f) of this Code section.

(e) No person appointed pursuant to subsection (d) of this Code section shall be deemed a peace officer under the laws of this state or:

(1) Be deemed to be an employee of or receive any compensation from the state, county, municipality, consolidated government, or appointing law enforcement agency;

(2) Be required to complete any training or be certified pursuant to the requirements of Chapter 8 of Title 35;

(3) Have the power or duty to enforce any traffic or other criminal laws of the state, county, municipality, or consolidated government;

(4) Have the power to possess and carry firearms and other weapons for the purpose of enforcing the littering laws; or

(5) Be entitled to any indemnification from the state, county, municipality, or consolidated government for any injury or property damage sustained by such person as a result of attempting to enforce the littering laws of this state or any local government.

(f) Notwithstanding any law to the contrary, neither the state nor any county, municipality, or consolidated government of this state or any department, agency, board, or officer of this state or any county, municipality, or consolidated government of this state shall be liable or accountable for or on account of any act or omission of any person appointed pursuant to this Code section in connection with such

person's enforcement of the provisions of this Code section or local littering ordinances.

(g) It shall be unlawful for any person willfully to obstruct, resist, impede, or interfere with any person appointed pursuant to this Code section in connection with such person's enforcement of this Code section or local littering ordinances or to retaliate or discriminate in any manner against such person as a reprisal for any act or omission of such person. Any violation of this subsection shall be punishable as a misdemeanor. (Ga. L. 1970, p. 494, §§ 4, 5; Ga. L. 1971, p. 886, § 1; Ga. L. 1974, p. 454, § 1; Ga. L. 1982, p. 3, § 16; Ga. L. 1987, p. 813, § 1; Ga. L. 1995, p. 315, § 1; Ga. L. 2002, p. 637, § 2; Ga. L. 2006, p. 275, § 2-1/HB 1320.)

Cross references. — Waste management generally, T. 12, C. 8. Littering of highways, § 40-6-249. Duty of wrecker truck driver to take away all parts of vehicle from scene of wreck, § 40-6-276.

Editor's notes. — Ga. L. 1987, p. 813, § 2, not codified by the General Assembly, and effective July 1, 1987, provided that that Act should not affect or abate the status as a crime of any act or omission which occurred prior to July 1, 1987, nor shall the prosecution of such crime be abated as a result of that Act.

Ga. L. 2002, p. 637, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Georgia Clean Communities Act of 2002'."

Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

Law reviews. — For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising under O.C.G.A. § 16-7-43(g) require fingerprinting. 2002 Op. Att'y Gen. No. 2002-7.

RESEARCH REFERENCES

Am. Jur. 2d. — 40 Am. Jur. 2d, Highways, Streets, and Bridges, § 677.

16-7-44. Prima-facie evidence; rebuttable presumption.

(a) Whenever litter is thrown, deposited, dropped, or dumped from any motor vehicle, boat, airplane, or other conveyance in violation of Code Section 16-7-43, the trier of fact may in its discretion and in consideration of the totality of the circumstances infer that the operator of the conveyance has violated this part.

(b) Except as provided in subsection (a) of this Code section, whenever any litter which is dumped, deposited, thrown, or left on public or

private property in violation of Code Section 16-7-43 is discovered to contain any article or articles, including but not limited to letters, bills, publications, or other writings which display the name of a person thereon in such a manner as to indicate that the article belongs or belonged to such person, the trier of fact may in its discretion and in consideration of the totality of the circumstances infer that such person has violated this part. (Ga. L. 1970, p. 494, § 6; Ga. L. 1984, p. 1489, § 1; Ga. L. 1990, p. 8, § 16; Ga. L. 2006, p. 275, § 2-1/HB 1320.)

Cross references. — Littering highways, § 40-6-249.

Editor's notes. — Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

16-7-45. Enforcement of this part.

All law enforcement agencies, officers, and officials of this state or any political subdivision thereof or any enforcement agency, officer, or any official of any commission or authority of this state or any political subdivision thereof is authorized, empowered, and directed to enforce compliance with this part. (Ga. L. 1970, p. 494, § 7; Ga. L. 1985, p. 149, § 16; Ga. L. 1990, p. 8, § 16; Ga. L. 2006, p. 275, § 2-1/HB 1320.)

Cross references. — Acceptance of cash bonds for violation of litter laws, § 17-6-5 et seq. Deposit of driver's license in lieu of bail, formal recognizance, or incarceration for violations of litter laws, § 17-6-11. County government authority to adopt ordinances for policing unincorporated portions of county, § 36-1-20.

Editor's notes. — Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 85-1606 are included in the annotations for this Code section.

Wildlife rangers of Game and Fish Commission are authorized to enforce compliance with the 1970 Litter Control Law. 1971 Op. Att'y Gen. No. 71-37 (decided under former Code 1933, § 85-1606).

By "officer" in the 1970 Litter Control Law, the legislature meant the wildlife rangers employed by the commission. 1971 Op. Att'y Gen. No. 71-37 (decided under former Code 1933, § 85-1606).

RESEARCH REFERENCES

Am. Jur. 2d. — 40 Am. Jur. 2d, Highways, Streets, and Bridges, §§ 677, 678.

16-7-46. Receptacles to be provided; notice to public.

All public authorities and agencies having supervision of properties of this state are authorized, empowered, and instructed to establish and maintain receptacles for the deposit of litter at appropriate locations where the property is frequented by the public, to post signs directing persons to the receptacles and serving notice of the provisions of this part, and to otherwise publicize the availability of litter receptacles and requirements of this part. (Ga. L. 1970, p. 494, § 8; Ga. L. 1990, p. 8, § 16; Ga. L. 2006, p. 275, § 2-1/HB 1320.)

Editor's notes. — Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

16-7-47. Designation of containers for household garbage; misuse or vandalization of container.

(a) As used in this Code section, the term "household garbage" means animal, vegetable, and fruit refuse matter and other refuse matter ordinarily generated as by-products of a household or restaurant, such as tin cans, bottles, paper, cardboard, plastics, and wrapping or packaging materials.

(b) The governing authority of each county, municipality, or consolidated government of this state which provides containers for the dumping of trash or garbage therein shall be authorized to designate any or all such containers as being suitable for the dumping therein of household garbage only. If a container is clearly marked "household garbage only," it shall be unlawful for any person to dump any refuse or other material into the container other than household garbage.

(c) It shall be unlawful for any person to set fire to the contents of, indiscriminately scatter or disperse the contents of, or otherwise vandalize any containers provided by any county, municipality, or consolidated government for the dumping of trash or garbage.

(d) Any person who violates subsection (b) or (c) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1979, p. 831, §§ 1-3; Ga. L. 2006, p. 275, § 2-1/HB 1320.)

Cross references. — Solid waste handling, disposal, etc., § 12-8-20 et seq.

Editor's notes. — Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

Law reviews. — For article surveying legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, §§ 398, 400 et seq.

C.J.S. — 39A C.J.S., Health and Environment, § 73.

16-7-48. Local ordinances regulating and controlling litter.

(a) Nothing in this part shall limit the authority of any state agency, county, municipality, or consolidated government to enforce any other laws, rules, or regulations relating to litter.

(b) Nothing within this part shall be construed to prohibit the adoption of local ordinances regulating and controlling litter within the jurisdiction of any county, municipality, or consolidated government. Violation of such ordinances shall be punished as provided in the municipal charter or local ordinances. (Ga. L. 1981, p. 1758, § 1; Ga. L. 2006, p. 275, § 2-1/HB 1320.)

Cross references. — County government authority to adopt ordinances for governing and policing unincorporated portions of county, § 36-1-20.

Editor's notes. — Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

PART 3

WASTE CONTROL

Cross references. — Investigations by director of environmental protection division to enforce Georgia Comprehensive Solid Waste Management Act, § 12-8-29 et seq.

Law reviews. — For note on 1993 enactment of this part, see 10 Ga. St. U.L. Rev. 100 (1993).

16-7-50. Short title.

Reserved. Repealed by Ga. L. 2006, p. 275, § 2-2, effective July 1, 2006.

Editor's notes. — This Code section was based on Code 1981, § 16-7-50, enacted by Ga. L. 1993, p. 496, § 2.

16-7-51. Definitions.

As used in this part, the term:

(1) "Biomedical waste" means that term as defined in paragraph (1.1) of Code Section 12-8-22.

(2) "Commercial purpose" means for the purpose of economic gain.

(3) "Dump" means to throw, discard, place, deposit, discharge, burn, or dispose of a substance.

(4) "Egregious litter" means all litter, as such term is defined in paragraph (1) of Code Section 16-7-42, exceeding ten pounds in weight or 15 cubic feet in volume; any discarded or abandoned substance in any weight or volume if biomedical waste, hazardous waste, or a hazardous substance; or any substance or material dumped for commercial purposes.

(5) "Hazardous substance" means that term as defined in paragraph (4) of Code Section 12-8-92.

(6) "Hazardous waste" means that term as defined in paragraph (10) of Code Section 12-8-62. (Code 1981, § 16-7-51, enacted by Ga. L. 1993, p. 496, § 2; Ga. L. 2006, p. 275, § 2-2/HB 1320.)

Editor's notes. — Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

JUDICIAL DECISIONS

Cited in Wiley v. State, 256 Ga. App. 786, 570 S.E.2d 28 (2002).

16-7-52. Unlawful dumping.

It shall be unlawful for any person to intentionally dump egregious litter unless authorized to do so by law or by a duly issued permit:

(1) In or on any public highway, road, street, alley, or thoroughfare, including any portion of the right of way thereof, or on any other public lands except in containers or areas lawfully provided for such dumping;

(2) In or on any fresh-water lake, river, canal, or stream or tidal or coastal water of the state; or

(3) In or on any private property, unless prior consent of the owner has been given and unless such dumping will not adversely affect the public health and is not in violation of any other state law, rule, or regulation. (Code 1981, § 16-7-52, enacted by Ga. L. 1993, p. 496, § 2; Ga. L. 2006, p. 275, § 2-2/HB 1320.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1993, the subsection (a) designation was deleted, since this Code section does not have a subsection (b), and, in paragraph (1), "right of way" was substituted for "right-of-way".

Editor's notes. — Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

JUDICIAL DECISIONS

Legal description of property on which waste is dumped not necessary. — Because defendant was charged with unlawful dumping under O.C.G.A. § 16-7-52(3), it was not necessary to prove the legal description of the property on which waste was dumped to obtain a conviction, even though the legal description was alleged in the indictment, because this allegation was mere surplusage, and venue was proved. Crouse v. State, 271 Ga. App. 820, 611 S.E.2d 113 (2005).

Cited in Wiley v. State, 256 Ga. App. 786, 570 S.E.2d 28 (2002); Warren v. State, 289 Ga. App. 481, 657 S.E.2d 533 (2008).

16-7-53. Penalties for unlawful dumping.

(a) Any person who intentionally dumps egregious litter in violation of Code Section 16-7-52 in an amount not exceeding 500 pounds in weight or 100 cubic feet in volume which is not biomedical waste, hazardous waste, or a hazardous substance and not for commercial purposes shall be guilty of a misdemeanor of a high and aggravated nature. For purposes of this subsection, each day a continuing violation occurs shall constitute a separate violation.

(b) Any person who intentionally dumps egregious litter in violation of Code Section 16-7-52 in an amount exceeding 500 pounds in weight or 100 cubic feet in volume which is not biomedical waste, hazardous waste, or a hazardous substance and not for commercial purposes shall upon the first offense be guilty of a misdemeanor of a high and aggravated nature. Upon the second and each subsequent offense such person shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $25,000.00 for each violation or imprisoned for not more than five years, or both; provided, however, that the portion of any term of imprisonment exceeding two years shall be probated conditioned upon payment of a fine imposed under this subsection. For

purposes of this subsection, each day a continuing violation occurs shall constitute a separate violation.

(c) Any person who intentionally dumps egregious litter in violation of Code Section 16-7-52 in any quantity if the substance is biomedical waste, hazardous waste, or a hazardous substance or if the dumping is for commercial purposes shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $25,000.00 for each violation or imprisoned for not more than five years, or both; provided, however, that the portion of any term of imprisonment exceeding two years shall be probated conditioned upon payment of a fine imposed under this subsection. For purposes of this subsection, each day a continuing violation occurs shall constitute a separate violation.

(d) In addition to the penalties provided in subsections (a) and (b) of this Code section, the court may order the violator to remove or render harmless any egregious litter dumped in violation of Code Section 16-7-52, repair or restore property damaged by or pay damages resulting from such dumping, or perform public service related to the removal of illegally dumped egregious litter or to the restoration of an area polluted by such substance.

(e)(1) The court shall cause to be published a notice of conviction for each person convicted of violating any provision of this Code section. Such notices of conviction shall be published in the manner of legal notices in the legal organ of the county in which such person resides or, in the case of a nonresident, in the legal organ of the county in which the person was convicted. Such notice of conviction shall contain the name and address of the convicted person; date, time, and place of arrest; and disposition of the case and shall be published once in the legal organ of the appropriate county in the second week following such conviction or as soon thereafter as publication may be made.

(2) The convicted person for which a notice of conviction is published pursuant to this subsection shall be assessed the cost of publication of such notice, and such assessment shall be imposed at the time of conviction in addition to any other fine imposed pursuant to this Code section.

(3) The clerk of the court, the publisher of any legal organ which publishes a notice of conviction, and any other person involved in the publication of an erroneous notice of conviction shall be immune from civil or criminal liability for such erroneous publication, provided such publication was made in good faith. (Code 1981, § 16-7-53, enacted by Ga. L. 1993, p. 496, § 2; Ga. L. 2006, p. 275, § 2-2/HB 1320.)

Editor's notes. — Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

JUDICIAL DECISIONS

Cited in Wiley v. State, 256 Ga. App. 786, 570 S.E.2d 28 (2002); Warren v. State, 289 Ga. App. 481, 657 S.E.2d 533 (2008).

16-7-53.1. Vehicle impoundment for intentionally dumping egregious litter.

(a) Whenever a person has been arrested for a violation of Code Section 16-7-52 committed while driving, moving, or operating a vehicle, the arresting law enforcement agency may impound the vehicle that the person was driving, moving, or operating at the time of arrest until such time as the arrestee claiming the vehicle meets the conditions for release in subsection (b) of this Code section or a person other than the arrestee meets the conditions for release in subsection (c) of this Code section.

(b) A vehicle impounded pursuant to this Code section shall not be released unless the person claiming the vehicle:

(1) Presents a valid driver's license, proof of ownership or lawful authority to operate the motor vehicle, and proof of valid motor vehicle insurance for that vehicle; and

(2) Is able to operate the vehicle in a safe manner and would not be in violation of Title 40.

(c) A vehicle impounded pursuant to this Code section may be released to a person other than the arrestee only if:

(1) The vehicle is not owned or leased by the person under arrest and the person who owns or leases the vehicle claims the vehicle and meets the conditions for release in subsection (b) of this Code section; or

(2) The vehicle is owned or leased by the arrestee, the arrestee gives written permission to another person to operate the vehicle, and the conditions for release in subsection (b) of this Code section are met.

(d) A law enforcement agency impounding a vehicle pursuant to this Code section may charge a reasonable fee for towing and storage of the vehicle. The law enforcement agency may retain custody of the vehicle until that fee is paid. (Code 1981, § 16-7-53.1, enacted by Ga. L. 2006, p. 275, § 2-2/HB 1320.)

Editor's notes. — Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

16-7-54. Evidence of identity of violator.

Whenever any egregious litter which is dumped in violation of Code Section 16-7-52 is discovered to contain any article or articles, including but not limited to letters, bills, publications, or other writings which display the name of a person thereon, addressed to such person or in any other manner indicating that the article belongs or belonged to such person, the trier of fact may in its discretion and in consideration of the totality of the circumstances infer that such person has violated this part. (Code 1981, § 16-7-54, enacted by Ga. L. 1993, p. 496, § 2; Ga. L. 2006, p. 275, § 2-2/HB 1320.)

Editor's notes. — Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

16-7-55. Enforcement of other laws, rules, or regulations not limited.

(a) Nothing in this part shall limit the authority of any state agency, county, municipality, or consolidated government to enforce any other laws, rules, or regulations relating to egregious litter or the management of solid, biomedical, or hazardous waste.

(b) Nothing within this part shall be construed to prohibit the adoption of local ordinances regulating and controlling egregious litter within the jurisdiction of any county, municipality, or consolidated government. Violation of such ordinances shall be punished as provided in the municipal charter or local ordinances. (Code 1981, § 16-7-55, enacted by Ga. L. 1993, p. 496, § 2; Ga. L. 2006, p. 275, § 2-2/HB 1320.)

Editor's notes. — Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

16-7-56. Title 12 provisions not affected.

Nothing in this part shall be construed so as to repeal, supersede, amend, or modify any provision of Title 12. (Code 1981, § 16-7-56, enacted by Ga. L. 1993, p. 496, § 2; Ga. L. 2006, p. 275, § 2-2/HB 1320.)

Editor's notes. — Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

Part 3A

Placement of Posters, Signs, and Advertisements

16-7-58. Prohibited placements of posters, signs, and advertisements.

(a) It shall be unlawful for any person to place posters, signs, or advertisements:

(1) On any public property or building, unless the owner thereof or the occupier as authorized by such owner has given permission to place such posters, signs, or advertisements on such property; provided, however, that signs within the rights of way of public roads shall be governed by Code Section 32-6-51;

(2) On any private property unless the owner thereof or the occupier as authorized by such owner has given permission to place such posters, signs, or advertisements on such property; and, provided, further that no municipal, county, or consolidated government may restrict by regulation or other means the length of time a political campaign sign may be displayed or the number of signs which may be displayed on private property for which permission has been granted; or

(3) On any property zoned for commercial or industrial uses if the placement of such posters, signs, or advertisements conflicts with any zoning laws or ordinances.

(b) Any poster, sign, or advertisement placed in violation of paragraph (1) of subsection (a) of this Code section is declared to be a public nuisance, and the officials having jurisdiction of the public property or building, including without limitation law enforcement officers, may remove or direct the removal of the same.

(c) Each poster, sign, or advertisement placed in violation of this Code section shall constitute a separate offense.

(d) Any person who violates this Code section shall be punished the same as for littering under Code Section 16-7-43. (Ga. L. 1971, p. 624, §§ 1, 3; Code 1981, § 21-1-1; Ga. L. 1983, p. 471, § 1; Code 1981, § 21-2-3; as redesignated by Ga. L. 2001, Ex. Sess., p. 335, § 4; Ga. L. 2006, p. 691, § 1/HB 1097; Code 1981, § 16-7-58, as redesignated by Ga. L. 2006, p. 275, § 2-3/HB 1320.)

Cross references. — Restrictions on campaign activities within vicinity of polling place, §§ 21-2-413, 21-2-414. Unlawful placement of signs within right of way of public road generally, § 32-6-51.

Editor's notes. — Ga. L. 2001, Ex. Sess., p. 335, § 4, effective October 1, 2001, redesignated former Code Section 21-2-3 as present Code Section 21-1-1 and redesignated former Code Section 21-1-1 as present Code Section 21-2-3. Subsequently, Ga. L. 2006, p. 275, § 2-3, redesignated Code Section 21-2-3 as present Code Section 16-7-58. Ga. L. 2006, p. 275, § 4-1, reserved the designation of Code Section 21-2-3.

Ga. L. 2006, p. 275, § 1-1/HB 1320, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Comprehensive Litter Prevention and Abatement Act of 2006.'"

Ga. L. 2006, p. 275, § 5-1/HB 1320, not codified by the General Assembly, provides that the Act shall become effective April 21, 2006, for purposes of adopting local ordinances to become effective on or after July 1, 2006.

Ga. L. 2006, p. 691, § 7/HB 1097, not codified by the General Assembly, provides for severability.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 34-2301 are included in the annotations for this Code section.

"One man, one vote" requirement. — Within the states, legislatures may not draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a congressman than others. Wesberry v. Sanders, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964) (decided under former Code 1933, § 34-2301).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Elections, §§ 8, 37.

C.J.S. — 29 C.J.S., Elections, § 81 et seq.

ARTICLE 3

ARSON AND EXPLOSIVES

Cross references. — Investigation of cases of suspected arson, § 25-2-27 et seq. Payment of sheriffs and other peace officers for assistance in arson or other cases, § 25-2-35.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Failure to Prevent Outbreak and Spread of Fire, 23 POF2d 461.

Paint or Lacquer Vapor Explosions, 30 POF2d 575.

Arson Defense to Coverage Under Property Insurance, 34 POF3d 291.

Am. Jur. Trials. — Preparation and Trial of Arson Case, 19 Am. Jur. Trials 685.

Handling Fire Claims Out of Court, 57 Am. Jur. Trials 155.

ALR. — Death resulting from arson as within contemplation of statute which makes homicide in perpetration of felony murder in first degree, 87 A.L.R. 414.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine, 50 A.L.R.3d 397.

What constitutes "burning" to justify charge of arson, 28 A.L.R.4th 482.

Pyromania and the criminal law, 51 A.L.R.4th 1243.

16-7-60. Arson in the first degree.

(a) A person commits the offense of arson in the first degree when, by means of fire or explosive, he or she knowingly damages or knowingly causes, aids, abets, advises, encourages, hires, counsels, or procures another to damage:

(1) Any dwelling house of another without his or her consent or in which another has a security interest, including but not limited to a mortgage, a lien, or a conveyance to secure debt, without the consent of both, whether it is occupied, unoccupied, or vacant;

(2) Any building, vehicle, railroad car, watercraft, or other structure of another without his or her consent or in which another has a security interest, including but not limited to a mortgage, a lien, or a conveyance to secure debt, without the consent of both, if such structure is designed for use as a dwelling, whether it is occupied, unoccupied, or vacant;

(3) Any dwelling house, building, vehicle, railroad car, watercraft, aircraft, or other structure whether it is occupied, unoccupied, or vacant and when such is insured against loss or damage by fire or explosive and such loss or damage is accomplished without the consent of both the insurer and the insured;

(4) Any dwelling house, building, vehicle, railroad car, watercraft, aircraft, or other structure whether it is occupied, unoccupied, or vacant with the intent to defeat, prejudice, or defraud the rights of a spouse or co-owner; or

(5) Any building, vehicle, railroad car, watercraft, aircraft, or other structure under such circumstances that it is reasonably foreseeable that human life might be endangered.

(b) A person also commits the offense of arson in the first degree when, in the commission of a felony, by means of fire or explosive, he or

she knowingly damages or knowingly causes, aids, abets, advises, encourages, hires, counsels, or procures another to damage anything included or described in subsection (a) of this Code section.

(c) A person convicted of the offense of arson in the first degree shall be punished by a fine of not more than $50,000.00 or by imprisonment for not less than one nor more than 20 years, or both. (Ga. L. 1924, p. 192, § 1; Code 1933, § 26-2208; Ga. L. 1949, p. 1118, § 2; Code 1933, § 26-1401, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 1497, § 1; Ga. L. 1979, p. 935, § 1; Ga. L. 2004, p. 734, § 1.)

Editor's notes. — Ga. L. 2004, p. 734, § 4, not codified by the General Assembly, provides that the amendment to this Code section is not applicable to any offense committed prior to July 1, 2004, and that any such offense shall be punishable as provided by the statute in effect at the time the offense was committed.

JUDICIAL DECISIONS

Analysis

General Consideration
Evidence
Jury Instructions

General Consideration

In a case of arson, the corpus delicti consists of two fundamental facts: first, the burning of the house described in the indictment, and second, the fact that a criminal agency was the cause of the burning. Wade v. State, 195 Ga. 870, 25 S.E.2d 712 (1943); Reese v. State, 94 Ga. App. 387, 94 S.E.2d 741 (1956).

In a case of arson, the corpus delicti consists in the proof of three fundamental facts: (1) the burning of the house described in the indictment; (2) that a criminal agency was the cause of the burning; and (3) that the defendant was the criminal agency. Hurst v. State, 88 Ga. App. 798, 78 S.E.2d 80 (1953).

Proof of burning resulting from criminal agency. — In a prosecution for arson, it is not only necessary that there be proof of a burning, but it must also be shown that the burning was the result of some criminal agency, for, when a house is consumed by fire and nothing appears but that fact, the law rather implies, that the fire was the result of the accident, or some providential cause, than of a criminal design. Underwood v. State, 51 Ga. App. 735, 181 S.E. 500 (1935).

Three things are necessary to sustain a conviction for arson: that the real property alleged in the indictment was in fact burned; that its cause was a criminal agency; and that the defendant was that criminal agency. Bragg v. State, 175 Ga. App. 640, 334 S.E.2d 184 (1985).

Crime of arson requires a knowing damage by fire or explosion intentionally caused. Burns v. State, 166 Ga. App. 766, 305 S.E.2d 398 (1983), cert. denied, 465 U.S. 1027, 104 S. Ct. 1286, 79 L. Ed. 2d 688 (1984).

Forseeability of danger to human life. — Evidence clearly established the reasonable foreseeability of danger to human life, where the fire was set in a carpet plant which was occupied by several employees. Vineyard v. State, 195 Ga. App. 788, 395 S.E.2d 49 (1990).

Consent to act of burning. — An act of burning is not criminal (i.e., consensual) if both the insurer and the insured have agreed or acquiesced in the act. However, if either or both do not consent to the act, the burning becomes an act of arson, for the nonconsenting party has been subjected to either a criminal tort or fraud. Burns v. State, 166 Ga. App. 766, 305 S.E.2d 398 (1983), cert. denied, 465 U.S. 1027, 104 S. Ct. 1286, 79 L. Ed. 2d 688 (1984).

General Consideration (Cont'd)

Pursuant to O.C.G.A. § 16-7-60(a)(2), the state is only required to prove that either the owner or the holder of the security interest did not consent to the damage, and is not required to prove both parties did not consent. Hall v. State, 201 Ga. App. 133, 410 S.E.2d 448 (1991).

Pursuant to O.C.G.A. § 16-7-60(a)(3), the state is only required to prove that either the owner or the insurer of the property did not consent to the damage. Hall v. State, 201 Ga. App. 133, 410 S.E.2d 448 (1991).

Causing smoke damage constitutes arson in first degree if other elements of crime are present. Smith v. State, 140 Ga. App. 200, 230 S.E.2d 350 (1976).

Dwelling. — Although the building involved in an arson prosecution was used for grocery store, dancehall and filling station, its one bedroom which was used as sleeping quarters for the employee who lost life as a result of the burning of the building was sufficient to constitute it a dwelling within the meaning of the statute. Wade v. State, 195 Ga. 870, 25 S.E.2d 712 (1943).

Occupancy and ownership. — Under the arson statute, an offense was committed whether the dwelling house was occupied, unoccupied, or vacant and whether the premises are the property of the defendant or of another. Tukes v. State, 125 Ga. App. 831, 189 S.E.2d 135 (1972); State v. Hovers, 148 Ga. App. 431, 251 S.E.2d 397 (1978); In re M.E.H., 180 Ga. App. 591, 349 S.E.2d 814 (1986).

Vacancy does not convert a building from a dwelling house to another type of structure for the purposes of an arson prosecution. Crawford v. GEICO, 771 F. Supp. 1230 (S.D. Ga. 1991).

Offense is committed whether or not the dwelling is occupied. Frost v. State, 200 Ga. App. 267, 407 S.E.2d 765, cert. denied, 200 Ga. App. 896, 407 S.E.2d 765 (1991).

Lawful occupancy by one in charge constitutes ownership as contemplated by statute, and the question of legal title is not involved. Tukes v. State, 125 Ga. App. 831, 189 S.E.2d 135 (1972); Rash v. State, 182 Ga. App. 655, 356 S.E.2d 719 (1987).

Notwithstanding that the indictment charged that the defendant damaged "the property of the . . . housing authority occupied by [named tenant]," the state was not required to introduce evidence that the building was indeed owned by the housing authority since lawful occupancy by the tenant constituted ownership as contemplated by the statute and the question of legal title was not involved. Stanford v. State, 236 Ga. App. 597, 512 S.E.2d 708 (1999).

Sufficiency of indictment. — Indictment charging defendant with "unlawfully" damaging by means of fire her husband's occupied dwelling house without the consent of her husband or of the lien holder, was not fatally defective, where defendant was unquestionably aware that she was charged with a violation of O.C.G.A. § 16-7-60. Frost v. State, 200 Ga. App. 267, 407 S.E.2d 765, cert. denied, 200 Ga. App. 896, 407 S.E.2d 765 (1991).

With regard to defendant's conviction for first degree arson, insofar as the indictment charged defendant as such, it was fatally defective because the indictment failed to allege essential elements of arson in the first degree, namely that either the vehicle that was damaged was designed for use as a dwelling, or that it was insured against fire damage that was done without the consent of both the insurer and insured, or that it was done with the intent to prejudice the rights of a spouse or co-owner or under circumstances making it reasonably foreseeable that human life might be endangered. Therefore, even though the state's proof may have been sufficient to sustain a conviction of arson in the first degree in one or more ways, defendant's conviction was erroneous due to the fatal defect in the indictment. Shelnutt v. State, 289 Ga. App. 528, 657 S.E.2d 611 (2008), cert. denied, No. S08C0977, 2008 Ga. LEXIS 518 (Ga. 2008).

Criminal damage to property is included offense in arson in first degree. — Anyone who commits first-degree arson necessarily has also committed criminal damage to property, provided that the property damaged belongs to another person. Since the criminal damage to property is established, however, by

proof of the same conduct as first-degree arson, but requires proof of a less culpable mental state, it is an included crime in first-degree arson, and a defendant may not be convicted of both. Corson v. State, 144 Ga. App. 559, 241 S.E.2d 454 (1978).

One who commits first-degree arson has also committed criminal damage to property when the property in question belongs to another, but while the latter crime is established by the same conduct as the former, it requires proof of a "less culpable mental state" under the Criminal Code. Bryant v. State, 188 Ga. App. 505, 373 S.E.2d 289 (1988).

When the evidence establishes without conflict that arson in the first degree occurred, and the defendant simply denies being the one who committed it, the crime of criminal damage to property merges with the crime of arson, and no charge on the lesser crime is required. Walker v. State, 193 Ga. App. 100, 386 S.E.2d 925 (1989).

Acquittal for crime of aggravated assault is not inconsistent with arson conviction. Corson v. State, 144 Ga. App. 559, 241 S.E.2d 454 (1978).

Presumption of causation of fire. — While on a trial for arson, if nothing appears but the mere fact that the house was consumed by fire, the presumption is that the fire was the result of accidental, or natural, or providential cause, the corpus delicti may be proved by circumstantial evidence, as well as by direct evidence. Wade v. State, 195 Ga. 870, 25 S.E.2d 712 (1943).

Every fire is presumed to be accidental or providential. Lockhart v. State, 76 Ga. App. 289, 45 S.E.2d 698 (1947).

Burden on state. — It is incumbent upon the state in an arson prosecution to establish the corpus delicti. Wade v. State, 195 Ga. 870, 25 S.E.2d 712 (1943).

Burden is on the state to prove that a fire was of an incendiary origin and that the accused was the person who did the burning. Lockhart v. State, 76 Ga. App. 289, 45 S.E.2d 698 (1947).

Burden of proof. — Every fire is presumed to be accidental or providential; the burden is on the state to prove that the fire was of an incendiary origin and that the accused did the burning. Bragg v. State, 175 Ga. App. 640, 334 S.E.2d 184 (1985).

When argument concerning arson's effect on insurance premiums is permissible. — When the district attorney's closing argument deals in part with the effect of arson upon insurance premiums, the argument is permissible when the defendant is indicted under O.C.G.A. § 16-7-60(a)(3). Waters v. State, 174 Ga. App. 916, 331 S.E.2d 893 (1985).

Submission to jury of prior conviction not unconstitutional. — Trial court properly sentenced a defendant as a recidivist for 20 years imprisonment, to serve 15 years, pursuant to O.C.G.A. § 17-10-7, as a result of defendant's arson conviction because defendant chose to proceed with a jury trial instead of pleading guilty, which would have involved only a three-year sentence, which was indicated by the trial judge during a pretrial hearing. Moore v. State, 283 Ga. App. 533, 642 S.E.2d 163 (2007).

Merger of counts following conviction. — Because the first degree criminal damage to property was the equivalent of charging the defendant with one of the five methods for proving first degree arson, the trial court erred by failing to merge the two counts upon conviction. Williams v. State, 329 Ga. App. 706, 766 S.E.2d 474 (2014).

Sentencing error. — With regard to a defendant's convictions for malice murder and other crimes, the trial court erred by not merging for sentencing the two first degree arson counts with the first degree arson committed by knowingly damaging by fire the dwelling house of one of the victims count and the count charging the defendant with first degree arson committed by knowingly damaging by fire the same structure on the same date under such circumstances that it was reasonably foreseeable that human life might be endangered. Although the evidence showed that the defendant set the victims' residence afire by setting multiple fires in succession throughout the house, the defendant's conduct constituted one act of arson, that of the burning of the residence, thus, there was only one crime of arson in the first degree, and the trial court erred in imposing two consecutive 20-year sen-

General Consideration (Cont'd)

tences for the single first degree offense. O'Kelley v. State, 284 Ga. 758, 670 S.E.2d 388 (2008).

Trial court's sentencing order was reversed insofar as the order imposed two sentences for the one crime of arson in the first degree because, although the jury convicted the defendant on two counts of arson in the first degree, one alleging that the structure burned was a dwelling house and one alleging that it was reasonably foreseeable that the fire might endanger human life, the evidence showed that only one continuous act of setting multiple fires in the same house; the trial court was directed to vacate the sentence the court imposed based on the second count of arson in the first degree. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, cert. denied, U.S. , 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010).

Defendant properly sentenced as a recidivist. — Trial court properly dismissed a defendant's petition to correct a void sentence, which challenged the imposition of a 60-year recidivist sentence imposed against the defendant for burglary and arson, in violation of O.C.G.A. §§ 16-7-1(a) and 16-7-60(c), respectively, as the state gave notice of the state's intent to have the defendant sentenced as a recidivist under O.C.G.A. § 17-10-7(a) and (c) and no abuse of the trial court's discretion was shown. Marshall v. State, 294 Ga. App. 282, 668 S.E.2d 892 (2008).

Cited in Keller v. State, 128 Ga. App. 129, 195 S.E.2d 767 (1973); Hall v. State, 130 Ga. App. 233, 202 S.E.2d 674 (1973); Griffin v. State, 133 Ga. App. 508, 211 S.E.2d 382 (1974); Powell v. State, 142 Ga. App. 641, 236 S.E.2d 779 (1977); Metts v. State, 162 Ga. App. 641, 291 S.E.2d 405 (1982); Howard v. State, 165 Ga. App. 184, 300 S.E.2d 194 (1983); Baxter v. State, 176 Ga. App. 154, 335 S.E.2d 607 (1985); Bryant v. State, 179 Ga. App. 653, 347 S.E.2d 301 (1986); Perez-Medina v. First Team Auction, Inc., 206 Ga. App. 719, 426 S.E.2d 397 (1992); Green v. State, 265 Ga. 263, 454 S.E.2d 466 (1995); Stanford v. Stewart, 274 Ga. 468, 554 S.E.2d 480 (2001).

Evidence

Arson can seldom be established by positive testimony. The character of the offense makes it necessarily dependent for conviction upon confessions and corroborating circumstances. The force to be given to the corroboration must be left to an upright and intelligent jury. Wade v. State, 195 Ga. 870, 25 S.E.2d 712 (1943).

Evidence of accused's motive is admissible. — Evidence that the accused had a motive for setting a fire is admissible to aid in identifying the guilty incendiary or in showing that the fire was of criminal origin rather than of accidental origin. Lockhart v. State, 76 Ga. App. 289, 45 S.E.2d 698 (1947).

Testimony by state's expert witness. — State's expert witness may be allowed to testify as to the expert's belief that the fire had been incendiary in origin. Blackburn v. State, 180 Ga. App. 436, 349 S.E.2d 286 (1986).

Accident defense rejected. — Evidence that the defendant had threatened the victim's life more than once before the fire and had physically abused the victim along with the state's arson expert's testimony that the extent and type of the defendant's injuries made the defendant's accidental version of the fire impossible sufficed to support a finding that the defendant's striking of the match was intentional. Alexander v. State, 263 Ga. 474, 435 S.E.2d 187 (1993).

Film showing flammability of material. — Trial court does not err in allowing a film showing the potential for the ignition of flammable material by a short circuiting cable as well as the effect of external heat upon an energized cable where, although the film is of tests that are wholly unrelated to the fire in question, one of the major issues in the case is whether the inception of the fire was the result of ignition of flammable material by a faulty entrance cable or whether the physical evidence indicates another starting point of the fire. Burns v. State, 166 Ga. App. 766, 305 S.E.2d 398 (1983), cert. denied, 465 U.S. 1027, 104 S. Ct. 1286, 79 L. Ed. 2d 688 (1984).

Stipulation of elements of arson. — Defendant's acquiescence in an oral stip-

ulation in open court, regarding the ownership and lack of consent to burning of a building, amounted to a conclusively binding admission on the required elements in an arson prosecution, even though the stipulation was not reduced to writing. Dryer v. State, 205 Ga. App. 671, 423 S.E.2d 297 (1992).

Sufficient evidence of intent to commit arson. — Evidence that a defendant, who was under a restraining order, broke into the basement of a former spouse's home, bringing lighter fluid and several lighters, was sufficient to prove that the defendant was guilty of burglary with the intent to commit arson. Bubrick v. State, 293 Ga. App. 502, 667 S.E.2d 666 (2008).

Defendant's conviction for first degree arson was affirmed because O.C.G.A. § 16-7-60(a)(3) did not require that the fire be set with the intent to defraud the insurer. Here the evidence, including the defendant's statement to the fire investigators, clearly showed that the defendant poured gasoline and lighter fluid throughout the house and garage, and not just on the defendant's person. Barber v. State, 318 Ga. App. 240, 733 S.E.2d 525 (2012).

Evidence sufficient to show lack of consent to burning. — Defendant's contention that the state did not prove that the burning of the building alleged in the first degree arson count was "accomplished without the consent of both the insurer and the insured …" is without merit where the evidence was sufficient to show that the insurer of the building did not consent to the building being burned. Blackburn v. State, 180 Ga. App. 436, 349 S.E.2d 286 (1986).

Evidence sustained defendant's conviction of attempt to commit arson in the first degree, where defendant was seen pouring or shaking gasoline on a house and surrounding hedge bushes, with a gasoline can in defendant's possession, and with a lighter in defendant's hand. Tucker v. State, 182 Ga. App. 625, 356 S.E.2d 559 (1987).

When the record showed that the defendant told his girlfriend during an argument that he was going to burn down their residence, and he poured gasoline on the front porch and a rug near the front door, such evidence was more than sufficient to support the defendant's conviction of attempted arson in the first degree. Dodson v. State, 257 Ga. App. 344, 571 S.E.2d 403 (2002).

Evidence supported the defendant's convictions for malice murder, attempted arson, and related charges since: (1) the victim was found encased in concrete in a cattle trough on a farm the defendant used for hunting; (2) the victim was killed by a .22 caliber bullet wound to the head and multiple stab wounds and the police executing a search warrant found a .22 caliber rifle and ammunition consistent with those used to kill the victim at the defendant's home; (3) the defendant's mailbox was painted with the same type of paint used on the cattle trough, and similar paint was found at the defendant's home; (4) the defendant purchased 10 80-pound bags of concrete and a cattle trough, like the one in which the victim was found; and (5) there was a heavy smell of kerosene and a candle burned down to the stub under the victim's sofa, indicating that someone had unsuccessfully attempted to set the house on fire. Fortson v. State, 277 Ga. 164, 587 S.E.2d 39 (2003).

Evidence was sufficient to support defendant's conviction of criminal attempt to commit arson, even though defendant testified that defendant poured the gasoline on the floor to as an experiment to get rid of insects, where a victim testified that defendant poured gasoline on the floor after getting angry with defendant's spouse, a neighbor testified that the victim and the victim's parent smelled like gasoline, the police chief testified that the odor of gasoline was so strong that the chief called the fire department, and the defendant testified that defendant overreacted when defendant heard the defendant's spouse and child laughing and that defendant told them that they thought that defendant was wrong about burning the house down. Waller v. State, 267 Ga. App. 608, 600 S.E.2d 706 (2004).

Conspiracy to commit arson. — Conspiracy to commit arson, without more, does not naturally, necessarily, and probably result in the murder of one co-conspirator by another; thus, defen-

Evidence (Cont'd)

dant was improperly convicted of murder because although defendant was guilty of conspiracy to commit arson, the subsequent murder of one co-conspirator by another to keep the murdered co-conspirator quiet was not reasonably foreseen as a necessary, probable consequence of the arson conspiracy. Everritt v. State, 277 Ga. 457, 588 S.E.2d 691 (2003).

Evidence sufficient to sustain conviction. — See Parker v. State, 181 Ga. App. 590, 353 S.E.2d 83 (1987); Rash v. State, 182 Ga. App. 655, 356 S.E.2d 719 (1987); Brown v. State, 195 Ga. App. 532, 394 S.E.2d 378 (1990); Frost v. State, 200 Ga. App. 267, 407 S.E.2d 765, cert. denied, 200 Ga. App. 896, 407 S.E.2d 765 (1991); Collins v. State, 201 Ga. App. 433, 411 S.E.2d 341 (1991); Stephens v. State, 214 Ga. App. 183, 447 S.E.2d 26 (1994); Steidl v. State, 215 Ga. App. 17, 449 S.E.2d 644 (1994); Grover v. State, 215 Ga. App. 907, 452 S.E.2d 586 (1994); Lawrence v. State, 265 Ga. 65, 453 S.E.2d 733 (1995); Moak v. State, 222 Ga. App. 36, 473 S.E.2d 576 (1996); Morrow v. State, 230 Ga. App. 137, 495 S.E.2d 609 (1998); Cannon v. State, 230 Ga. App. 440, 496 S.E.2d 330 (1998); Kent v. Brown, 238 Ga. App. 607, 518 S.E.2d 737 (1999); White v. State, 238 Ga. App. 367, 519 S.E.2d 13 (1999); Allen v. State, 245 Ga. App. 884, 539 S.E.2d 211 (2000).

Evidence sufficient to sustain convictions of arson in the first degree and two counts of aggravated battery. Rhodes v. State, 187 Ga. App. 218, 370 S.E.2d 219 (1988).

Evidence was legally sufficient to support defendant's conviction for arson, as the evidence showed not only that defendant, who was romantically linked to the victim, killed the victim and fled from the victim's house after committing the act, but also that defendant intentionally set fire to the victim's house and burned it down. Parker v. State, 277 Ga. 439, 588 S.E.2d 683 (2003).

Evidence was sufficient to support defendant's conviction for arson, felony murder, and aggravated assault resulting from a fire set at a residence occupied by defendant's sister-in-law, the sister-in-law's four children, and the sister-in-law's 12-year-old sibling where: (1) defendant confronted defendant's sister-in-law at the sister-in-law's home, alleging that the sister-in-law had stolen items from defendant's mobile home; (2) a physical altercation ensued between defendant and the sister-in-law; (3) defendant retrieved a gasoline can from defendant's car, poured gasoline onto the back door of the sister-in-law's home, and ignited it; and (4) the sister-in-law's three-year-old child died from the injuries sustained in the fire. Tarvin v. State, 277 Ga. 509, 591 S.E.2d 777 (2004).

Because defendant admitted that while the defendant's children were sleeping and to scare a love interest defendant used a cigarette lighter to set fire to the bedding on the corner of one child's bed, causing a fire in a trailer that killed three children, the evidence was sufficient to enable a rational trier of fact to find that defendant was, beyond a reasonable doubt, guilty of three counts of malice murder, three counts of felony murder, and two counts of arson in the first degree; thus, the trial court did not err by denying defendant's motion for a directed verdict of acquittal pursuant to O.C.G.A. § 17-9-1(a). Riley v. State, 278 Ga. 677, 604 S.E.2d 488 (2004).

Denial of defendant's motions for a directed verdict and judgment notwithstanding the verdict was proper as the evidence established the essential elements of attempted arson and aggravated assault; the evidence showed that defendant poured gasoline near two ignition sources (a light bulb and hot water heater) in the crawlspace of an estranged love interest's house and then told the estranged love interest's adult children to light the water heater's pilot flame. McGraw v. State, 276 Ga. App. 607, 624 S.E.2d 232 (2005).

Because the fire occurred in the early morning hours, there was sufficient evidence under O.C.G.A. § 16-7-60(a)(5) that it was reasonably foreseeable that a human life was endangered to convict the defendant of first degree arson; people were sometimes on or near the premises after hours, and there was testimony that the fire presented a danger to nearby

residents, the public, and firefighters. Pless v. State, 277 Ga. App. 415, 626 S.E.2d 613 (2006).

Malice murder and attempted arson convictions were upheld as: (1) the evidence presented showed that an attempted arson was inextricably linked to the victim's murder, and the jury was authorized to find beyond a reasonable doubt that the defendant was guilty; (2) the admission of two handwritten documents that defendant had penned was proper as their prejudicial impact did not outweigh their probative value; and (3) the trial court did not abuse the court's discretion in determining that any prejudicial impact of a religious prayer asking for strength, and an expression of uncertainty as to what "makes me tick," did not outweigh the probative value of the evidence. Fortson v. State, 280 Ga. 376, 628 S.E.2d 104 (2006).

When the facts demonstrated that the defendant threatened to burn down a restaurant and then proceeded to pour gasoline onto the restaurant's tables and carpet in front of numerous eyewitnesses, such was sufficient evidence to allow a rational jury to convict defendant of attempt to commit arson and terroristic threats; moreover, the defendant's act of damaging the tables and carpet by pouring gasoline on them was sufficient to support a conviction of first-degree criminal damage to property. Robinson v. State, 288 Ga. App. 219, 653 S.E.2d 810 (2007).

Sufficient evidence supported the defendant's first degree arson conviction under O.C.G.A. § 16-7-60; the defendant had set fire to the spouse's belongings before, the defendant confessed to an inmate that the defendant had set fire to the spouse's master bedroom, and the fire expert testified that the fire had been set intentionally and had originated in the master bedroom. Fields v. State, 281 Ga. App. 733, 637 S.E.2d 136 (2006), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007).

Sufficient evidence supported the defendant's convictions of malice murder and first-degree arson since: the defendant, who owed money to the victim for a house and who had delayed paying the money, was supposed to meet the victim at a bank to pay the victim on the day the victim's body was discovered in the victim's burned mobile home; a medical examiner testified that the victim had died by strangulation; the defendant had been seen at the mobile home twice that day and appeared agitated; there was fire-related activity in the defendant's home; the defendant had completed firefighting classes for work that included training in delayed-ignition devices constructed from household items; there was similar transaction evidence about a fire in the defendant's home and the defendant's use of the insurance proceeds from that fire to pay debts; and the defendant's claim that the defendant had been with the defendant's spouse at the time of the fire could be readily explained by the possibility of the use of a delayed-ignition device. Bryant v. State, 282 Ga. 631, 651 S.E.2d 718 (2007).

Sufficient evidence was presented to support a finding of felony murder based on arson in the first degree as O.C.G.A. § 16-7-60(a) did not require that a defendant personally set the fire or possess ignitable materials and the defendant knowingly damaged property by adding tires to the fire; additionally, based on the defendant's statements at the scene, the defendant was aware that human life might be endangered under § 16-7-60(a)(5) because the defendant indicated that the defendant knew someone was inside the building. Vega v. State, 285 Ga. 32, 673 S.E.2d 223 (2009).

Convictions of arson, O.C.G.A. § 16-7-60(a), and stalking, O.C.G.A. § 16-5-90, were proper because the circumstantial evidence presented at trial included a kerosene-soaked, partially burned mailing label addressed to the defendant found at the scene of a fire at the victim's home; the jury was entitled to infer from this evidence that the defendant left a virtual "calling card." The state also presented evidence of the defendant's escalating obsession with the victim and the threatening phone calls the defendant made to the victim shortly before the fire. Ransom v. State, 297 Ga. App. 902, 678 S.E.2d 574 (2009).

Trial court did not err in convicting the defendant of first degree arson in violation of O.C.G.A. § 16-7-60(a)(5) because there

Evidence (Cont'd)

was evidence that the defendant intended to damage an apartment and that it was reasonably foreseeable that human life would be endangered as a result of the fire when the defendant ripped out the smoke detector and poured alcohol on the items the defendant put in the oven; an arson investigator testified that it was "absolutely" foreseeable that the fire could have endangered human life, and the evidence was that there was visible smoke damage on the walls, which was sufficient to constitute "damage" under § 16-7-60. Ursulita v. State, 307 Ga. App. 735, 706 S.E.2d 123 (2011).

Evidence was sufficient to support convictions for arson because: (1) one of the defendants placed dozens of calls from the decedent's cell phone as the defendants traveled from Tampa to Atlanta in the decedent's pickup truck; (2) the truck was destroyed in a fire that was started through the use of an accelerant near an apartment complex where the defendants were staying with relatives; (3) the decedent's body was found in the bed of the truck; (4) the decedent had been dead for days before the fire; (5) personal belongings of the decedent were found in the possession of the defendants; and (6) the defendants gave statements to the police. Miller v. State, 289 Ga. 854, 717 S.E.2d 179 (2011).

Evidence was sufficient to convict the defendant of first degree arson, because a rational jury could have found that the defendant knew the victim's house would catch fire when the defendant set the victim's van, parked only six feet from the victims' house, on fire. Crawford v. State, 318 Ga. App. 270, 732 S.E.2d 794 (2012).

Evidence that fire investigators found that the fire had two points of origin and that a kitchen drawer, which contained a large box of matches, had been opened before the fire, and the circumstantial evidence that whoever stole the victim's coins had to enter the residence, insofar as the coins were kept in the victim's bedroom, authorized a jury to infer that the fire was set intentionally. Blevins v. State, 291 Ga. 814, 733 S.E.2d 744 (2012).

Evidence that the defendant had money problems, had a drug problem, had removed valuable and irreplaceable items from the home, and made sure the family and pets were out of the home at the time of the fire, authorized the jury to conclude that the defendant knowingly damaged the house, which was mortgaged and insured, by means of fire and supported a conviction for first degree arson. Graf v. State, 327 Ga. App. 598, 760 S.E.2d 613 (2014).

Evidence was sufficient to convict the defendant of first-degree arson because there was sufficient evidence to support the jury's conclusion that it was reasonably foreseeable that human life might be endangered by setting fire to a car containing additional tires, which were classified as accelerants, in a heavily wooded area near homes. Clary v. State, 344 Ga. App. 710, No. A17A1593, 2018 Ga. App. LEXIS 129 (2018).

Evidence insufficient to sustain conviction. — Conviction of first degree arson, O.C.G.A. § 16-7-60(a)(2), was not supported by sufficient evidence since there was no showing that a truck allegedly burned by the defendant was designed for use as a dwelling, and there was no showing of a lack of consent to the burning by the lienholder on the truck or by the joint owner, the defendant's spouse; neither the spouse's insurance claim form stating that the spouse did not procure the loss, nor an insurance payment to the lienholder showed the required lack of consent, and there was no evidence in the entirely circumstantial case from which a jury could have excluded the very reasonable alternate hypothesis that the lien holder consented to the fire so as to recover the insurance proceeds for payment on a loan owed by a financially-troubled debtor, the defendant. Prater v. State, 279 Ga. App. 527, 631 S.E.2d 746 (2006).

Jury Instructions

Jury must act on probabilities, not impossibilities. — The mere possibility that the fire was occasioned by spontaneous combustion or by some other cause innocent of criminal intent does not demand an acquittal, for the jury must act on probabilities, not impossibilities.

Lockhart v. State, 76 Ga. App. 289, 45 S.E.2d 698 (1947).

Charge on attempted first-degree arson was authorized since the jury would have been authorized from the evidence to conclude that defendant intended to set fire to a house and that defendant set fire to clothing as a substantial step toward the commission of that crime. Plemons v. State, 194 Ga. App. 554, 390 S.E.2d 916 (1990).

Charge on third-degree arson not warranted. — When the evidence indicated that five fires were intentionally set, that at least three of the fires damaged a dwelling house, and that one of the fires may have only damaged personal property, and there was no evidence to support a finding that defendant set only a personal property fire, it was not error for a trial court to refuse to charge on third-degree arson. Plunkett v. State, 244 Ga. App. 504, 535 S.E.2d 852 (2000).

Charge on criminal damage to property not warranted. — State's evidence, including defendant's confession, established all the elements of arson in the first-degree and defendant did not present any evidence raising criminal damage to property as a lesser-included offense in a case where defendant set a fire in a trailer home. Accordingly, the trial court did not err in refusing to give defendant's requested jury charge on criminal damage to property as a lesser-included offense of arson, even assuming that defendant requested such an instruction at trial. Tumlin v. State, 264 Ga. App. 565, 591 S.E.2d 448 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arson and Related Offenses, § 1 et seq. 31A Am. Jur. 2d, Explosions and Explosives, §§ 169 et seq., 191.

C.J.S. — 6A C.J.S., Arson, § 1 et seq.

ALR. — Ownership of property as affecting criminal liability for burning thereof, 17 A.L.R. 1168.

Vacancy or nonoccupancy of building as affecting its character as "dwelling" as regards arson, 44 A.L.R.2d 1456.

Burning of building by mortgagor as burning property of another so as to constitute arson, 76 A.L.R.2d 524.

16-7-61. Arson in the second degree.

(a) A person commits the offense of arson in the second degree as to any building, vehicle, railroad car, watercraft, aircraft, or other structure not included or described in Code Section 16-7-60 when, by means of fire or explosive, he or she knowingly damages or knowingly causes, aids, abets, advises, encourages, hires, counsels, or procures another to damage any building, vehicle, railroad car, watercraft, aircraft, or other structure of another without his or her consent or in which another has a security interest, including but not limited to a mortgage, a lien, or a conveyance to secure debt, without the consent of both.

(b) A person also commits the offense of arson in the second degree as to any building, vehicle, railroad car, watercraft, aircraft, or other structure not included or described in Code Section 16-7-60 when, in the commission of a felony, by means of fire or explosive, he or she knowingly damages or knowingly causes, aids, abets, advises, encourages, hires, counsels, or procures another to damage any building, vehicle, railroad car, watercraft, aircraft, or other structure of another without his or her consent or in which another has a security interest,

including but not limited to a mortgage, a lien, or a conveyance to secure debt, without the consent of both.

(c) A person convicted of the offense of arson in the second degree shall be punished by a fine of not more than $25,000.00 or by imprisonment for not less than one nor more than ten years, or both. (Ga. L. 1924, p. 192, § 2; Code 1933, § 26-2209; Ga. L. 1949, p. 1118, § 3; Code 1933, § 26-1402, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 1497, § 2; Ga. L. 1979, p. 935, § 2; Ga. L. 1985, p. 149, § 16; Ga. L. 2004, p. 734, § 2.)

Editor's notes. — Ga. L. 2004, p. 734, § 4, not codified by the General Assembly, provides that the amendment to this Code section is not applicable to any offense committed prior to July 1, 2004, and that any such offense shall be punishable as provided by the statute in effect at the time the offense was committed.

JUDICIAL DECISIONS

No variance in the indictment. — Defendant's allegations that a fatal variance existed between the allegations of the indictment and the evidence at trial were rejected, as it was unnecessary to prove who had legal title to the property, lawful possession was proven to be in the victim, a sheriff's deputy corroborated the allegations in the indictment concerning the date, place, the property damaged, and that defendant was the agent that caused the burning. Wisham v. State, 262 Ga. App. 380, 585 S.E.2d 675 (2003).

Burning separate structures as one crime. — When evidence establishes commission of only one incendiary act, only one crime was committed, even though two separate structures were burned. Altman v. State, 156 Ga. App. 185, 273 S.E.2d 923 (1980).

Apartment as protected structure. — There was no dispute that the victim's apartment was a protected structure for purposes of O.C.G.A. §§ 16-7-60 and 16-7-61. Alexander v. State, 263 Ga. 474, 435 S.E.2d 187 (1993).

Circumstantial evidence of both guilt and corpus delicti. — Circumstances must generally be depended upon, not only to show the guilt of the accused, but to establish the corpus delicti of the crime of arson. Reese v. State, 94 Ga. App. 387, 94 S.E.2d 741 (1956).

Corpus delicti in arson. — In a case of arson, the corpus delicti consists of two fundamental facts: first, the burning of the house described in the indictment, and second, the fact that a criminal agency was the cause of the burning. Reese v. State, 94 Ga. App. 387, 94 S.E.2d 741 (1956).

Arson and cruelty to animals as separate crimes. — Defendant was properly convicted for arson in the second degree and cruelty to animals, where the essential elements of each of the crimes differed, and the state carried its burden of proving the distinct elements of each crime. Motes v. State, 189 Ga. App. 430, 375 S.E.2d 893 (1988).

Criminal damage as lesser included offense of arson. — Trial court properly merged a conviction of criminal damage to property in the second degree, in violation of O.C.G.A. § 16-7-23(a)(1), into a conviction for arson in the second degree, in violation of O.C.G.A. § 16-7-61, as the arson was not a lesser included offense of the criminal damage offense pursuant to O.C.G.A. § 16-1-6(1); arson required the higher mentally culpable state of knowingly, rather than the criminal damage scienter requirement of intentionally, and arson required that the damage to the property have been caused by fire or explosive. Youmans v. State, 270 Ga. App. 832, 608 S.E.2d 300 (2004).

Similar transaction evidence admitted in arson trial. — Similar transaction evidence was properly admitted in

the defendant's trial for arson, O.C.G.A. § 16-7-61(a), under circumstances in which the defendant was accused of setting fire to a car belonging to the girlfriend of the defendant's former boyfriend; the state presented evidence of two prior incidents showing acts of property damage committed by the defendant following an argument with a former boyfriend or those close to a former boyfriend. The prior incidents were sufficiently similar to the crime charged to show the defendant's course of conduct or bent of mind to react violently when upset with men with whom the defendant had been intimate. Cherry v. State, 299 Ga. App. 194, 682 S.E.2d 150 (2009).

Circumstantial evidence sufficient to convict. — Jury was authorized to find the defendant guilty of arson even though the evidence was circumstantial as the proven facts were consistent with the hypothesis of guilt and excluded every other reasonable hypothesis other than the defendant's guilt as the defendant's burning of three trucks using gasoline at a truck-driving school where the defendant failed truck-driving courses, the defendant's presence at a nearby gas station around the time of the fire, and the defendant's admission that the defendant burned the trucks because an instructor "burned" the defendant, meant the defendant's arson convictions were supportable as a matter of law. Denson v. State, 259 Ga. App. 342, 577 S.E.2d 29 (2003).

Evidence presented at the defendant's trial for second degree arson, O.C.G.A. § 16-7-61(a), was sufficient to allow the jury to infer that the defendant was the person who set fire to a car belonging to the new girlfriend of the defendant's former boyfriend; the evidence showed that the defendant had a history of expressing anger by damaging or destroying property, that the defendant had made numerous threats against the boyfriend and the girlfriend in the 12-hour period immediately prior to the arson, that the defendant was seen running from the scene shortly after the fire began, that a car similar to the defendant's was then seen driving away from the girlfriend's home, and that no other person was observed near the scene at or near the time the girlfriend's car began to burn. Cherry v. State, 299 Ga. App. 194, 682 S.E.2d 150 (2009).

Evidence held sufficient to prove the essential elements of arson in the second degree. Patterson v. State, 202 Ga. App. 440, 414 S.E.2d 895 (1992); Stephens v. State, 214 Ga. App. 183, 447 S.E.2d 26 (1994).

Evidence was sufficient to support conviction for arson because: (1) one of the defendants placed dozens of calls from the decedent's cell phone as the defendants traveled from Tampa to Atlanta in the decedent's pickup truck; (2) the truck was destroyed in a fire that was started through the use of an accelerant near an apartment complex where the defendants were staying with relatives; (3) the decedent's body was found in the bed of the truck; (4) the decedent had been dead for days before the fire; (5) personal belongings of the decedent were found in the possession of the defendants; and (6) the defendants gave statements to the police. Miller v. State, 289 Ga. 854, 717 S.E.2d 179 (2011).

Evidence, including defendant's confession, which was corroborated by the victim's boyfriend, who testified to seeing the defendant in the backyard of the victim's home immediately before the boyfriend and the victim became aware that the victim's van was ablaze, was sufficient to support the defendant's conviction for second degree arson. Crawford v. State, 318 Ga. App. 270, 732 S.E.2d 794 (2012).

Cited in Shelnutt v. State, 289 Ga. App. 528, 657 S.E.2d 611 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arson and Related Offenses, § 1 et seq. 31A Am. Jur. 2d, Explosions and Explosives, §§ 169 et seq., 191.

ALR. — Ownership of property as affecting criminal liability for burning thereof, 17 A.L.R. 1168.

Burning of building by mortgagor as burning property of another so as to constitute arson, 76 A.L.R.2d 524.

16-7-62. Arson in the third degree.

(a) A person commits the offense of arson in the third degree when, by means of fire or explosive, he or she knowingly damages or knowingly causes, aids, abets, advises, encourages, hires, counsels, or procures another to damage:

(1) Any personal property of another without his or her consent or in which another has a security interest, including but not limited to a lien, without the consent of both and the value of the property is $25.00 or more;

(2) Any personal property when such is insured against loss or damage by fire or explosive and the loss or damage is accomplished without the consent of both the insurer and insured and the value of the property is $25.00 or more; or

(3) Any personal property with the intent to defeat, prejudice, or defraud the rights of a spouse or co-owner and the value of the property is $25.00 or more.

(b) A person also commits the offense of arson in the third degree when, in the commission of a felony, by means of fire or explosive, he or she knowingly damages or knowingly causes, aids, abets, advises, encourages, hires, counsels, or procures another to damage anything included or described in subsection (a) of this Code section.

(c) A person convicted of the offense of arson in the third degree shall be punished by a fine not to exceed $10,000.00 or by imprisonment for not less than one nor more than five years, or both. (Ga. L. 1924, p. 192, §§ 3, 4; Code 1933, § 26-2210; Ga. L. 1949, p. 1118, § 4; Code 1933, § 26-1403, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 1497, § 3; Ga. L. 1979, p. 935, § 3; Ga. L. 2004, p. 734, § 3.)

Editor's notes. — Ga. L. 2004, p. 734, § 4, not codified by the General Assembly, provides that the amendment to this Code section is not applicable to any offense committed prior to July 1, 2004, and that any such offense shall be punishable as provided by the statute in effect at the time the offense was committed.

JUDICIAL DECISIONS

Corpus delicti in arson. — In a case of arson, the corpus delicti consists of two fundamental facts: first, the burning of the house described in the indictment, and second, the fact that a criminal agency was the cause of the burning. Reese v. State, 94 Ga. App. 387, 94 S.E.2d 741 (1956).

Burning with intent to defraud is not essential element of third-degree arson. Powell v. State, 121 Ga. App. 57, 172 S.E.2d 455 (1970).

Burning to defraud insurer is not lesser included offense. — Burning to defraud an insurer under former Code 1933, § 26-2213 (see now O.C.G.A. § 16-9-53) is not a lesser offense included in the greater one of third-degree arson under former Code 1933, § 26-2210 (see now O.C.G.A. § 16-7-62) because each is a

separate and distinct offense. Powell v. State, 121 Ga. App. 57, 172 S.E.2d 455 (1970).

Testimony by state's expert witness. — State's expert witness may be allowed to testify as to the expert's belief that the fire had been incendiary in origin. Blackburn v. State, 180 Ga. App. 436, 349 S.E.2d 286 (1986).

Proof of loss form admitted without objection. — When the defendant and the defendant's father filed with the insurer of the personal property a proof of loss form which stated that personal property damage amounting to several thousand dollars had resulted from the fire, this form, which was admitted into evidence without objection, was sufficient to authorize a finding that the personal property damaged by the fire was valued at $25 or more. Blackburn v. State, 180 Ga. App. 436, 349 S.E.2d 286 (1986).

Circumstances generally depended on to show guilt and establish corpus delicti. — Circumstances must generally be depended upon, not only to show the guilt of the accused, but to establish the corpus delicti of the crime of arson. Reese v. State, 94 Ga. App. 387, 94 S.E.2d 741 (1956).

Evidence sufficient to support conviction. — There was sufficient evidence to support a defendant's convictions of malice murder, armed robbery, kidnapping, third-degree arson, burglary, and possession of a firearm during the commission of a crime when the evidence showed that the defendant made the defendant's accomplice shoot a convenience store clerk after the defendant forced the clerk at gunpoint into a wooded area, took money from a cash register in the store, and started a fire in the store. The accomplice's testimony was sufficiently corroborated by the defendant's admission that the defendant owned the shotgun that was used in the shooting, the defendant's admission that the defendant gave the shotgun to the accomplice, the testimony of a third person that the accomplice gave the third person the shotgun after the robbery, and the fact that shotgun shells found in the defendant's home matched shells taken from the clerk's body. Judkins v. State, 282 Ga. 580, 652 S.E.2d 537 (2007).

Cited in Boggus v. State, 136 Ga. App. 917, 222 S.E.2d 686 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arson and Related Offenses, § 1 et seq. 31A Am. Jur. 2d, Explosions and Explosives, §§ 169 et seq., 191.

C.J.S. — 6A C.J.S., Arson, § 17.

16-7-63. Burning of woodlands, brush, fields, or other lands; arson of lands; destruction of or damage to material or device used in detection or suppression of wildfires; penalties for violations.

(a) It shall be unlawful:

(1) To, with intent to damage, start, cause, or procure another to start or cause a fire in any woodlands, brush, field, or other lands that are not one's own and without the permission of the owner or the lessee having control of such property;

(2) To burn any brush, field, forest land, campfire, or debris, whether on one's own land or the lands of another, without taking the necessary precautions before, during, and after the fire to prevent the

escape of such fire onto the lands of another. The escape of such fire shall be prima-facie evidence that necessary precautions were not taken;

(3) For any person to cause a fire by discarding any lighted cigarette, cigar, debris, or any other flaming or smoldering material that may cause a forest fire; or

(4) To destroy or damage any material or device used in the detection or suppression of wildfires.

(b) This Code section shall not apply to fire resulting from the operation of transportation machinery or equipment used in its normal or accustomed manner.

(c)(1) Any person who violates paragraph (2), (3), or (4) of subsection (a) of this Code section shall be guilty of a misdemeanor.

(2) Any person who violates paragraph (1) of subsection (a) of this Code section shall be guilty of arson of lands in the third degree and shall be punished the same as provided by subsection (c) of Code Section 16-7-62 for arson in the third degree.

(3) Any person whose violation of paragraph (1) of subsection (a) of this Code section results in a fire that burns more than five acres that are not one's own shall be guilty of arson of lands in the second degree and shall be punished the same as provided by subsection (c) of Code Section 16-7-61 for arson in the second degree.

(4) Any person who violates paragraph (1) of subsection (a) of this Code section under such circumstances that it was reasonably foreseeable that human life might be endangered shall be guilty of arson of lands in the first degree and shall be punished the same as provided by subsection (c) of Code Section 16-7-60 for arson in the first degree. (Laws 1833, Cobb's 1851 Digest, p. 824; Code 1863, § 4473; Ga. L. 1865-66, p. 233, § 2; Code 1868, § 4519; Code 1873, § 4609; Code 1882, § 4609; Penal Code 1895, § 698; Ga. L. 1898, p. 60, § 1; Penal Code 1910, § 748; Code 1933, § 26-7704; Code 1933, § 26-2214, enacted by Ga. L. 1949, p. 1118, § 8; Code 1933, § 26-3601, enacted by Ga. L. 1956, p. 737, § 8; Ga. L. 1971, p. 577, §§ 1, 2; Code 1981, § 16-7-63, as redesignated by Ga. L. 2008, p. 444, § 3/SB 400.)

Cross references. — Further provisions regarding setting of fires in woods, grasslands, etc., §§ 12-6-21, 12-6-90, 12-6-91.

Editor's notes. — This Code section formerly pertained to criminal possession of explosives. The former Code section was based on Ga. L. 1967, p. 452, § 1; Code 1933, § 26-1404, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1991, p. 324, § 1 and was repealed by Ga. L. 1996, p. 416, § 2, effective May 1, 1996. For present provisions as to bombs and explosives, see Code Section 16-7-80 et seq.

JUDICIAL DECISIONS

Cited in McMichael v. Robinson, 162 Ga. App. 67, 290 S.E.2d 168 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 35A Am. Jur. 2d, Fires, § 11 et seq.

C.J.S. — 36A C.J.S., Fires, § 1 et seq. 65A C.J.S., Negligence, § 1029 et seq.

ALR. — Liability for spread of fire intentionally set for legitimate purpose, 25 A.L.R.5th 391.

16-7-64. Criminal possession of an explosive device.

Repealed by Ga. L. 1996, p. 416, § 2, effective May 1, 1996.

Editor's notes. — This Code section, relating to criminal possession of explosive devices was based on Ga. L. 1967, p. 452, §§ 1—3; Code 1933, § 26-1405, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1991, p. 324, § 1. For present provisions as to bombs, explosives, and chemical and biological weapons, see Code Section 16-7-80 et seq.

ARTICLE 4

BOMBS, EXPLOSIVES, AND CHEMICAL AND BIOLOGICAL WEAPONS

Cross references. — Regulation of manufacture, transportation, and other issues involving explosives, § 25-2-17. Penalty for terroristic threats or acts, § 16-11-37.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions rendered under former O.C.G.A § 16-7-64 are included in the opinions under this article.

Any firebomb which contained either flammable liquid or compound would come under former Code 1933, § 26-1405; it was not necessary that the liquid or compound be the only ingredient, so long as it was in fact a part of the firebomb, and met the other statutory requirements. 1968 Op. Att'y Gen. No. 68-313 (decided under former § 16-7-64).

Term "breakable containers" encompasses anything that could break, that is, a container that is "not unbreakable." 1968 Op. Att'y Gen. No. 68-313 (decided under former § 16-7-64).

Compound. — Compound is a distinct substance formed by the chemical union of two or more ingredients in definite proportion by weight. 1968 Op. Att'y Gen. No. 68-313 (decided under former § 16-7-64).

Flammable. — If a liquid or compound could start a fire and cause the destruction intended by the user of the Molotov cocktail, then it would seem, by definition, to be "flammable." 1968 Op. Att'y Gen. No. 68-313 (decided under former § 16-7-64).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Explosions and Explosives, § 167 et seq.

C.J.S. — 35 C.J.S., Explosives, § 95 et seq.

ALR. — Possession of bomb, Molotov cocktail, or similar device as criminal offense, 42 A.L.R.3d 1230.

16-7-80. Definitions.

As used in this article, the term:

(1) "Bacteriological weapon" or "biological weapon" means:

(A) The following toxic chemicals:

(i) O-Alkyl (≤C10, including cycloalkyl) alkyl (Me, Et, n-Pr or i-Pr)-phosphonofluoridates; e.g., Sarin: O-Isopropyl methylphosphonofluoridate, Soman: O-Pinacolyl methylphosphonofluoridate;

(ii) O-Alkyl (≤C10, including cycloalkyl) N,N-dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidocyanidates; e.g., Tabun: O-Ethyl N,N-dimethyl phosphoramidocyanidate;

(iii) O-Alkyl (H or ≤C10, including cycloalkyl) S-2-dialkyl (Me, Et, n-Pr or i-Pr)-aminoethyl alkyl (Me, Et, n-Pr or i-Pr) phosphonothiolates and corresponding alkylated or protonated salts; e.g., VX: O-Ethyl S-2-diisopropylaminoethyl methyl phosphonothiolate;

(B) Sulfur mustards:

(i) 2-Chloroethylchloromethylsulfide;

(ii) Mustard gas: Bis(2-chloroethyl)sulfide;

(iii) Bis(2-chloroethylthio)methane;

(iv) Sesquimustard: 1,2-Bis(2-chloroethylthio)ethane;

(v) 1,3-Bis(2-chloroethylthio)-n-propane;

(vi) 1,4-Bis(2-chloroethylthio)-n-butane;

(vii) 1,5 Bis(2-chloroethylthio)-n-pentane;

(viii) Bis(2-chloroethylthiomethyl)ether;

(ix) O-Mustard: Bis(2-chloroethylthioethyl)ether;

(C) Lewisites:

(i) Lewisite 1: 2-Chlorovinyldichloroarsine;

(ii) Lewisite 2: Bis(2-chlorovinyl)chloroarsine;

(iii) Lewisite 3: Tris(2-chlorovinyl)arsine;

(D) Nitrogen mustards:

(i) HN1: Bis(2-chloroethyl)ethylamine;

(ii) HN2: Bis(2-chloroethyl)methylamine;

(iii) HN3: Tris(2-chloroethyl)amine;

(E) Saxitoxin;

(F) Ricin;

(G) Precursors:

(i) Alkyl (Me, Et, n-Pr or i-Pr) phosphonyldifluorides; e.g., DF: Methylphosphonyldifluoride;

(ii) O-Alkyl (H or ≤C10, including cycloalkyl) O-2-dialkyl (Me, Et, n-Pr or i-Pr)-aminoethyl alkyl (Me, Et, n-Pr or i-Pr) phosphonites and corresponding alkylated or protonated salts; e.g., QL: O-Ethyl O-2-diisopropylaminoethyl methylphosphonite;

(iii) Chlorosarin: O-Isopropyl methylphosphonochloridate;

(iv) Chlorosoman: O-Pinacolyl methylphosphonochloridate; or

(H) Any device which is designed in such a manner as to permit the intentional release into the population or environment of microbial or other biological agents or toxins or vectors whatever their origin or method of production in a manner not otherwise authorized by law.

(1.1) "Biological agent" means any microorganism, including, but not limited to, bacteria, viruses, fungi, rickettsiae or protozoa, or infectious substance, or any naturally occurring, bioengineered or synthesized component of any such microorganism or infectious substance, capable of causing:

(A) Death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;

(B) Deterioration of food, water, equipment, supplies, or material of any kind; or

(C) Deleterious alteration of the environment.

(2) "Commissioner" means the Safety Fire Commissioner.

(3) "Conviction" means an adjudication of guilt of or a plea of guilty or nolo contendere to the commission of an offense against the laws of this state, any other state or territory, the United States, or a foreign nation recognized by the United States. Such term includes any such conviction or plea notwithstanding the fact that sentence was imposed pursuant to Article 3 of Chapter 8 of Title 42. Such term also includes the adjudication or plea of a juvenile to the commission of an

act which if committed by an adult would constitute a crime under the laws of this state.

(4) "Destructive device" means:

(A) Any explosive, incendiary, or over-pressure device or poison gas which has been configured as a bomb; a grenade; a rocket with a propellant charge of more than four ounces; a missile having an explosive or incendiary charge of more than one-quarter ounce; a poison gas; a mine; a Molotov cocktail; or any other device which is substantially similar to such devices;

(B) Any type of weapon by whatever name known which will or may be readily converted to expel a projectile by the action of an explosive or other propellant, through a barrel which has a bore diameter of more than one-half inch in diameter; provided, however, that such term shall not include a pistol, rifle, or shotgun suitable for sporting or personal safety purposes or ammunition; a device which is neither designed or redesigned for use as a weapon; a device which, although originally designed for use as a weapon, is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; or surplus military ordnance sold, loaned, or given by authority of the appropriate official of the United States Department of Defense;

(C) A weapon of mass destruction;

(D) A bacteriological weapon or biological weapon; or

(E) Any combination of parts either designed or intended for use in converting any device into a destructive device as otherwise defined in this paragraph.

(5) "Detonator" means a device containing a detonating charge that is used to initiate detonation in an explosive, including but not limited to electric blasting caps, blasting caps for use with safety fuses, and detonating cord delay connectors.

(6) "Director" means the director of the Georgia Bureau of Investigation.

(7) "Distribute" means the actual, constructive, or attempted transfer from one person to another.

(8) "Explosive" means any chemical compound or other substance or mechanical system intended for the purpose of producing an explosion capable of causing injury to persons or damage to property or containing oxidizing and combustible units or other ingredients in such proportions or quantities that ignition, fire, friction, concussion, percussion, or detonator may produce an explosion capable of causing injury to persons or damage to property, including but not limited to

the substances designated in Code Section 16-7-81; provided, however, that the term explosive shall not include common fireworks as defined by Code Section 25-10-1, model rockets and model rocket engines designed, sold, and used for the purpose of propelling recoverable aero models, or toy pistol paper caps in which the explosive content does not average more than 0.25 grains of explosive mixture per paper cap for toy pistols, toy cannons, toy canes, toy guns, or other devices using such paper caps unless such devices are used as a component of a destructive device.

(9) "Explosive ordnance disposal technician" or "EOD technician" means:

(A) A law enforcement officer, fire official, emergency management official, or an employee of this state or its political subdivisions or an authority of the state or a political subdivision who is certified in accordance with Code Section 35-8-13 and members of the Georgia National Guard who are qualified as explosive ordnance disposal technicians under the appropriate laws and regulations when acting in the performance of their official duties; and

(B) An official or employee of the United States, including but not limited to a member of the armed forces of the United States, who is qualified as an explosive ordnance disposal technician under the appropriate laws and regulations when acting in the performance of his or her official duties.

(10) "Felony" means any offense punishable by imprisonment for a term of one year or more, and includes conviction by a court-martial under the Uniform Code of Military Justice for an offense which would constitute a felony under the laws of the United States. A conviction of an offense under the laws of a foreign nation shall be considered a felony for the purposes of this article if the conduct giving rise to such conviction would have constituted a felony under the laws of this state or of the United States if committed within the jurisdiction of this state or the United States at the time of such conduct.

(11) "Hoax device" or "replica" means a device or article which has the appearance of a destructive device.

(12) "Incendiary" means a flammable liquid or compound with a flash point of 150 degrees Fahrenheit or less as determined by Tagliabue or equivalent closed-cup device, including but not limited to, gasoline, kerosene, fuel oil, or a derivative of such substances.

(13) "Over-pressure device" means a frangible container filled with an explosive gas or expanding gas which is designed or constructed so as to cause the container to break or fracture in a manner which is capable of causing death, bodily harm, or property damage.

(14) "Poison gas" means any toxic chemical or its precursors that through its chemical action or properties on life processes causes death or permanent injury to human beings; provided, however, that such term shall not include:

(A) Riot control agents, smoke, and obscuration materials or medical products which are manufactured, possessed, transported, or used in accordance with the laws of the United States and of this state;

(B) Tear gas devices designed to be carried on or about the person which contain not more than one-half ounce of the chemical;

(C) Pesticides, as provided in paragraph (12) of Code Section 16-7-93.

(15) "Property" means any real or personal property of any kind including money, choses in action, and other similar interests in property.

(16) "Public building" means any structure which is generally open to members of the public with or without the payment of an admission fee or membership dues including, but not limited to structures owned, operated, or leased by the state, the United States, any of the several states, or any foreign nation or any political subdivision or authority thereof; any religious organization; any medical facility; any college, school, or university; or any corporation, partnership, or association.

(16.1) "Toxin" means the toxic material or product of plants, animals, microorganisms, including, but not limited to, bacteria, viruses, fungi, rickettsiae or protozoa, or infectious substances, or a recombinant or synthesized molecule, whatever their origin and method of production, and includes:

(A) Any poisonous substance or biological product that may be engineered as a result of biotechnology produced by a living organism; or

(B) Any poisonous isomer or biological product, homologue, or derivative of such a substance.

(16.2) "Vector" means a living organism, or molecule, including a recombinant or synthesized molecule, capable of carrying a biological agent or toxin to a host.

(17) "Weapon of mass destruction" means any device which is designed in such a way as to release radiation or radioactivity at a level which will result in internal or external bodily injury or death to any person. (Code 1981, § 16-7-80, enacted by Ga. L. 1996, p. 416, § 3; Ga. L. 2017, p. 536, § 3-1/HB 452.)

The 2017 amendment, effective July 1, 2017, substituted the present provisions of paragraph (1) for the former provisions, which read: "'Bacteriological weapon' or 'biological weapon' means any device which is designed in such a manner as to permit the intentional release into the population or environment of microbial or other biological agents or toxins whatever their origin or method of production in a manner not otherwise authorized by law or any device the development, production, or stockpiling of which is prohibited pursuant to the 'Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction,' 26 U.S.T. 583, TIAS 8063."; and added paragraphs (1.1), (16.1), and (16.2).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, paragraph (3) was redesignated as paragraph (6) and former paragraphs (6) through (16) were redesignated as paragraphs (7) through (17), respectively, to maintain alphabetical order; "Safety Fire" was substituted for "Fire Safety" in paragraph (2); "detonating cord" was substituted for "detonating-chord" in paragraph (5); "director" was substituted for "Director" in present paragraph (6); and "Code Section" was substituted for "Code section" near the middle of present paragraph (8).

Law reviews. — For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 17 (2017).

JUDICIAL DECISIONS

Homemade device was destructive device. — Homemade device that was constructed from a metal pipe, a cap on one end, with a bolt to serve as a detonator or firing pin, and into which the defendant had loaded a shotgun shell, and which the defendant used in an attempt to intimidate two victims into paying the defendant money was a destructive device within the meaning of O.C.G.A. §§ 16-7-80(4) and 16-7-88(a). Mason v. State, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Cited in Turner v. State, 246 Ga. App. 49, 539 S.E.2d 553 (2000); State v. Henderson, 281 Ga. 623, 641 S.E.2d 515 (2007).

16-7-81. Explosive materials.

The following materials are explosives within the meaning of this article:

(1) Acetylides of heavy metals;

(2) Aluminum containing polymeric propellant;

(3) Aluminum ophorite explosive;

(4) Amatex;

(5) Amatol;

(6) Ammonal;

(7) Ammonium nitrate explosive mixtures, cap sensitive;

(8) Ammonium nitrate explosive mixtures, noncap sensitive;

(9) Aromatic nitro-compound explosive mixtures;

(10) Ammonium perchlorate explosive mixtures;

(11) Ammonium perchlorate composite propellant;

(12) Ammonium picrate (picrate of ammonia, Explosive D);

(13) Ammonium salt lattice with isomorphously substituted inorganic salts;

(14) Ammonium tri-iodide;

(15) ANFO (ammonium nitrate-fuel oil);

(16) Baratol;

(17) Baronol;

(18) BEAF (1,2-bis (2,2-difluoro-2-nitroacetoxyethane));

(19) Black powder;

(20) Black powder based explosive mixtures;

(21) Blasting agents, nitro-carbo-nitrates, including noncap sensitive slurry and water-gel explosives;

(22) Blasting caps;

(23) Blasting gelatin;

(24) Blasting powder;

(25) BTNEC (bis (trinitroethyl) carbonate);

(26) Bulk salutes;

(27) BTNEN (bis (trinitroethyl) nitramine);

(28) BTTN (1,2,4 butanetriol trinitrate);

(29) Butyl tetryl;

(30) Calcium nitrate explosive mixture;

(31) Cellulose hexanitrate explosive mixture;

(32) Chlorate explosive mixtures;

(33) Composition A and variations;

(34) Composition B and variations;

(35) Composition C and variations;

(36) Copper acetylide;

(37) Cyanuric triazide;

(38) Cyclotrimethylenetrinitramine (RDX);

(39) Cyclotetramethylenetetranitramine (HMX);

(40) Cyclonite (RDX);

(41) Cyclotol;

(42) DATB (diaminotrinitrobenzene);

(43) DDNP (diazodinitrophenol);

(44) DEGDN (diethyleneglycol dinitrate);

(45) Detonating cord;

(46) Detonators;

(47) Dimethylol dimethyl methane dinitrate composition;

(48) Dinitroethyleneurea;

(49) Dinitroglycerine (glycerol dinitrate);

(50) Dinitrophenol;

(51) Dinitrophenolates;

(52) Dinitrophenyl hydrazine;

(53) Dinitroresorcinol;

(54) Dinitrotoluene-sodium nitrate explosive mixtures;

(55) DIPAM;

(56) Dipicryl sulfone;

(57) Dipicrylamine;

(58) Display fireworks;

(59) DNDP (dinitropentano nitrile);

(60) DNPA (2,2-dinitropropyl acrylate);

(61) Dynamite;

(62) EDDN (ethylene diamine dinitrate);

(63) EDNA;

(64) Ednatol;

(65) EDNP (ethyl 4,4-dinitropentanoate);

(66) Erythritol tetranitrate explosives;

(67) Esters of nitro-substituted alcohols;

(68) EGDN (ethylene glycol dinitrate);

(69) Ethyl-tetryl;

(70) Explosive conitrates;

(71) Explosive gelatins;

(72) Explosive mixtures containing oxygen-releasing inorganic salts and hydrocarbons;

(73) Explosive mixtures containing oxygen-releasing inorganic salts and nitro bodies;

(74) Explosive mixtures containing oxygen-releasing inorganic salts and water insoluble fuels;

(75) Explosive mixtures containing oxygen-releasing inorganic salts and water soluble fuels;

(76) Explosive mixtures containing sensitized nitromethane;

(77) Explosive mixtures containing tetranitromethane (nitroform);

(78) Explosive nitro compounds of aromatic hydrocarbons;

(79) Explosive organic nitrate mixtures;

(80) Explosive liquids;

(81) Explosive powders;

(82) Flash powder;

(83) Fulminate of mercury;

(84) Fulminate of silver;

(85) Fulminating gold;

(86) Fulminating mercury;

(87) Fulminating platinum;

(88) Fulminating silver;

(89) Gelatinized nitrocellulose;

(90) Gem-dinitro aliphatic explosive mixtures;

(91) Guanyl nitrosamino guanyl tetrazene;

(92) Guanyl nitrosamino guanylidene hydrazine;

(92.1) Guncotton;

(92.2) Heavy metal azides;

(92.3) Hexamitrostrilbene;

(92.4) Hexanite;

(92.5) Hexanitrodiphenylamine;

(92.6) Hexogen;

(93) Hexogene or octogene and a nitrated N-methylaniline;

(94) Hexolites;

(95) HMX (cyclo-l,3,5,7-tetramethylene-2,4,6,8-tetranitramine; Octogen);

(96) Hydrazinium nitrate/hydrazine/aluminum explosive system;

(97) Hydrazoic acid;

(98) Igniter cord;

(99) Igniters;

(100) Initiating tube systems;

(101) KDNBF (potassium dinitrobenzo-furoxane);

(102) Lead azide;

(103) Lead mannite;

(104) Lead mononitroresorcinate;

(105) Lead picrate;

(106) Lead salts, explosive;

(107) Lead styphnate (styphnate of lead, lead trinitroresorcinate);

(108) Liquid nitrated polyol and trimethylolethane;

(109) Liquid oxygen explosives;

(110) Magnesium ophorite explosives;

(111) Mannitol hexanitrate;

(112) MDNP (methyl 4,4-dinitropentanoate);

(113) MEAN (monoethanolamine nitrate);

(114) Mercuric fulminate;

(115) Mercury oxalate;

(116) Mercury tartrate;

(117) Metriol trinitrate;

(118) Minol-2 (40% TNT, 40% ammonium nitrate, 20% aluminum);

(119) MMAN (monomethylamine nitrate); methylamine nitrate;

(120) Mononitrotoluene-nitroglycerin mixture;

(121) Monopropellants;

(122) NIBTN (nitroisobutametriol trinitrate);

(123) Nitrate sensitized with gelled nitroparaffin;

(124) Nitrated carbohydrate explosive;

(125) Nitrated glucoside explosive;

(126) Nitrated polyhydric alcohol explosives;

(127) Nitrates of soda explosive mixtures;

(128) Nitric acid and a nitro aromatic compound explosive;

(129) Nitric acid and carboxylic fuel explosive;

(130) Nitric acid explosive mixtures;

(131) Nitro aromatic explosive mixtures;

(132) Nitro compounds of furane explosive mixtures;

(133) Nitrocellulose explosive;

(134) Nitroderivative of urea explosive mixture;

(135) Nitrogelatin explosive;

(136) Nitrogen trichloride;

(137) Nitrogen tri-iodide;

(138) Nitroglycerine (NG, RNG, nitro, glyceryl trinitrate, trinitroglycerine);

(139) Nitroglycide;

(140) Nitroglycol (ethylene glycol dinitrate, EGDN);

(141) Nitroguanidine explosives;

(142) Nitroparaffins Explosive Grade and ammonium nitrate mixtures;

(143) Nitronium perchlorate propellant mixtures;

(144) Nitrostarch;

(145) Nitro-substituted carboxylic acids;

(146) Nitrourea;

(147) Octogen (HMX);

(148) Octol (75% HMX, 25% TNT);

(149) Organic amine nitrates;

(150) Organic nitramines;

(151) PBX (RDX and plasticizer);

(152) Pellet powder;

(153) Penthrinite composition;

(154) Pentolite;

(155) Perchlorate explosive mixtures;

(156) Peroxide based explosive mixtures;

(157) PETN (nitropentaerythrite, pentaerythrite tetranitrate, pentaerythritol tetranitrate);

(158) Picramic acid and its salts;

(159) Picramide;

(160) Picrate of potassium explosive mixtures;

(161) Picratol;

(162) Picric acid (manufactured as an explosive);

(163) Picryl chloride;

(164) Picryl fluoride;

(165) PLX (95% nitromethane, 5% ethylenediamine);

(166) Polynitro aliphatic compounds;

(167) Polyolpolynitrate-nitrocellulose explosive gels;

(168) Potassium chlorate and lead sulfocyanate explosive;

(169) Potassium nitrate explosive mixtures;

(170) Potassium nitroaminotetrazole;

(171) Pyrotechnic compositions;

(172) PYX (2,6-bis(picrylamino)-3,5-dinitropyridine);

(173) RDX (cyclonite, hexogen, T4,cyclo-l,3,5,-trimethylene-2,4,6,-rinitramine; hexahydro-l,3,5-trinitro-S-triazine);

(174) Safety fuse;

(175) Salutes, (bulk);

(176) Salts of organic amino sulfonic acid explosive mixture;

(177) Silver acetylide;

(178) Silver azide;

(179) Silver fulminate;

(180) Silver oxalate explosive mixtures;

(181) Silver styphnate;

(182) Silver tartrate explosive mixtures;

(183) Silver tetrazene;

(184) Slurried explosive mixtures of water, inorganic oxidizing salt, gelling agent, fuel, and sensitizer, cap sensitive;

(185) Smokeless powder;

(186) Sodatol;

(187) Sodium amatol;

(188) Sodium azide explosive mixture;

(189) Sodium dinitro-ortho-cresolate;

(190) Sodium nitrate-potassium nitrate explosive mixture;

(191) Sodium picramate;

(192) Special fireworks;

(193) Squibs;

(194) Styphnic acid explosives;

(195) Tacot (tetranitro-2,3,5,6-dibenzo-l,3a,4,6a tetrazapentalene);

(196) TATB (triaminotrinitrobenzene);

(197) TATP (triacetone triperoxide);

(198) TEGDN (triethylene glycol dinitrate);

(199) Tetrazene (tetracene, tetrazine, l(5-tetrazolyl)-4-guanyl tetrazene hydrate);

(200) Tetranitrocarbazole;

(201) Tetryl (2,4,6 tetranitro-N-methylaniline);

(202) Tetrytol;

(203) Thickened inorganic oxidizer salt slurried explosive mixture;

(204) TMETN (trimethylolethane trinitrate);

(205) TNEF (trinitroethyl formal);

(206) TNEOC (trinitroethylorthocarbonate);

(207) TNEOF (trinitroethylorthoformate);

(208) TNT (trinitrotoluene, trotyl, trilite, triton);

(209) Torpex;

(210) Tridite;

(211) Trimethylol ethyl methane trinitrate composition;

(212) Trimethylolthane trinitrate-nitrocellulose;

(213) Trimonite;

(214) Trinitroanisole;

(215) Trinitrobenzene;

(216) Trinitrobenzoic acid;

(217) Trinitrocresol;

(218) Trinitro-meta-cresol;

(219) Trinitronaphthalene;

(220) Trinitrophenetol;

(221) Trinitrophloroglucinol;

(222) Trinitroresorcinol;

(223) Tritonal;

(224) Urea nitrate;

(225) Water bearing explosives having salts of oxidizing acids and nitrogen bases, sulfates, or sulfamates, cap sensitive;

(226) Water-in-oil emulsion explosive compositions;

(227) Xanthamonas hydrophilic colloid explosive mixture. (Code 1981, § 16-7-81, enacted by Ga. L. 1996, p. 416, § 3; Ga. L. 2000, p. 1562, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, semicolons were substituted for periods at the end of paragraphs (10) through (226); "tri-iodide" was substituted for "triiodide" in paragraph (14); and "(2,6-bis-(picrylamino)-3,5- dinitropyridine)" was substituted for "(2,6-bis(picrylamino))-3, 5-dinitropyridine" in paragraph (172).

Pursuant to Code Section 28-9-5, in 2000, a semicolon was substituted for a period at the end of paragraph (92.6).

16-7-82. Manufacturing, transporting, distributing, possessing with intent to distribute, and offering to distribute an explosive device.

(a) It shall be unlawful for any person to possess, manufacture, transport, distribute, possess with the intent to distribute, or offer to distribute a destructive device except as provided in this article.

(b) Any person convicted of a violation of this Code section shall be punished by imprisonment for not less than three nor more than 20 years or, by a fine of not more than $25,000.00 or both or, if the defendant is a corporation, by a fine of not less than $25,000.00 nor more than $100,000.00 or not fewer than 5,000 nor more than 10,000 hours of community service or both. (Code 1981, § 16-7-82, enacted by Ga. L. 1996, p. 416, § 3.)

16-7-83. Persons convicted or under indictment for certain offenses.

(a) It shall be unlawful for any person who is under indictment for or who has been convicted of a felony by a court of this state, any other state, the United States including its territories, possessions, and dominions, or a foreign nation to possess, manufacture, transport, distribute, possess with the intent to distribute, or offer to distribute a destructive device, detonator, explosive, poison gas, or hoax device.

(b) It shall be unlawful for any person knowingly to distribute a destructive device, detonator, explosive, poison gas, or hoax device to any person:

(1) Who he or she knows or should know is under indictment for or has been convicted of a felony by a court of this state, any other state, the United States including its territories, possessions, and dominions, or a foreign nation; or

(2) Who he or she knows or should know has been adjudicated to be mentally incompetent or mentally ill by a court of this state, any other state, or the United States including its territories, possessions, and dominions.

(c) Any person convicted of a violation of this Code section shall be punished, in the case of an individual, by imprisonment for not less than one nor more than 15 years or by a fine of not more than $25,000.00 or both or, if the defendant is a corporation, by a fine of not less than $10,000.00 nor more than $75,000.00 or not fewer than 1,000 nor more than 5,000 hours of community service or both.

(d) Notwithstanding any other provision of law, the Department of Behavioral Health and Developmental Disabilities shall make available to any law enforcement agency or district attorney of this state such information as may be necessary to establish that a person has been adjudicated by any court to be mentally incompetent or mentally ill.

(e) The provisions of this Code section shall not apply to:

(1) Any person who has been pardoned for a felony by the President of the United States, the State Board of Pardons and Paroles, or

the person or agency empowered to grant pardons under the constitution or laws of any other state or of a foreign nation and, by the terms of the pardon, has expressly been authorized to receive, possess, distribute, or transport a destructive device, explosive, poison gas, or detonator; or

(2) A person who has been convicted of a felony, but who has been granted relief from the disabilities imposed by the laws of the United States with respect to the acquisition, receipt, transfer, shipment, or possession of explosives by the secretary of the United States Department of the Treasury pursuant to 18 U.S.C. 845, may apply to the Board of Public Safety for relief from the disabilities imposed by this Code section in the same manner as is provided in subsection (d) of Code Section 16-11-131. The board may grant such relief under the same standards and conditions as apply to firearms. (Code 1981, § 16-7-83, enacted by Ga. L. 1996, p. 416, § 3; Ga. L. 2009, p. 453, § 3-2/HB 228.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, "board" was substituted for "Board" in the last sentence in paragraph (e)(2).

16-7-84. Distribution of certain materials to persons under 21 years of age.

(a) It shall be unlawful for any person to distribute or to offer to distribute a destructive device, explosive, poison gas, or detonator to any person who is under 21 years of age.

(b) Any person convicted of a violation of this Code section shall be punished, in the case of an individual, by imprisonment for not less than one nor more than three years or by a fine of not more than $10,000.00 or both or, if the defendant is a corporation, by a fine of not more than $20,000.00 or not fewer than 3,000 hours of community service or both. (Code 1981, § 16-7-84, enacted by Ga. L. 1996, p. 416, § 3.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, a semicolon was deleted following "$10,000.00" in subsection (b).

16-7-85. Hoax devices.

(a) It shall be unlawful for any person to manufacture, possess, transport, distribute, or use a hoax device or replica of a destructive device or detonator with the intent to cause another to believe that such hoax device or replica is a destructive device or detonator.

(b) Any person convicted of a violation of this Code section shall be punished by imprisonment for not more than one year or by a fine of not more than $10,000.00 or both or, if the defendant is a corporation, a fine

of not less than $1,000.00 or not fewer than 500 hours of community service or both for each such hoax device or replica; provided, however, that if such person communicates or transmits to another that such hoax device or replica is a destructive device or detonator with the intent to obtain the property of another person or to interfere with the ability of another person to conduct or carry on the ordinary course of business, trade, education, or government, such violation shall be punished by imprisonment for not less than one year nor more than five years or by a fine of not more than $25,000.00 or both or, if the defendant is a corporation, a fine of not less than $50,000.00 or not fewer than 1,000 nor more than 10,000 hours of community service or both for each such hoax device or replica. (Code 1981, § 16-7-85, enacted by Ga. L. 1996, p. 416, § 3.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, a semicolon was deleted following "$10,000.00" and "$25,000.00" in subsection (b).

JUDICIAL DECISIONS

Evidence sufficient for conviction. — Any rational trier of fact could find the defendant guilty beyond a reasonable doubt of terroristic threats, O.C.G.A. § 16-11-37(a), hoax devices, O.C.G.A. § 16-7-85(a), and armed robbery, O.C.G.A. § 16-8-41(a), because although circumstantial, the evidence authorized the jury to exclude every reasonable hypothesis other than that the defendant engaged in the acts that constituted the crimes; even though the defendant was apprehended while wearing clothing that did not match that described by the victims, an officer familiar with the habits of bank robbers testified that bank robbers like to wear multi-layer clothing and then shed clothes after the crime. Williams v. State, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

16-7-86. Attempt or conspiracy.

It shall be unlawful for any person to attempt or conspire to commit any offense prohibited by this article. Any person convicted of a violation of this Code section shall be punished by imprisonment or community service; by a fine; or by both such punishments not to exceed the maximum punishment prescribed for the offense the commission of which was the object of the attempt or conspiracy. (Code 1981, § 16-7-86, enacted by Ga. L. 1996, p. 416, § 3.)

Law reviews. — For review of 1996 damage to and intrusion upon property legislation, see 13 Ga. St. U.L. Rev. 108 (1996).

16-7-87. Interference with officers.

It shall be unlawful for any person knowingly to hinder or obstruct any explosive ordnance technician, law enforcement officer, fire official, emergency management official, animal trained to detect destructive devices, or any robot or mechanical device designed or utilized by a law

enforcement officer, fire official, or emergency management official of this state or of the United States in the detection, disarming, or destruction of a destructive device. Any person convicted of a violation of this Code section shall be punished as provided in subsection (b) of Code Section 16-10-24. (Code 1981, § 16-7-87, enacted by Ga. L. 1996, p. 416, § 3.)

16-7-88. Possessing, transporting, or receiving explosives, destructive devices, bacteriological weapon, or biological weapon with intent to kill, injure, or intimidate individuals or destroy public buildings; sentencing; enhanced penalties.

(a) Any person who possesses, transports, or receives or attempts to possess, transport, or receive any destructive device, explosive, bacteriological weapon, or biological weapon with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or to destroy any public building shall be punished by imprisonment for not less than ten nor more than 20 years or by a fine of not more than $125,000.00 or both or, if the defendant is a corporation, by a fine of not less than $125,000.00 nor more than $200,000.00 or sentenced to perform not fewer than 10,000 nor more than 20,000 hours of community service or both.

(b) In addition to any other penalty imposed under the laws of this state or of the United States, any person who shall use or attempt to use any destructive device or explosive to kill or injure any individual, including any public safety officer performing duties as a direct or proximate result of a violation of this subsection, or to destroy any public building shall be imprisoned for not less than 20 nor more than 40 years or fined the greater of the cost of replacing any property that is destroyed or $250,000.00 or both or, if the defendant is a corporation, fined the greater of the cost of replacing any property which is destroyed or $1 million or sentenced to perform not fewer than 20,000 nor more than 40,000 hours of community service or both.

(c) Any other provision of law to the contrary notwithstanding, no part of any sentence imposed pursuant to subsection (a) or (b) of this Code section shall be probated, deferred, suspended, or withheld and no person sentenced pursuant to subsection (a) or (b) of this Code section shall be eligible for early release, leave, work release, earned time, good time, or any other program administered by any agency of the executive or judicial branches of this state which would have the effect of reducing or mitigating such sentence until the defendant has completed the minimum sentence as provided by subsection (a) or (b) of this Code section. (Code 1981, § 16-7-88, enacted by Ga. L. 1996, p. 416, § 3; Ga. L. 1997, p. 512, § 1; Ga. L. 2017, p. 536, § 3-2/HB 452.)

The 2017 amendment, effective July 1, 2017, substituted "device, explosive, bacteriological weapon, or biological weapon" for "device or explosive" near the middle of subsection (a).

Law reviews. — For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 17 (2017).

JUDICIAL DECISIONS

Separate victims. — In a prosecution under O.C.G.A. § 16-7-88(a), a defendant may be convicted separately for possession of a destructive device with the intent to intimidate as to each individual victim who was the specific target of such intent. Mason v. State, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Possession of destructive device offense did not merge with aggravated assault. — Defendant's aggravated assault convictions and the defendant's possession of a destructive device convictions did not merge because the possession offense required that the weapon function in a certain way and have certain dimensions, and the assault offense required that the victim was conscious of the risk of immediately receiving a violent injury by use of an offensive weapon. Because each offense required proof of a fact not required for the other, there was no merger under the required evidence test. Mason v. State, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Homemade device was destructive device. — Homemade device that was constructed from a metal pipe, a cap on one end, with a bolt to serve as a detonator or firing pin, and into which defendant had loaded a shotgun shell, and which the defendant used in an attempt to intimidate two victims into paying the defendant money was a destructive device within the meaning of O.C.G.A. §§ 16-7-80(4) and 16-7-88(a). Mason v. State, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Evidence sufficient to sustain conviction. — Evidence that the defendant was in possession of a pill capsule containing black powder, a low explosive, and had threatened to kill at least one person was sufficient to support a conviction for unlawful possession of a destructive device. Hall v. State, 322 Ga. App. 313, 744 S.E.2d 833 (2013).

16-7-89. Separate offenses.

Each violation of the provisions of this article shall be considered a separate offense. (Code 1981, § 16-7-89, enacted by Ga. L. 1996, p. 416, § 3.)

16-7-90. Records and reports.

It shall be the duty of any person authorized by paragraph (1) or (2) of Code Section 16-7-93 to manufacture, possess, transport, distribute, or use a destructive device, detonator, explosive, or hoax device within the state:

(1) To maintain such records as may be required pursuant to Title 25. Such records may be inspected by the Commissioner or the director or such officers' designees or any law enforcement officer or fire official during normal business hours; and

(2) To report promptly the loss or theft of any destructive device, detonator, explosive, or hoax device to the Georgia Bureau of Investigation. (Code 1981, § 16-7-90, enacted by Ga. L. 1996, p. 416, § 3.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, "Commissioner" was substituted for "commissioner" and "designees" was substituted for "designee" in paragraph (1).

16-7-91. Searches and inspections.

The Commissioner or director or such officers' designees or any law enforcement officer or fire official may obtain an inspection warrant as provided in Code Section 25-2-22.1 to conduct a search or inspection of:

(1) Any person licensed pursuant to Title 25 to manufacture, possess, transport, sell, distribute, or use a destructive device or detonator within the state;

(2) Any person licensed pursuant to Chapter 7 of Title 2 to manufacture, possess, transport, sell, or distribute or use pesticides; or

(3) Any property where such pesticide, destructive device, or detonator is manufactured, possessed, transported, distributed, or used. (Code 1981, § 16-7-91, enacted by Ga. L. 1996, p. 416, § 3.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, "Commissioner" was substituted for "commissioner" near the beginning of the introductory language.

16-7-92. Compelling attendance of witnesses and production of evidence.

In any case where there is reason to believe that a destructive device, detonator, explosive, or hoax device has been manufactured, possessed, transported, distributed, or used in violation of this article or Title 25 or that there has been an attempt or a conspiracy to commit such a violation, the Attorney General, any district attorney, the director, or such persons as may be designated in writing by such officials shall have the same power to compel the attendance of witnesses and the production of evidence before such official in the same manner as the state fire marshal as provided in Code Sections 25-2-27, 25-2-28, and 25-2-29. (Code 1981, § 16-7-92, enacted by Ga. L. 1996, p. 416, § 3.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, a comma was inserted following "distributed" near the beginning and following "25-2-28" near the end.

16-7-93. Exceptions to applicability of provisions.

The provisions of Code Sections 16-7-82, 16-7-84, 16-7-85, and 16-7-86 shall not apply to:

(1) Any person authorized to manufacture, possess, transport, distribute, or use a destructive device or detonator pursuant to the laws of the United States, as amended, or pursuant to Title 25 when such person is acting in accordance with such laws and any regulations issued pursuant thereto;

(2) Any person licensed as a blaster by the Commissioner pursuant to Chapter 8 of Title 25, when such blaster is acting in accordance with the laws of the state and any regulations promulgated thereunder and any ordinances and regulations of the political subdivision or authority of the state where blasting operations are being performed;

(3) Fireworks, as defined by Code Section 25-10-1 and any person authorized by the laws of this state and of the United States to manufacture, possess, distribute, transport, store, exhibit, display, or use fireworks;

(4) A law enforcement, fire service, or emergency management agency of this state, any agency or authority of a political subdivision of this state, or the United States and any employee or authorized agent thereof while in performance of official duties and any law enforcement officer, fire official, or emergency management official of the United States or any other state while attending training in this state;

(5) The armed forces of the United States or of this state;

(6) Research or educational programs conducted by or on behalf of a college, university, or secondary school which have been authorized by the chief executive officer of such educational institution or his or her designee and which is conducted in accordance with the laws of the United States and of this state;

(7) The use of explosive materials in medicines and medicinal agents in forms prescribed by the most recent published edition of the official United States Pharmacopoeia or the National Formulary;

(8) Small arms ammunition and reloading components thereof;

(9) Commercially manufactured black powder in quantities not to exceed 50 pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers intended to be used solely for sporting, recreational, or cultural purposes in antique firearms or antique devices; or

(10) An explosive which is lawfully possessed in accordance with the rules adopted pursuant to Code Section 16-7-94. (Code 1981, § 16-7-93, enacted by Ga. L. 1996, p. 416, § 3.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, a comma was inserted following "16-7-85" in the introductory language; "Commissioner" was substituted for "commissioner" in paragraph (2); "Pharmacopoeia" was substituted for "Pharmacopia" in paragraph (7); "50" was substituted for "fifty" in paragraph (9); and "16-7-94" was substituted for "16-7-95" in paragraph (10).

JUDICIAL DECISIONS

Erroneous denial of motion to withdraw plea. — Trial court abused the court's discretion in denying defendant's motion to withdraw a guilty plea to false imprisonment charges because the state conceded that defendant received ineffective assistance of counsel as to the less serious armed robbery and kidnapping offenses that were part of the same negotiated plea agreement that were included in the same indictment and that involved the same codefendants; defendant should have been permitted to withdraw the guilty plea in order to avoid a manifest injustice. Clue v. State, 273 Ga. App. 672, 615 S.E.2d 800 (2005).

16-7-94. Agricultural activities.

After consultation with the Commissioner of Agriculture or his or her designee, the Board of Public Safety may except by rule any explosive or quantity of explosive for use in legitimate agricultural activities. A copy of any such rule shall be furnished to the Commissioner of Agriculture. (Code 1981, § 16-7-94, enacted by Ga. L. 1996, p. 416, § 3.)

16-7-95. Civil forfeiture for violations of article; special provisions for destructive material.

(a) As used in this Code section, the terms "proceeds" and "property" shall have the same meanings as set forth in Code Section 9-16-2.

(b) Any property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of this article and any proceeds are declared to be contraband and no person shall have a property right in them.

(c) Any property subject to forfeiture pursuant to subsection (b) of this Code section shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9.

(d) On application of the seizing law enforcement agency, the superior court may authorize the seizing law enforcement agency to destroy or transfer to any agency of this state or of the United States which can safely store or render harmless any destructive device, explosive, poison gas, or detonator which is subject to forfeiture pursuant to this Code section if the court finds that it is impractical or unsafe for the

seizing law enforcement agency to store such destructive device, explosive, poison gas, or detonator. Such application may be made at any time after seizure. Any destruction authorized pursuant to this subsection shall be made in the presence of at least one credible witness or shall be recorded on film, videotape, or other electronic imaging method. Any such film, videotape, or other electronic imaging method shall be admissible as evidence in lieu of such destructive device, explosive, poison gas, or detonator. The court may also direct the seizing agency or an agency to which such destructive device, explosive, poison gas, or detonator is transferred to make a report of the destruction, take samples, or both.

(e) The provisions of subsection (d) of this Code section shall not prohibit an explosive ordnance technician, other law enforcement officer, or fire service personnel from taking action which will render safe an explosive, destructive device, poison gas, or detonator or any object which is suspected of being an explosive, destructive device, poison gas, or detonator without the prior approval of a court when such action is intended to protect lives or property. (Code 1981, § 16-7-95, enacted by Ga. L. 1996, p. 416, § 3; Ga. L. 1997, p. 143, § 16; Ga. L. 1997, p. 512, § 2; Ga. L. 2015, p. 693, § 2-5/HB 233.)

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).

16-7-96. Admissible evidence.

(a) Photographs, videotapes, or other identification or analysis of a destructive device, explosive, poison gas, or detonator duly identified by an explosive ordnance disposal technician or a person qualified as a forensic expert in the area of destructive devices shall be admissible in any civil or criminal trial in lieu of the destructive device or detonator.

(b) If a destructive device, explosive, poison gas, or detonator which has been rendered safe is introduced into evidence in any criminal or civil action, it shall be the duty of the clerk of court immediately to photograph the same and to transfer custody of the destructive device or detonator to the director or his or her designee or an explosive ordnance disposal technician. (Code 1981, § 16-7-96, enacted by Ga. L. 1996, p. 416, § 3.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, "videotapes" was substituted for "video tapes" near the beginning of subsection (a).

16-7-97. Fertilizers and pesticides.

The provisions of this article shall not apply to:

(1) Fertilizers, propellant actuated devices, or propellant activated industrial tools manufactured, imported, distributed, or used for their intended purposes; or

(2) A pesticide which is manufactured, stored, transported, distributed, possessed, or used in accordance with Chapter 7 of Title 2, the federal Insecticide, Fungicide, and Rodenticide Act, 61 Stat. 163, as amended, and the federal Environmental Pesticide Control Act of 1972, Pub. L. 92-516, as amended. (Code 1981, § 16-7-97, enacted by Ga. L. 1996, p. 416, § 3.)

CHAPTER 8

OFFENSES INVOLVING THEFT

Article 1

Theft

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16-8-2. Theft by taking.
16-8-3. Theft by deception.
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16-8-5. Theft of services.
16-8-5.1. Circumstances permitting inference of intent to avoid payment; exceptions.
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16-8-14. Theft by shoplifting.
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16-8-18. Entering automobile or other motor vehicle with intent to commit theft or felony.
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16-8-23. Prohibited uses of fifth wheel.

Article 2

Robbery

Sec.

16-8-40. Robbery.
16-8-41. Armed robbery; robbery by intimidation; taking controlled substance from pharmacy in course of committing offense.

Article 3

Criminal Reproduction and Sale of Recorded Material

16-8-60. Reproduction of recorded material; transfer, sale, distribution, circulation; civil forfeiture; restitution.
16-8-61. Display of official rating on video movies.
16-8-62. Film piracy prohibited; exceptions; penalty for violation.

Article 4

Motor Vehicle Chop Shops and Stolen and Altered Property

16-8-80. Short title.
16-8-81. Legislative findings.
16-8-82. Definitions.
16-8-83. Owning, operating, or conducting a chop shop; penalty.
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16-8-85. Civil forfeiture of personal property seized.
16-8-86. Civil action for violation of this article.

Article 5

Residential Mortgage Fraud

16-8-100. Short title.
16-8-101. Definitions.
16-8-102. Residential mortgage fraud.
16-8-103. Venue.
16-8-104. Authority to investigate and prosecute for residential mortgage fraud.

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16-8-105. Penalties.

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16-8-106. Civil forfeiture.

Cross references. — Theft of telecommunication services, § 46-5-2 et seq.

Law reviews. — For article advocating consolidation of the Georgia law of theft prior to enactment of the Criminal Code of 1968, see 12 Mercer L. Rev. 308 (1961). For article advocating consolidated theft statute in Georgia, see 23 Ga. B.J. 461 (1961). For annual survey article on local government law, see 50 Mercer L. Rev. 263 (1998).

JUDICIAL DECISIONS

Title of stolen article. — One charged with theft will not be heard to raise nice and delicate questions as to the title of the article stolen. Cline v. State, 153 Ga. App. 576, 266 S.E.2d 266 (1980).

RESEARCH REFERENCES

ALR. — Admissibility of evidence that one charged with burglary, larceny, or robbery was in possession of property not identified as part of that stolen, 3 A.L.R. 1213.

Larceny or embezzlement by appropriating money or proceeds of paper mistakenly delivered in excess of the amount due or intended, 14 A.L.R. 894.

Larceny: effect of participation by spouse of owner in, or consent to, taking of property, 14 A.L.R. 1271.

Conviction or acquittal of larceny as bar to prosecution for burglary, 19 A.L.R. 626.

Pendency in one county of charge of larceny as bar to subsequent charge in another county of offense which involves both felonious breaking and felonious taking of same property, 19 A.L.R. 636.

What amounts to asportation which will support charge of larceny, 19 A.L.R. 724; 144 A.L.R. 1383.

Appropriation of property after obtaining possession by fraud as larceny, 26 A.L.R. 381.

Larceny by finder of property, 36 A.L.R. 372.

Criminal liability of corporation for larceny, 59 A.L.R. 379.

Acceptance of defendant's note or other contractual obligation as affecting charge of embezzlement or larceny, 70 A.L.R. 208.

Misappropriation of executor, administrator, guardian, or trustee as embezzlement, 75 A.L.R. 299.

Appropriation or removal without payment of property delivered in expectation of immediate cash payment, as criminal offense, 83 A.L.R. 441.

Necessity of alleging and proving in prosecution for larceny, embezzlement, or receiving stolen property that "owner" of property, if not a natural person, was incorporated or otherwise a legal entity capable of owning property, 88 A.L.R. 485.

Larceny as affected by distinction between custody and possession, 125 A.L.R. 367.

Stolen money or property as subject of larceny or robbery, 80 A.L.R.2d 1435.

Larceny: entrapment or consent, 10 A.L.R.3d 1121.

Series of takings over a period of time as involving single or separate larcenies, 53 A.L.R.3d 398.

What constitutes "money" within coverage or exclusion of theft or other crime policy, 68 A.L.R.3d 1179.

Larceny as within disorderly conduct statute or ordinance, 71 A.L.R.3d 1156.

What conduct amounts to an overt act or acts done toward commission of larceny so as to sustain charge of attempt to commit larceny, 76 A.L.R.3d 842.

Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 A.L.R.3d 245.

Applicability of best evidence rule to proof of ownership of allegedly stolen per-

sonal property in prosecution for theft, 94 A.L.R.3d 824.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 A.L.R.3d 280.

Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime, 1 A.L.R.4th 481.

Bank officer's or employee's misapplication of funds as state criminal offense, 34 A.L.R.4th 547.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 A.L.R.4th 971.

Cat as subject of larceny, 55 A.L.R.4th 1080.

Offense of obtaining telephone services by unauthorized use of another's telephone number—state cases, 61 A.L.R.4th 1197.

What constitutes theft within automobile theft insurance policy — modern cases, 67 A.L.R.4th 82.

ARTICLE 1

THEFT

Cross references. — Restitution and distribution of profits to victims of crimes, T. 17, C. 14.

16-8-1. Definitions.

As used in this article, the term:

(1) "Deprive" means, without justification:

(A) To withhold property of another permanently or temporarily; or

(B) To dispose of the property so as to make it unlikely that the owner will recover it.

(2) "Financial institution" means a bank, insurance company, credit union, building and loan association, investment trust, or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment.

(3) "Property of another" includes property in which any person other than the accused has an interest but does not include property belonging to the spouse of an accused or to them jointly. (Code 1933, § 26-1801, enacted by Ga. L. 1968, p. 1249, § 1.)

JUDICIAL DECISIONS

Inference or presumption of fact based on unexplained possession of stolen goods. — When a theft, whether by simple larceny, burglary, or robbery is proven, recent unexplained possession of the stolen goods by the defendant creates an inference or presumption of fact sufficient to convict. Selph v. State, 142 Ga. App. 26, 234 S.E.2d 831 (1977); Wells v. State, 151 Ga. App. 416, 260 S.E.2d 374 (1979), overruled on other grounds, Copeland v. State, 160 Ga. App. 786, 287 S.E.2d 120 (1982).

Inference exists without direct proof or other circumstantial evidence that the defendant committed the theft. Selph v.

State, 142 Ga. App. 26, 234 S.E.2d 831 (1977).

Effect of proving criminal intent at time of taking. — Once criminal intent at the time of taking was proved, it became irrelevant whether the deprivation was permanent or temporary. Martin v. State, 143 Ga. App. 875, 240 S.E.2d 231 (1977).

Defendant's intent to take motor vehicles for defendant's own temporary use without the owner's authorization evinced an intent to commit theft. Sorrells v. State, 267 Ga. 236, 476 S.E.2d 571 (1996).

Defendant's use of an automobile after the owner's death was evidence of defendant's intent to commit theft. Mullinax v. State, 273 Ga. 756, 545 S.E.2d 891 (2001).

Failure to allege "property of another". — Indictment for robbery by force, O.C.G.A. § 16-8-40(a)(1), was defective because the indictment failed to allege the essential element that the defendant took the "property of another," defined in O.C.G.A. § 16-8-1(3), and the defendant could admit all the allegations in the indictment and not be guilty of a crime. Defendant's general demurrer should have been granted. Cooks v. State, 325 Ga. App. 426, 750 S.E.2d 765 (2013).

Spouse's property not "property of another." — Because the object of theft must be "property of another," a person cannot commit theft of property of his/her spouse. Calloway v. State, 176 Ga. App. 674, 337 S.E.2d 397 (1985).

Mutually exclusive verdicts. — Trial court erred in vacating defendant's theft by taking verdict and in sentencing defendant on the theft by receiving stolen property verdict as the verdict was illegal; the crimes of theft by taking and theft by receiving stolen property were mutually exclusive, and the addition of the word "retain" in O.C.G.A. § 16-8-7(a) does not change the fact that the heart of the crime of receiving stolen property was the guilty possession by someone who was not the thief. Ingram v. State, 268 Ga. App. 149, 601 S.E.2d 736 (2004).

Cited in Johnson v. State, 130 Ga. App. 134, 202 S.E.2d 525 (1973); Dunphy v. State, 131 Ga. App. 615, 206 S.E.2d 524 (1974); Franklin Life Ins. Co. v. Hill, 136 Ga. App. 128, 220 S.E.2d 707 (1975); Clark v. State, 138 Ga. App. 266, 226 S.E.2d 89 (1976); Causey v. State, 139 Ga. App. 499, 229 S.E.2d 1 (1976); First Nat'l Bank & Trust Co. v. State, 141 Ga. App. 471, 233 S.E.2d 861 (1977); Smith v. State, 172 Ga. App. 356, 323 S.E.2d 257 (1984); Parrott v. State, 190 Ga. App. 784, 380 S.E.2d 343 (1989); Sledge v. State, 245 Ga. App. 488, 537 S.E.2d 753 (2000); Knight v. State, 246 Ga. App. 299, 540 S.E.2d 254 (2000); Howard v. State, 263 Ga. App. 593, 588 S.E.2d 793 (2003); Lewis v. State, 287 Ga. App. 379, 651 S.E.2d 494 (2007); Brandeburg v. State, 292 Ga. App. 191, 663 S.E.2d 844 (2008); Cisco v. State, 285 Ga. 656, 680 S.E.2d 831 (2009); Tauch v. State, 305 Ga. App. 643, 700 S.E.2d 645 (2010).

RESEARCH REFERENCES

ALR. — Should ownership of property be laid in the husband or wife in an indictment for larceny, 2 A.L.R. 352.

Larceny by general owner of property in which another has a special interest or right of possession, 58 A.L.R. 330.

Necessity of alleging and proving in prosecution for larceny, embezzlement, or receiving stolen property that "owner" of property, if not a natural person, was incorporated or otherwise a legal entity capable of owning property, 88 A.L.R. 485.

Dogs as subject of larceny, 92 A.L.R. 2l2.

Larceny of real property or things savoring of real property, 131 A.L.R. 146.

Charge of larceny or receiving stolen goods predicated upon taking or appropriation of waste paper or other articles deposited in street with intention to donate to patriotic or other cause, 156 A.L.R. 631.

Person who steals property in one state or country and brings it into another as subject to prosecution for larceny in latter, 156 A.L.R. 862.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 A.L.R.4th 971.

Joyriding or similar charge as lesser-included offense of larceny or similar charge, 78 A.L.R.5th 567.

Theft of misaddressed or misdelivered mail as violation of 18 USCS § 1708, covering theft from mail post office, or mail depository, 113 A.L.R. Fed. 411.

What is "property of another" within statute proscribing larceny, theft, or embezzlement of property of another, 57 A.L.R. 6th 445.

16-8-2. Theft by taking.

A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated. (Laws 1833, Cobb's 1851 Digest, p. 791; Code 1863, § 4290; Code 1868, § 4327; Code 1873, § 4393; Code 1882, § 4393; Penal Code 1895, § 155; Penal Code 1910, § 152; Code 1933, § 26-2602; Code 1933, § 26-1802, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1974, p. 468, § 1; Ga. L. 1975, p. 876, § 1; Ga. L. 1978, p. 2257, § 1.)

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article, "Legal Remedies for Computer Abuse," see 21 Ga. St. B.J. 100 (1985). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001). For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Penal Code 1910, §§ 172, 174; former Ga. L. 1919, p. 135, § 20; former Code 1933, §§ 26-2602, 26-2803, as it read prior to revision of the title by Ga. L. 1968, p. 1249, and former Code 1933, § 26-1813, are included in the annotations for this Code section.

Former Code 1933, § 26-1802(a) (see now O.C.G.A. § 16-8-2) was not violative of the due process provisions of the state and federal Constitutions; it was not so vague, uncertain and indefinite that it failed to inform persons charged thereunder of the conduct proscribed thereby. Stull v. State, 230 Ga. 99, 196 S.E.2d 7 (1973).

Construction with Immigration and Nationality Act. — Conviction for theft by taking under Georgia law was not a "theft offense" as that term is defined under the Immigration and Nationality Act, 8 U.S.C. § 1151, because taking property through fraudulently obtained consent is not "without consent"; therefore, a lawful permanent resident's deportation was not supported by the resident's guilty plea to theft by taking, based on charges that the resident took merchandise from a department store while working at the

store. Vassell v. United States AG, 839 F.3d 1352 (11th Cir. 2016).

Phrase "regardless of the manner in which the property is taken or appropriated" in O.C.G.A. § 16-8-2 established that it did not require any lack of consent on the part of the victim; the statute was overbroad because the statute punished both theft and fraud, and a violation of the statute wasn't necessarily a "theft offense" as that term was used in the Immigration and Nationality Act, 8 U.S.C. § 1151. Vassell v. United States AG, 825 F.3d 1252 (11th Cir. 2016).

No private right of action. — In a declaratory judgment case in which three intended beneficiaries alleged that an insurance company violated O.C.G.A. §§ 16-8-2, 16-8-3, and 16-8-4, those criminal statutes did not create a private cause of action. Am. Gen. Life & Accident Ins. Co. v. Ward, 509 F. Supp. 2d 1324 (N.D. Ga. Mar. 12, 2007).

Mortgage borrower could not bring civil claims against a loan servicer under O.C.G.A. §§ 16-8-2, 16-8-3, and 16-8-4, which were criminal statutes prohibiting theft by taking, by conversion, and by deception; the statutes did not purport to create a private cause of action. Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012).

When a car buyer appealed a district court's entry of summary judgment in favor of a lender, the Georgia criminal statutes for trespassing and theft, O.C.G.A. §§ 16-7-21, 16-8-2, and 16-8-3, did not expressly provide for a civil remedy and, thus, a civil remedy could not arise from a violation of those statutes. Goia v. Citifinancial Auto, 499 Fed. Appx. 930 (11th Cir. Dec. 3, 2012) (Unpublished).

Civil liability for damages. — Plaintiff failed to plead a claim to recover damages for conversion under O.C.G.A. § 51-10-6 based on a violation of two criminal statutes — theft by conversion of payments for property improvements and theft by taking — as the plaintiff did not allege any of the necessary elements to establish the violations and did not allege that the defendant was charged with or found guilty of a violation of those statutes. Vanbenschoten v. Turner (In re Turner), No. 16-04004-EJC, 2017 Bankr. LEXIS 918 (Bankr. S.D. Ga. Mar. 31, 2017).

Indictment need only inform generally. — It was not essential to a charge under former Code 1933, § 26-1802 (see now O.C.G.A. § 16-8-2) that the indictment do more than inform the accused generally of the items which it contended were taken. Stull v. State, 230 Ga. 99, 196 S.E.2d 7 (1973).

Defendant was not prejudiced by poorly drafted language in an indictment that otherwise contained the statutory elements of the offense of theft by taking. Franklin v. State, 243 Ga. App. 440, 533 S.E.2d 455 (2000).

Second indictment did not need to allege special exception to statute of limitations. — Trial court properly denied the defendant's motion in arrest of a judgment of conviction for burglary and theft by taking because the second indictment was filed within the six-month extension authorized by O.C.G.A. § 17-3-3 and, therefore, did not need to allege an exception to the four-year statute of limitation. Johnson v. State, 335 Ga. App. 886, 782 S.E.2d 50 (2016).

First indictment, while perhaps not perfect in form, was not void; therefore, under O.C.G.A. § 17-3-3, the statute of limitation was properly extended by an additional six months after the first indictment was quashed and the state did not need to allege any exception to the limitation period in the second indictment for burglary or theft. Johnson v. State, 335 Ga. App. 886, 782 S.E.2d 50 (2016).

Sufficiency of indictment. — Trial court erred in overruling the defendant's special demurrer with regard to portions of the indictment that contended that the Medicaid fraud and theft by taking crimes were committed over a range of 38 months because the specific dates were known to the state and the state should have listed those dates due to the number of alleged acts. Cole v. State, 334 Ga. App. 752, 780 S.E.2d 406 (2015).

Motion to compel response to subpoena duces tecum. — In a theft by taking case, the trial court erred in denying the defendant's motion to compel a response to the defendant's subpoena duces tecum as the defendant met the

General Consideration (Cont'd)

burden of showing the relevance of the evidence sought in the subpoena because the defendant demonstrated that the defendant sought the documents not just for use in cross-examining the pharmacy owner, but also to prove the volume of cash that the pharmacy used to pay its cash-based employees and that the defendant took cash out of the register at the employer's direction to pay those employees and other expenses. Gregg v. State, 331 Ga. App. 833, 771 S.E.2d 486 (2015).

Failure to allege "property of another". — Indictment for robbery by force, O.C.G.A. § 16-8-40(a)(1), was defective because the indictment failed to allege the essential element that the defendant took the "property of another," and the defendant could admit all the allegations in the indictment and not be guilty of a crime; likewise, the defendant would not be guilty of theft by taking, which also required that the accused had taken the property of another, O.C.G.A. § 16-8-2. Cooks v. State, 325 Ga. App. 426, 750 S.E.2d 765 (2013).

Word "theft" is word of general and broad connotation, covering any criminal appropriation of another's property to the taker's use, unlike "larceny," a technical word of art with narrowly defined meaning. The fact that the defendants were in recent possession of stolen goods without a reasonable explanation will authorize a conviction of theft by taking. Henson v. State, 136 Ga. App. 868, 222 S.E.2d 685 (1975).

Probable cause to charge. — In a malicious prosecution action, even though the employee had been given temporary custody of the employer's truck, the employee's retention of the truck after the employee was ordered to return it gave the employer probable cause to charge the employee with theft by taking. Tate v. Holloway, 231 Ga. App. 831, 499 S.E.2d 72 (1998).

Probable cause found for warrantless arrest. — Defendant's warrantless arrest for theft under either O.C.G.A. § 16-8-2 or O.C.G.A. § 16-8-7(a) was supported by probable cause as: (1) an officer observed defendant banging on and breaking into a coin-operated air compressor in the middle of the night; (2) the officer recognized the air compressor as belonging to a gas station; (3) the officer saw defendant at the gas station less than 24 hours earlier; and (4) defendant refused to provide information that would verify the claim that defendant had lawfully obtained the compressor. Cole v. State, 273 Ga. App. 259, 614 S.E.2d 883 (2005).

Gravamen of offense is taking of property of another against will of such other. Stull v. State, 230 Ga. 99, 196 S.E.2d 7 (1973).

Plea agreement. — Trial court committed reversible error when the court failed to follow the bright line test, as required by State v. Germany and Ga. Unif. Super. Ct. R. 33.10, by failing to inform the defendant personally that: (1) the trial court was not bound by any plea agreement encompassing defendant's plea to theft by taking; (2) the trial court intended to reject the plea agreement presently before it; (3) the disposition of the present case might be less favorable to the defendant than that contemplated by the plea agreement; and (4) that the defendant had a right to then withdraw the guilty plea. Mulkey v. State, 265 Ga. App. 631, 595 S.E.2d 330 (2004).

Because nothing in the transcript of the plea hearing indicated that the defendant entered a negotiated plea, but rather the plea was open-ended, the trial court was not required to comply with Ga. Unif. Super. Ct. R. 33.10; hence, a lack of compliance with the rule could not serve as a basis to allow the withdrawal of the plea. Manley v. State, 287 Ga. App. 358, 651 S.E.2d 453 (2007), cert. denied, 2008 Ga. LEXIS 94 (Ga. 2008).

Merger inappropriate. — Each and every transaction in which the defendant, the director and a fiduciary of the animal shelter, took money belonging to the animal shelter with the intent of depriving the facility of that money constituted a separate and distinct completed crime; thus, the defendant's convictions for theft by taking did not merge into one count. Kilby v. State, 335 Ga. App. 238, 780 S.E.2d 411 (2015), cert. denied, No. S16C0653, No. S16C0653, 2016 Ga.

LEXIS 437 (Ga. 2016).

Venue proper in county where checks taken, not deposited. — Venue in prosecution for theft by taking, where defendants took checks in one county and deposited them in their bank account in another county was proper in the county where the checks were taken. Hawkins v. State, 167 Ga. App. 143, 305 S.E.2d 797 (1983).

Venue not established. — State failed to establish venue when the indictment was for theft by taking from a trust which at all times was located in another state, not in the county where the trust beneficiary lived. DeVine v. State, 229 Ga. App. 346, 494 S.E.2d 87 (1997).

Evidence sufficient to establish venue. — Evidence was sufficient to establish venue beyond a reasonable doubt and to sustain the defendant's conviction for theft by taking because the state established that the defendant wrote checks at a company's county office, the amount of the check cashed exceeded the amount entered into the computer register, and the total amount of the difference was more than $500; the company president testified that the company was located in the county where the defendant's trial was held and that the defendant worked at the company office and then began working from home. Gautreaux v. State, 314 Ga. App. 103, 722 S.E.2d 915 (2012).

In a theft by taking case involving the theft of donations to an animal shelter, the evidence was sufficient to prove that venue was proper in Rabun County, Georgia, as the defendant exercised control over the money in that county because the state elicited direct testimony that the animal shelter was located in that county, that the defendant's residence was located in that county, that one bank used in the theft was located in that county, that one branch of another bank was located in that county, and that the defendant's "fundraising" efforts were conducted in that county, on either the defendant's home or work computer. Kilby v. State, 335 Ga. App. 238, 780 S.E.2d 411 (2015), cert. denied, No. S16C0653, No. S16C0653, 2016 Ga. LEXIS 437 (Ga. 2016).

Venue sufficiently established. — Venue was sufficiently established in Cobb County, Georgia, pursuant to O.C.G.A. § 16-8-11 in the defendant's trial for theft by taking in violation of O.C.G.A. § 16-8-2 because a Secret Service agent testified that during the investigation, the agent discovered that checks disbursed from the victims' loans were sent to the defendant at the defendant's mailbox located in Cobb County. Bearden v. State, 316 Ga. App. 721, 728 S.E.2d 874 (2012).

Venue in theft by taking case. — In an action for theft by taking, venue was properly shown as the trial court was authorized to find that deposit of the subject check had been made by the defendant or someone acting on the defendant's behalf; specifically, the check was deposited into a business account for the defendant's wife and the defendant identified the defendant's new company to the homeowner and the general contractor at a meeting. Erick v. State, 322 Ga. App. 71, 744 S.E.2d 69 (2013).

Repossession is not theft. — Defendant's conviction for theft by taking was reversed, where the trial court's findings indicated that defendant's intent was to repossess a motorcycle under an honest claim of right after purchasers had defaulted on their payments. Edens v. State, 197 Ga. App. 146, 397 S.E.2d 612 (1990).

Moment one removes property from place it is kept with intention of stealing it, the crime of theft by taking is complete, regardless of any consent that may be obtained subsequently from the owner. Henderson v. State, 167 Ga. App. 808, 307 S.E.2d 704 (1983).

Theft of several items as one crime. — When several articles are stolen at the same time, the defendant has committed only one offense, whether one or more persons owns the articles. Hubbard v. State, 168 Ga. App. 778, 310 S.E.2d 556 (1983).

There can only be one sentence and conviction if several items are stolen as part of a continuous criminal act. Bigby v. State, 184 Ga. App. 94, 360 S.E.2d 751 (1987).

Merger of several counts was required. — Three theft-by-taking counts against a defendant required merger since the case involved one victim who was

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robbed of multiple items in a single transaction; therefore, only one robbery was committed. Jones v. State, 285 Ga. App. 114, 645 S.E.2d 602 (2007).

Taking money from vehicle after taking vehicle as second criminal act. — Although money was in a van at the time the van was stolen, the jury was authorized to find that defendant was not then aware of its presence, and defendant's act of physically taking the money from its hiding place, coupled with the then present intent to steal it, was thus a second criminal act against the property of the victim, which was separate and distinct from the earlier theft of the van. Accordingly, the trial court did not err in failing to grant appellant's motion for a directed verdict of acquittal as to one of the counts of theft by taking. Cook v. State, 180 Ga. App. 139, 348 S.E.2d 687 (1986).

Theft by taking a motor vehicle and theft by taking a purse should have merged. — Trial court erred by failing to merge a theft by taking of a motor vehicle count with a theft by taking a purse count as the state conceded that the record was unclear as to whether the theft of the vehicle and the theft of the purse constituted two separate acts, and the evidence appeared to show that the victim's purse was stolen as a result of being inside the car when the car was stolen by the defendant. Hall v. State, 292 Ga. App. 544, 664 S.E.2d 882 (2008), cert. denied, No. S08C1841, 2008 Ga. LEXIS 926 (Ga. 2008).

Theft by taking did not merge with entering an automobile because the defendant completed the latter offense at the time the defendant entered the truck with the intent of taking items stored inside the truck, and because different elements had to be demonstrated to find the defendant guilty of both offenses. Hawkins v. State, 219 Ga. App. 484, 465 S.E.2d 527 (1995).

Theft by taking not lesser included offense of armed robbery and robbery by intimidation. — Evidence showed that defendant committed robbery either by use of a replica of a handgun or by intimidation and no evidence was presented that intimidation was not used in the robbery; therefore, defendant was not entitled to a charge on theft by taking as a lesser included offense of armed robbery and robbery by intimidation. Espinoza v. State, 243 Ga. App. 665, 534 S.E.2d 127 (2000).

Theft by taking not lesser included offense of robbery. — Defendant was not entitled to an instruction regarding theft by taking under O.C.G.A. § 16-8-2 as a lesser included offense of robbery under O.C.G.A. § 16-8-40(a)(1), (2) or as a sole defense, because there was no evidence to support either instruction, where defendant admitted to removing the victim's purse by force, which constituted robbery, allegedly as payment for drugs that defendant had given to the victim. Miller v. State, 259 Ga. App. 244, 576 S.E.2d 631 (2003).

Manner of taking property is irrelevant. — It was not error for a charge based on the provisions of former Code 1933, § 26-1802 (see now O.C.G.A. § 16-8-2) to fail to define "unlawful taking" or the manner in which the property was taken, because the statute does not define "unlawful taking" and makes the manner of taking irrelevant. Clark v. State, 138 Ga. App. 266, 226 S.E.2d 89 (1976).

Gravamen of the offense is the taking of the property of another against the will of such other, regardless of whether the property is taken or appropriated and the manner of the taking or the appropriation. Clark v. State, 138 Ga. App. 266, 226 S.E.2d 89 (1976).

Knowledge that person from whom car was borrowed was guilty of theft by taking and conversion was sufficient to support conviction for receiving stolen property. — Because the defendant, who was loaned a car by the lender in exchange for crack cocaine, knew that the lender did automobile body work for others and the car was clearly undergoing body work, sufficient evidence supported the receiving stolen property conviction under O.C.G.A. § 16-8-7(a); a jury could have found that the defendant knew or should have known that the lender had no authority to loan the car

and that the lender had converted the car to the lender's own use by renting the car to the defendant in violation of O.C.G.A. § 16-8-4(a), prohibiting theft by conversion, and O.C.G.A. § 16-8-2, prohibiting theft by taking. McKinney v. State, 276 Ga. App. 75, 622 S.E.2d 427 (2005).

State is obliged to prove its case under a conversion theory when such is set out in the indictment. Cutter v. State, 168 Ga. App. 651, 310 S.E.2d 16 (1983).

Proof of description, value, and ownership of stolen property is important for conviction of theft by taking; and proof of the specific place within the county where the theft occurred has never been necessary for conviction. State v. Ramos, 145 Ga. App. 301, 243 S.E.2d 693 (1978).

Ownership may be in real owner or person in possession. — It is well settled that ownership of stolen property may be laid either in the real owner or in the person in whose possession the property was at the time of the theft. McKee v. State, 200 Ga. 563, 37 S.E.2d 700 (1946) (decided under former Code 1933, § 26-2603).

Ostensible ownership is enough to justify description. Earley v. State, 155 Ga. App. 576, 271 S.E.2d 709 (1980).

Thief cannot question title of apparent owner. Hall v. State, 132 Ga. App. 612, 208 S.E.2d 621 (1974); Earley v. State, 155 Ga. App. 576, 271 S.E.2d 709 (1980).

Ownership of personal property may be in bailee. — Ownership of personal property, in an indictment for larceny, may be laid in a bailee having possession of the property when it was stolen, though the bailment was gratuitous. A like description of ownership of personal property mentioned in an indictment for burglary is sufficient. Hall v. State, 132 Ga. App. 612, 208 S.E.2d 621 (1974).

Person cannot commit theft of property of his or her spouse. Calloway v. State, 176 Ga. App. 674, 337 S.E.2d 397 (1985).

Decline in value of stock not a theft. — Taxpayers' complaint for a refund was dismissed, as they were not entitled to a theft loss deduction under 26 U.S.C. § 165(e) with respect to a decline in value of publicly traded stock after the taxpayer husband exercised his stock options because they did not show that they were victims of either a theft by taking, theft by deception, theft by conversion, or theft of services under O.C.G.A. § 16-8-2, O.C.G.A. § 16-8-3, O.C.G.A. § 16-8-4, or O.C.G.A. § 16-8-5. The taxpayers were only entitled to capital loss deductions under 26 U.S.C. § 2511. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

Property taken must have value. — When the evidence authorizes a finding that the stolen property is of some value it will authorize a conviction of theft by taking and sentencing as for a misdemeanor under former Code 1933, §§ 26-1802 and 26-1812 (see now O.C.G.A. §§ 16-8-2 and 16-8-12). Stancell v. State, 146 Ga. App. 773, 247 S.E.2d 587 (1978).

It must appear that stolen property was of some value or a conviction for theft by taking cannot be sustained. Bryan v. State, 148 Ga. App. 428, 251 S.E.2d 338 (1978); Hammett v. State, 246 Ga. App. 287, 539 S.E.2d 193 (2000).

Evidence of value of property taken. — Owner of property may not testify as to the owner's opinion of the value of the property taken without giving the owner's reasons therefor, and an opinion as to value based solely on cost price is inadmissible in evidence as it has no probative value. Dotson v. State, 144 Ga. App. 113, 240 S.E.2d 238 (1977).

Rule that cost price is not probative evidence of market value is ameliorated by the allowance of proof of price at purchase as a circumstance from which value may be inferred. Ragsdale v. State, 170 Ga. App. 448, 317 S.E.2d 288 (1984).

Same rules apply to the ascertainment of value of personalty whether that personalty is the subject of a negligence case or the object of a theft in a criminal case; value is value in whichever context. Ragsdale v. State, 170 Ga. App. 448, 317 S.E.2d 288 (1984).

When in a trial for theft of two televisions sets by taking, in response to questioning concerning the prices of the subject television sets, defendant testified

General Consideration (Cont'd)

that one set cost "four-ninety something or five-ninety something" and the other "about three-something," this evidence sufficiently showed the value of the property taken to be in excess of $500. Hall v. State, 181 Ga. App. 697, 353 S.E.2d 614 (1987).

It was held that there was sufficient evidence, which, when coupled with the jury's awareness of the value of such everyday objects as video cassette recorders, authorized a jury determination that the value of the video cassette recorder stolen was greater than $100. Franklin v. State, 184 Ga. App. 396, 361 S.E.2d 700 (1987).

Trial court did not err in concluding that the victim's testimony was sufficient to allow a felony theft charge to go to the jury because the victim testified as to the market value for each of the items stolen from the victim, and the total value exceeded $500; the victim established that the victim had an opportunity to form a correct opinion because the victim based the opinion as to the market value of the stolen tools on the age of the tools and the victim's experience using and purchasing the tools. Sheppard v. State, 300 Ga. App. 631, 686 S.E.2d 295 (2009).

Trial court did not err in assessing the value of a six car hauling trailer at $13,000 because an expert testified that based on the expert's experience, the fair market value of the trailer would be between $13,000 and $15,000, and the evidence showed that there was a basis for that value; evidence of the expert's experience in the equipment valuation field provided evidence of an obvious opportunity to gain familiarity with equipment values, creating at least a minimal basis for that value evidence. Rushing v. State, 305 Ga. App. 629, 700 S.E.2d 620 (2010).

Retail value or price is standard to be used in theft by taking cases from retail establishments and where once established the wholesale price is not relevant. Brown v. State, 143 Ga. App. 678, 239 S.E.2d 556 (1977).

State failed to show value of jewelry exceeded $500. — State failed to establish that the value of stolen jewelry exceeded $500 as required for felony theft by taking. There was evidence that the rings were part of an entire lot of jewelry — including necklaces, bracelets, rings, and pendants — that the victim had previously purchased from the pawn shop for $10,000. The only evidence related to the specific items taken by the defendant showed that the defendant pawned nine rings for $275. Schneider v. State, 312 Ga. App. 504, 718 S.E.2d 833 (2011).

Misdemeanor offenses. — Indictment charging two counts of theft by taking, each involving less than $500, charged offenses with maximum punishments of less than 12 months, i.e., misdemeanor offenses within the jurisdiction of the state court. Royster v. State, 226 Ga. App. 737, 487 S.E.2d 491 (1997).

Broad language of section is no impediment to indictment. — Former Code 1933, § 26-1802 (see now O.C.G.A. § 16-8-2) was sufficiently broad to encompass thefts or larcenies perpetrated by deception as prohibited under former Code 1933, § 26-1803 (see now O.C.G.A. § 16-8-3), and possibly broad enough to encompass other types of theft prohibited by other sections of the Criminal Code. Stull v. State, 230 Ga. 99, 196 S.E.2d 7 (1973).

While the language embodied in the clause, "regardless of the manner in which said property is taken or appropriated," rendered former Code 1933, § 26-1802 (see now O.C.G.A. § 16-8-2) sufficiently broad to encompass thefts or larcenies perpetrated by deception or prohibited under former Code 1933, § 26-1803 (see now O.C.G.A. § 16-8-3), and possibly broad enough to encompass other types of theft prohibited by other sections of the Criminal Code of Georgia, this was no impediment to an indictment thereunder. Flinchum v. State, 141 Ga. App. 59, 232 S.E.2d 396 (1977).

Phrase "regardless of the manner in which the property is taken or appropriated" renders O.C.G.A. § 16-8-2 sufficiently broad to encompass thefts or larcenies perpetrated by deception and theft by conversion. Cole v. State, 186 Ga. App. 243, 366 S.E.2d 844 (1988); Byrd v. State, 186 Ga. App. 446, 367 S.E.2d 300 (1988); Elder v. State, 230 Ga. App. 122, 495 S.E.2d 596 (1998).

Since theft by taking encompasses theft by conversion, O.C.G.A. § 16-8-12(a)(1) authorizes the imposition of like punishment upon conviction for either offense, misdesignation constitutes only a clerical error, which may be corrected by the court at any time on its own initiative. Bartel v. State, 202 Ga. App. 458, 414 S.E.2d 689, cert. denied, 202 Ga. App. 906, 414 S.E.2d 689 (1992).

Sufficiency of indictment. — In a prosecution for theft by taking, the indictment was defective for failing to identify the date or dates of the offense and for failing to specifically identify the amount taken; it was not necessary for the indictment to specifically identify the form of the currency taken. State v. Stamey, 211 Ga. App. 837, 440 S.E.2d 725 (1994).

Indictment sufficient. — Trial court properly denied defendant's demurrer and plea in abatement filed on the basis that the state failed to name a specific victim in the indictment charging defendant for theft by taking as the indictment alleged all of the elements of the crime and the items taken and did not prevent defendant from knowing what actions defendant was to defend against nor did the indictment subject defendant to the possibility of a subsequent prosecution with regard to the same act. Further, defendant submitted an affidavit describing the time of the alleged incident, which indicated that defendant was clearly aware of what actions defendant had to defend against, therefore, defendant was in no way prejudiced by the state's omission of the name of the owner of the articles alleged to have been taken. Brandeburg v. State, 292 Ga. App. 191, 663 S.E.2d 844 (2008), cert. denied, No. S08C1796, 2008 Ga. LEXIS 921 (Ga. 2008).

Indictments charging two attorneys with theft by taking in connection with a client's property transfers were sufficient in that they tracked the statutory language, placed defendants on notice of the charges against the defendants, and sufficiently alleged a statute of limitations exception. Rader v. State, 300 Ga. App. 411, 685 S.E.2d 405 (2009).

Accusation that alleged that the defendant took "drugs the property of Dr. Bob Lanier having a value of less than $500 with the intention of depriving said owner of said property" was sufficient to allege theft by taking under O.C.G.A. § 16-8-2. State v. Meeks, 309 Ga. App. 855, 711 S.E.2d 403 (2011).

Indictment conjunctively alleging two violations sufficient. — Indictment which conjunctively alleged violations of O.C.G.A. §§ 16-8-2 and 16-8-12 (breach of fiduciary duties by government employee) sufficiently advised defendant of both charges. Wages v. State, 165 Ga. App. 587, 302 S.E.2d 112 (1983).

Description of stolen property at trial may be more minute than description in indictment. Burkett v. State, 133 Ga. App. 728, 212 S.E.2d 870 (1975).

On the trial of a defendant charged with the offense of larceny, where there is some evidence descriptive of the stolen property which is substantially conformable to the description alleged in the indictment, and nowhere contradictory thereof, the identity of the stolen property is a matter addressed peculiarly and solely to the jury, and in such case there is no fatal variance between the allegata and the probata. Burkett v. State, 133 Ga. App. 728, 212 S.E.2d 870 (1975).

In order to sustain a conviction of larceny, the evidence must make out the description of the stolen property as laid in the indictment or accusation, although such description may have been unnecessarily minute. Burkett v. State, 133 Ga. App. 728, 212 S.E.2d 870 (1975).

"Fatal variance" rule does not apply where stolen property is identified as being same as that described in indictment. Burkett v. State, 133 Ga. App. 728, 212 S.E.2d 870 (1975).

When the indictment alleged an unlawful taking of a vehicle and the evidence at trial established that the defendant had unlawfully appropriated the vehicle after first obtaining lawful possession of it, there was no fatal variance between the allegata and the probata since either act constituted theft by taking. Bell v. State, 220 Ga. App. 293, 469 S.E.2d 714 (1996).

Vehicle title inaccuracies in indictment. — Trial court properly denied defendant's motion for acquittal, made on the ground that the state failed to prove ownership of the stolen vehicles given

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certain inaccuracies as to title in the indictment, since these variances neither misinformed the accused of the charges against the accused nor left the accused subject to subsequent prosecutions for the same offense. Holbrook v. State, 209 Ga. App. 301, 433 S.E.2d 616 (1993).

There is no inconsistency in indictments which charge theft by having possession of county money and withdrawing such money by check for an illegal purpose. DeFoor v. State, 233 Ga. 190, 210 S.E.2d 707 (1974).

Severance when theft and robberies not connected by "common scheme or plan." — Even though all the crimes were alleged to have been perpetrated by members of the same family, a sister acting individually as to the theft by taking and jointly with her brother as to armed robberies, severance was warranted since the three crimes were not part of a common scheme or plan and there was no viable "common scheme or plan" connecting the theft by taking with the armed robberies. Hayes v. State, 182 Ga. App. 26, 354 S.E.2d 655 (1987).

Uniform Commercial Code definition of "negotiable instrument" did not apply as an additional element in a prosecution for criminal attempt to commit the crime of theft by taking. Thogerson v. State, 224 Ga. App. 76, 479 S.E.2d 463 (1996).

Predicate acts for purposes of RICO prosecution. — Trial court erred in failing to grant defendant's demurrer to ten predicate acts of racketeering activity involving the filing of false deeds because the deed transactions were part of 14 theft by taking transactions and therefore could not form the basis of separate predicate acts. Adams v. State, 231 Ga. App. 279, 499 S.E.2d 105 (1998).

Jurisdiction under 28 U.S.C. § 1331 did not exist in a borrower's suit asserting various claims against a lender and an appraiser in connection with a loan that encumbered the borrower's property with a debt that exceeded the property's value. Athough the borrower alleged that the lender violated 18 U.S.C. §§ 1341, 1343 as predicate acts under O.C.G.A. § 16-14-3 of Georgia's Racketeer Influenced and Corrupt Organizations (RICO) Act, O.C.G.A. § 16-14-1 et seq., that did not require the court to interpret the federal statutes; further, the borrower also asserted that the lender violated state statutes that could serve as predicate acts under Georgia's RICO law. Austin v. Ameriquest Mortg. Co., 510 F. Supp. 2d 1218 (N.D. Ga. Feb. 27, 2007).

Identification of thief. — Although the victim was unable to identify the defendant in court as the person who robbed the victim at gunpoint, due to the defendant's changed appearance, the victim positively identified the defendant from a photo lineup both immediately after the robbery and at trial; therefore, the evidence had been sufficient to convict the defendant of theft by taking a motor vehicle. Garcia v. State, 271 Ga. App. 794, 611 S.E.2d 92 (2005).

Statute of frauds. — Defendant was properly convicted of felony theft by taking in violation of O.C.G.A. § 16-8-2 for failing to transmit to a law firm, payments the defendant received for indigent defense work because the statute of frauds, O.C.G.A. § 13-5-30(5), was not implicated; the firm performed the firm's part of the parties' agreement in paying the defendant a salary, providing rent-free office space, and offering administrative support, among other things. Clarke v. State, 317 Ga. App. 471, 731 S.E.2d 100 (2012).

Conduct was criminal conversion under insurance policy. — Trial court erred in granting an insurer's motion for summary judgment in an insured's action alleging breach of contract and bad faith due to the insurer's decision to deny an insurance claim for the purported loss of a vehicle by theft because there was evidence from which a jury could find that the insured's loss was covered by the theft provisions of the policy; there was evidence from which a jury could find the fraudulent intent required to commit theft by conversion in violation of O.C.G.A. § 16-8-4. Byrd v. United Servs. Auto. Ass'n, 317 Ga. App. 280, 729 S.E.2d 522 (2012).

Sufficiency of allegations. — Allegations under the Georgia Racketeer Influ-

enced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., against a mortgage loan servicer were sufficient to state a claim of theft by taking, deception, and conversion because despite being told that the mortgage loan was fraudulent, the servicer kept the borrowers' money and continuously threatened the borrower's with foreclosure. Kerfoot v. FNF Servicing, Inc., No. 1:13-cv-33, 2013 U.S. Dist. LEXIS 153849 (M.D. Ga. Oct. 25, 2013).

Cited in King v. State, 127 Ga. App. 83, 192 S.E.2d 392 (1972); Baker v. State, 127 Ga. App. 99, 192 S.E.2d 558 (1972); Barrett v. State, 129 Ga. App. 72, 199 S.E.2d 116 (1973); Wade v. State, 129 Ga. App. 571, 200 S.E.2d 370 (1973); Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973); Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874 (1974); Maddox v. State, 131 Ga. App. 86, 205 S.E.2d 31 (1974); A.C.G. v. State, 131 Ga. App. 156, 205 S.E.2d 435 (1974); Welborn v. State, 132 Ga. App. 207, 207 S.E.2d 688 (1974); McCrary v. Ricketts, 232 Ga. 890, 209 S.E.2d 148 (1974); Godwin v. State, 133 Ga. App. 397, 211 S.E.2d 7 (1974); Rhodes v. State, 233 Ga. 899, 213 S.E.2d 870 (1975); Breland v. State, 135 Ga. App. 478, 218 S.E.2d 153 (1975); Rhodes v. State, 135 Ga. App. 484, 218 S.E.2d 159 (1975); Justice v. State, 135 Ga. App. 902, 219 S.E.2d 592 (1975); Roberts v. State, 137 Ga. App. 208, 223 S.E.2d 208 (1976); Jones v. State, 137 Ga. App. 612, 224 S.E.2d 473 (1976); Gasaway v. State, 137 Ga. App. 653, 224 S.E.2d 772 (1976); Chandler v. State, 138 Ga. App. 128, 225 S.E.2d 726 (1976); Billings v. State, 139 Ga. App. 95, 227 S.E.2d 892 (1976); Jones v. State, 139 Ga. App. 366, 228 S.E.2d 387 (1976); Causey v. State, 139 Ga. App. 499, 229 S.E.2d 1 (1976); First Nat'l Bank & Trust Co. v. State, 141 Ga. App. 471, 233 S.E.2d 861 (1977); Bennett v. State, 141 Ga. App. 795, 234 S.E.2d 327 (1977); Malone v. State, 142 Ga. App. 47, 234 S.E.2d 844 (1977); Bramblett v. State, 239 Ga. 336, 236 S.E.2d 580 (1977); Andrews v. State, 143 Ga. App. 791, 240 S.E.2d 142 (1977); Walker v. State, 146 Ga. App. 237, 246 S.E.2d 206 (1978); Herrington v. State, 149 Ga. App. 130, 253 S.E.2d 810 (1979); Dyer v. State, 150 Ga. App. 760, 258 S.E.2d 620 (1979); Miller v. Roses' Stores, Inc., 151 Ga. App. 158, 259 S.E.2d 162 (1979); Perkins v. State, 151 Ga. App. 199, 259 S.E.2d 193 (1979); Maddox v. State, 152 Ga. App. 384, 262 S.E.2d 636 (1979); Grizzle v. State, 155 Ga. App. 91, 270 S.E.2d 311 (1980); Carnes v. Crawford, 246 Ga. 677, 272 S.E.2d 690 (1980); Bembry v. State, 155 Ga. App. 847, 273 S.E.2d 208 (1980); Change v. State, 156 Ga. App. 316, 274 S.E.2d 711 (1980); Tisdol v. State, 158 Ga. App. 852, 282 S.E.2d 411 (1981); Slack v. State, 159 Ga. App. 185, 283 S.E.2d 64 (1981); Maxey v. State, 159 Ga. App. 503, 284 S.E.2d 23 (1981); Jones v. State, 159 Ga. App. 845, 285 S.E.2d 584 (1981); Kraus v. State, 161 Ga. App. 739, 289 S.E.2d 555 (1982); Brown v. State, 162 Ga. App. 75, 290 S.E.2d 174 (1982); Moyer v. State, 164 Ga. App. 629, 298 S.E.2d 308 (1982); Moore v. State, 167 Ga. App. 207, 300 S.E.2d 543 (1983); Lovett v. State, 165 Ga. App. 379, 301 S.E.2d 303 (1983); Bailey v. State, 169 Ga. App. 802, 315 S.E.2d 297 (1984); Weaver v. State, 169 Ga. App. 890, 315 S.E.2d 467 (1984); Pelligrini v. State, 174 Ga. App. 84, 329 S.E.2d 186 (1985); Hambrick v. State, 174 Ga. App. 444, 330 S.E.2d 383 (1985); Miller v. State, 174 Ga. App. 703, 331 S.E.2d 616 (1985); Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987); Henderson v. State, 257 Ga. 618, 362 S.E.2d 346 (1987); Abelman v. State, 185 Ga. App. 278, 363 S.E.2d 764 (1987); Williams v. State, 187 Ga. App. 859, 371 S.E.2d 673 (1988); King v. State, 195 Ga. App. 353, 393 S.E.2d 709 (1990); Tenney v. State, 194 Ga. App. 820, 392 S.E.2d 294 (1990); Radford v. State, 202 Ga. App. 532, 415 S.E.2d 34 (1992); Groom v. State, 212 Ga. App. 133, 441 S.E.2d 259 (1994); State v. Schuman, 212 Ga. App. 231, 441 S.E.2d 466 (1994); Randall v. State, 234 Ga. App. 704, 507 S.E.2d 511 (1998); Pruitt v. State, 245 Ga. App. 801, 538 S.E.2d 874 (2000); Urness v. State, 251 Ga. App. 401, 554 S.E.2d 546 (2001); Merritt v. State, 254 Ga. App. 788, 564 S.E.2d 3 (2002); Atkinson v. State, 263 Ga. App. 274, 587 S.E.2d 332 (2003); Ford v. Schofield, 488 F. Supp. 2d 1258 (N.D. Ga. 2007); Tiller v. State, 286 Ga. App. 230, 648 S.E.2d 738 (2007); Great Am. Ins. Co. v. Davis (In re Davis), No. A04-74475-REB, 2007 Bankr. LEXIS 3684 (Bankr. N.D. Ga. Sept. 20,

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2007); Am. Southern Ins. Group, Inc. v. Goldstein, 291 Ga. App. 1, 660 S.E.2d 810 (2008); Barron v. State, 291 Ga. App. 494, 662 S.E.2d 285 (2008); Johnson v. State, 293 Ga. App. 32, 666 S.E.2d 452 (2008); State v. Fisher, 293 Ga. App. 228, 666 S.E.2d 594 (2008); State v. Campbell, 295 Ga. App. 856, 673 S.E.2d 336 (2009); Brashier v. State, 299 Ga. App. 107, 681 S.E.2d 750 (2009); Cox v. Mayan Lagoon Estates Ltd., 319 Ga. App. 101, 734 S.E.2d 883 (2012); Davis v. State, 319 Ga. App. 501, 736 S.E.2d 160 (2012); State v. Bachan, 321 Ga. App. 712, 742 S.E.2d 526 (2013); In the Interest of S. M., 322 Ga. App. 678, 745 S.E.2d 863 (2013); Davis v. State, 322 Ga. App. 826, 747 S.E.2d 19 (2013); Pruitt v. State, 323 Ga. App. 689, 747 S.E.2d 694 (2013); In the Interest of D. C., 324 Ga. App. 95, 748 S.E.2d 514 (2013); Lucas v. State, 328 Ga. App. 741, 760 S.E.2d 257 (2014); McGil v. State, 339 Ga. App. 130, 793 S.E.2d 442 (2016).

Intent

Former Code 1933, § 26-1802 (see now O.C.G.A. § 16-8-2) required only proof of intent to deprive permanently, as opposed to an intent to deprive temporarily, at the time of the wrongful taking; and the accused's original intent was not rendered void when the accused later had a change of heart. Martin v. State, 143 Ga. App. 875, 240 S.E.2d 231 (1977).

Once criminal intent at the time of taking was proved, it became irrelevant whether the deprivation, as defined in former Code 1933, § 26-1801(a) (see now O.C.G.A. § 16-8-1(1)), was permanent or temporary. Martin v. State, 143 Ga. App. 875, 240 S.E.2d 231 (1977).

Intent to only temporarily deprive owner of goods constitutes theft. — Regardless of whether a defendant intended to take property and withhold it permanently, defendant's intent to take it for defendant's own temporary use without the owner's authorization evinces an intent to commit a theft. Smith v. State, 172 Ga. App. 356, 323 S.E.2d 257 (1984).

When larceny is charged and taking is shown, jury must necessarily be exclusive judges of intention which actuated the accused in the asportation. Though the circumstances evidencing the amimun furandi are weak, a reviewing court cannot hold them to be legally insufficient to sustain a finding that the accused's intent was to steal. Hawkins v. State, 130 Ga. App. 277, 202 S.E.2d 837 (1973).

Intent is material element. — Guilt of the accused depends upon the intent with which the act was committed, and intent is a material ingredient of the crime. Scott v. State, 46 Ga. App. 213, 167 S.E. 210 (1932) (decided under former Penal Code 1910, §§ 172, 174).

Evidence of fraudulent intent. — Jury was authorized to infer that the defendant acted with fraudulent intent and to find the defendant guilty of theft by taking because shortly after the defendant received checks for the purpose of starting construction of the victims' modular homes, the defendant abandoned the respective projects without accomplishing any task towards completion of the modular homes; the defendant failed to pay the requisite deposits to obtain the engineering plans for the modular homes. Bearden v. State, 316 Ga. App. 721, 728 S.E.2d 874 (2012).

Intent not shown when defendant without knowledge and mere passenger. — Evidence was insufficient to support a juvenile's theft by taking motor vehicle conviction under O.C.G.A. § 16-8-2 as the juvenile was only a passenger in a truck belonging to the father of the juvenile's friend and did not know that the friend did not have permission to drive the truck. In re J. B. M., 294 Ga. App. 545, 669 S.E.2d 523 (2008).

Intent was a jury question. — Trial court did not err in denying the defendant's motion for an acquittal as the question of whether or not the defendant had the requisite intent to steal was for the jury to decide. Dudley v. State, 287 Ga. App. 794, 652 S.E.2d 840 (2007), cert. denied, No. S08C0319, 2008 Ga. LEXIS 168 (Ga. 2008).

Evidence regarding intent created a question for the jury. — Defendant was charged with theft by taking after the defendant sped off with money an infor-

mant had given the defendant for cocaine, and the trial court properly denied the defendant's motion for a directed verdict on the ground that there could be no intent to steal contraband. The defendant could not question the informant's title to the money; in light of the testimony, including the defendant's admission that the defendant owed a second person money for the second person's role in the robbery, the defendant's intent to steal the money was a question for the jury. Dudley v. State, 287 Ga. App. 794, 652 S.E.2d 840 (2007), cert. denied, No. S08C0319, 2008 Ga. LEXIS 168 (Ga. 2008).

Intent to deprive temporarily is not larceny. — When the intention is only to deprive temporarily the owner of the use of the property it may be some other crime, but not larceny. Austin v. State, 65 Ga. App. 733, 16 S.E.2d 497 (1941) (decided under former Code 1933, § 26-2603).

Intent not shown. — Taxpayers were not entitled to a theft loss under 26 U.S.C. § 165(e) with respect to a decline in value of publicly traded stock, as a theft by taking did not occur under O.C.G.A. § 16-8-2 because a corporation did not unlawfully take or appropriate any property from the taxpayer, and there was no evidence of any intention by the corporation or its executives to deprive the taxpery of the property at issue. Although corporate stock, which was in the taxpayer's control after he exercised his stock options, subsequently declined in value, there was no evidence that the corporate executives had any specific intent with regard to the taxpayer to take or appropriate his stock by devaluation or by any other means; rather, the goal of the corporation, including its later-convicted executives, was to increase the value of the stock, including any stock owned and controlled by the taxpayer. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

Larceny

Taking against will of owner is essence of crime of larceny. Kent v. State, 66 Ga. App. 147, 17 S.E.2d 301 (1941) (decided under former Code 1933, § 26-2603).

To constitute larceny taking must be done without using intimidation, or open force and violence. Shehany v. Lowry, 170 Ga. 70, 152 S.E. 114 (1930) (decided under former Penal Code 1910, §§ 172 and 174).

If intimidation, force, and violence be used in committing the theft, the offense is robbery. Shehany v. Lowry, 170 Ga. 70, 152 S.E. 114 (1930) (decided under former Penal Code 1910, §§ 172 and 174).

Taking need not be directly from one's person. — To constitute robbery or larceny, it is unnecessary that the taking of the property should be directly from one's person, but it is sufficient if it be taken while in the person's possession and immediate presence. Banks v. State, 74 Ga. App. 449, 40 S.E.2d 103 (1946) (decided under former Code 1933, § 26-2603).

Asportation and intent to steal. — Slightest change of location from where the goods are left by the owner was sufficient proof of asportation and, when coupled with the intent to steal, the crime of larceny was completed. Brown v. State, 135 Ga. App. 323, 217 S.E.2d 500 (1975).

Larceny is completed when there is asportation, however slight, although the goods are not removed from the land of the owner. Hawkins v. State, 130 Ga. App. 277, 202 S.E.2d 837 (1973).

Any unlawful asportation, however slight (15 feet in this case), is sufficient to show the "taking" element. It is not necessary that property be removed from the premises of the owner. Craighead v. State, 126 Ga. App. 300, 190 S.E.2d 606 (1972).

Prima-facie case. — By proving the corpus delicti, the venue, and the recent possession of the stolen property, and its sale by the defendant, the state makes a prima-facie case. Whether the defendant's explanation of possession of the property was consistent with defendant's innocence and satisfactory to the jury was a matter exclusively for them. Howard v. State, 58 Ga. App. 391, 198 S.E. 548 (1938) (decided under former Code 1933, § 26-2603).

Elements of larceny may be established by circumstantial evidence. Yawn v. State, 94 Ga. App. 400, 94 S.E.2d 769 (1956) (decided under former Code 1933, § 26-2603).

Larceny (Cont'd)

Taking goods in cash sale without paying cash is larceny. — If personal property is voluntarily placed in the hands of a person upon the condition that there should be returned to the owner at once its value in money (a cash sale), neither title nor right of possession passes and becomes complete until this condition is complied with; thus, if a sale be for cash, the taking of the goods without paying cash is larceny, otherwise if there be credit. Thomas v. State, 62 Ga. App. 725, 9 S.E.2d 854 (1940) (decided under former Code 1933, § 26-2603).

Mere borrowing without fraudulent intent is not larceny. — Taking goods, not with the intention of depriving the owner of the owner's property in the goods, but with the object of temporarily using the goods and then returning the goods, is not larceny since the mere borrowing, without fraudulent intent, is not larceny. Austin v. State, 65 Ga. App. 733, 16 S.E.2d 497 (1941) (decided under former Code 1933, § 26-2603).

State to show taking without owner's consent. — While it is true that where larceny is charged and a taking is shown, the jury must necessarily be the exclusive judges of the intention which actuated the accused in the asportation, it is still incumbent on the state to show that the taking was without the consent of the owner. Felder v. State, 60 Ga. App. 643, 4 S.E.2d 716 (1939) (decided under former Code 1933, § 26-2603).

Descriptions of personal chattels. — When, as in larceny, personal chattels are the subject of an offense, they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated. Kyler v. State, 94 Ga. App. 321, 94 S.E.2d 429 (1956) (decided under former Code 1933, § 26-2603).

Object of the description of stolen chattels is to individualize the transaction, and enable the court to see that the chattels are, in law, the subjects of larceny. The description should be simply such as in connection with the other allegations, will affirmatively show the defendant to be guilty, will reasonably inform the defendant of the instance meant, and put the defendant in a position to make the needful preparations to meet the charge. Kyler v. State, 94 Ga. App. 321, 94 S.E.2d 429 (1956) (decided under former Code 1933, § 26-2603).

There must be such certainty in description of stolen chattels as will enable the jury to say whether the chattel proved to be stolen is the same as that upon which the indictment is founded. Kyler v. State, 94 Ga. App. 321, 94 S.E.2d 429 (1956) (decided under former Code 1933, § 26-2603).

Articles must be identified as those alleged to have been stolen. — While it is necessary for conviction in a larceny case, where the state relies upon recent possession of the stolen goods, that the articles found in the possession of the accused be identified as those alleged to have been stolen, such identity can be established by the testimony of the owner of the goods that the articles found in the possession of the accused, where they have no "earmarks" to identify them, are of the same brand and character as the stolen goods, and that, from their brand, character, and appearance, the owner believes them to be the property stolen from the owner. This is especially true where many different articles of various kinds, brands and sizes were stolen, and articles similar in make, brand, character, and appearance to the stolen ones were found in the recent possession of the accused. Yawn v. State, 94 Ga. App. 400, 94 S.E.2d 769 (1956) (decided under former Code 1933, § 26-2603).

Value of items not an element of offense required to be stated in indictment. — Although an indictment for theft by taking under O.C.G.A. § 16-8-2 did not allege the value of stolen car parts defendant was caught removing from a business, the value was not an element of the offense. Because a jury found the parts were worth more than $100, the crime was punishable as a felony under O.C.G.A. § 16-8-12(a)(5)(A). Roman v. State, 300 Ga. App. 526, 685 S.E.2d 775 (2009), cert. denied, No. S10C0386, 2010 Ga. LEXIS 306 (Ga. 2010).

Decedent's property is property of administrator. — Even when there is no

will, the property of a deceased person is not derelict; but is regarded in law as the property of the administrator subsequently appointed, by relation from the time of the death, so that taking the property by anyone, animo furandi, is larceny. Lawson v. State, 68 Ga. App. 830, 24 S.E.2d 326 (1943) (decided under former Code 1933, § 26-2603), overruled on other grounds, McKee v. State, 73 Ga. App. 815, 38 S.E.2d 184 (1946).

Embezzlement

Contents of indictment. — Indictment for embezzlement should state amount of money and its value, and should describe any other property. The rule for determining the sufficiency of the description of the property (other than money) embezzled is that the description in the indictment, in connection with the other allegations thereof, shall make it affirmatively appear to the defendant what particular instance is meant, and thus enable defendant to make the necessary preparation to meet the charge at the trial, and to plead the judgment in bar to any subsequent prosecution for the same offense. Bivins v. State, 47 Ga. App. 391, 170 S.E. 513 (1933) (decided under former Ga. L. 1919, p. 135, § 20).

Goods on consignment. — When the defendants were consignees of gasoline belonging to the victim and as such were in lawful possession of property belonging to the victim but sold large quantities of the gasoline without accounting to the victim either for its disposition or for the victim's share of the proceeds from its sale, the evidence was sufficient to support a conviction of theft. Ketcham v. State, 181 Ga. App. 868, 354 S.E.2d 171 (1987).

Continuous conversions constitute single embezzlement. — When there is a continuous series of conversions of property of the owner entrusted to the defendant, the offense may be charged in a single count of the indictment since such series of transactions constitute but a single embezzlement. Simmons v. State, 79 Ga. App. 390, 53 S.E.2d 772 (1949) (decided under former Code 1933, § 26-2603).

Element of conversion of property before owner obtains possession is always essential element in embezzlement. Simmons v. State, 79 Ga. App. 390, 53 S.E.2d 772 (1949) (decided under former Code 1933, § 26-2603).

Embezzlement differs from larceny in that in embezzlement accused comes into possession lawfully, whereas in larceny the property comes into the hands of the thief secretly and unlawfully. In the former there is an entrustment and in the latter there is not. Simmons v. State, 79 Ga. App. 390, 53 S.E.2d 772 (1949) (decided under former Code 1933, § 26-2603).

Sufficient evidence supporting theft by taking by embezzlement by a fiduciary who was a city employee from the city included direct and circumstantial evidence of the employee's spouse's bankruptcy, deposits to their personal account in excess of their earned income, losses stopping after the employee resigned, and excluding other employees' culpability; the evidence was sufficient in spite of the employee's defenses which included that the city: (1) did not lose the money but had poor accounting procedures; (2) had four other persons that had access to the safe and that could have taken the money; and (3) blamed the employee because the city's insurance policy did not cover non-theft-related losses, and that they had outside receipts or gifts to explain deposits greater than city salary income deposited to their account. Stack-Thorpe v. State, 270 Ga. App. 796, 608 S.E.2d 289 (2004).

Checks have the same value as the federal reserve notes the checks represent. — Trial court was authorized to convict defendant of the offense of felony theft by taking as the employer's checks which were admittedly stolen and which when negotiated by defendant had the same value as the federal reserve notes which they represented; defendant obviously knew the checks represented cash because defendant deposited them and then withdrew the cash. Harper v. State, 259 Ga. App. 843, 578 S.E.2d 544 (2003).

Defendant was not entitled to directed verdict on charges of embezzling money representing traffic tickets and

Embezzlement (Cont'd)

other fines from the city just because the defendant did not have exclusive access to the money; the defendant also had to show that the state had failed to present any evidence to exclude the possibility that someone else had taken the money. Stack-Thorpe v. State, 270 Ga. App. 796, 608 S.E.2d 289 (2004).

Included Crimes

Theft by taking as lesser included offense of robbery by sudden snatching. — In a prosecution for robbery by sudden snatching, since there was evidence to support the defendant's written request to charge on the lesser included offense of theft by taking, the trial court's failure to give the requested charge was reversible error. King v. State, 214 Ga. App. 311, 447 S.E.2d 645 (1994).

Theft by taking was not lesser included offense of robbery by sudden snatching where the victim saw the defendant take her purse out of her grocery cart when it was no more than two feet away from her. Bryant v. State, 213 Ga. App. 301, 444 S.E.2d 391 (1994).

Armed robbery. — In a trial for armed robbery under O.C.G.A. § 16-8-41, a charge on the lesser included offense of theft by taking under O.C.G.A. § 16-8-2 was not warranted under circumstances in which the defendant used force to take the victim's purse and then the victim's money; the fact that the purse was not in the victim's hands during the second taking did not preclude an armed robbery conviction. Thomas v. State, 290 Ga. App. 10, 658 S.E.2d 796 (2008).

Although armed robbery requires proof of the use of an offensive weapon and proof that the property was taken from the presence of a person, whereas theft by taking does not, theft by taking does not require proof of any facts separate from those required for armed robbery. Wells v. State, 294 Ga. App. 277, 668 S.E.2d 881 (2008).

Theft by receiving is not lesser included offense of theft by taking. These two crimes are so mutually exclusive that the thief and the receiver cannot even be accomplices. Sosbee v. State, 155 Ga. App. 196, 270 S.E.2d 367 (1980).

Trial court did not err in failing to give a requested jury instruction on a lesser offense of theft by receiving stolen property as theft by receiving stolen property is not a lesser included offense of armed robbery, theft by taking, or hijacking a motor vehicle. Mullins v. State, 267 Ga. App. 393, 599 S.E.2d 340 (2004).

Theft by receiving stolen property, O.C.G.A. § 16-8-7(a), was not a lesser included offense of theft by taking under O.C.G.A. § 16-8-2 because applying the required evidence test each crime required proof that the other did not; the former required a showing that the defendant knew or should have known that the gun the victim wanted to sell was stolen while the latter required that the defendant took the gun from the victim with intent to deprive the victim of the gun. Peoples v. State, 295 Ga. App. 731, 673 S.E.2d 82 (2009).

Theft by taking as included offense in theft by receiving. — When the proof of a recent unexplained possession of stolen property was sufficient in itself to prove theft by taking but was only one element necessary to prove theft by receiving, theft by taking must be considered an included offense in theft by receiving. Callahan v. State, 148 Ga. App. 555, 251 S.E.2d 790 (1978).

Theft by deception. — Trial court properly denied the defendant's motion for a directed verdict on the issue of whether the state proved an unlawful taking as the phrase in the theft by taking statute "regardless of the manner in which the property is taken or appropriated" was broad enough to encompass the theft by deception that the state proved defendant committed in regard to the agreement with the couple by which defendant was supposed to take their cash payments and build the couple a home, but which the defendant converted to the defendant's own use. McMahon v. State, 258 Ga. App. 512, 574 S.E.2d 548 (2002).

Defendants' convictions for theft by taking were affirmed because: (1) the trial court did not err in denying their general and special demurrers to the indictment as the indictment was not defective, or in

admitting similar transaction evidence; and (2) the evidence was sufficient to show that the defendants committed theft by deception in deceiving lenders through flipping houses and obtaining false loan applications from investors in the houses. Bradford v. State, 266 Ga. App. 198, 596 S.E.2d 715 (2004).

Merger of theft by taking, conversion, and theft by deception. — After the defendant was convicted on 52 counts related to the defendant's theft of more than $600,000 as the operator of a Ponzi scheme, although the trial court did not err in failing to merge the defendant's convictions for theft by conversion and theft by deception into the defendant's convictions for theft by taking, because theft by taking proscribed certain criminal conduct generally, while theft by conversion and theft by deception were specific crimes, the defendant's convictions for theft by taking merged into the defendant's convictions for theft by conversion and theft by deception; thus, the defendant's sentences for theft by taking were vacated, and the case was remanded to the trial court for resentencing. Mathis v. State, 343 Ga. App. 206, 807 S.E.2d 4 (2017).

Money given to defendant by police for drug buy. — Elements of theft by taking were met when the defendant fled with money that state law enforcement agents gave the defendant to effect a drug transaction. Stevens v. State, 213 Ga. App. 293, 444 S.E.2d 840 (1994).

Theft by taking is lesser included offense to burglary. Lockett v. State, 153 Ga. App. 569, 266 S.E.2d 236 (1980); Breland v. Smith, 247 Ga. 690, 279 S.E.2d 204 (1981).

Burglary and theft by taking did not merge. — Defendant's burglary and theft by taking charges involving the same house were not based on the same facts; the burglary was complete when the defendant entered the dwelling house with the intent to commit theft, and the theft by taking occurred when the defendant actually took the property described in the indictment. Martin v. State, 285 Ga. App. 375, 646 S.E.2d 339 (2007).

Attempt to commit theft. — Theft by taking may in some circumstances be a lesser included offense of burglary, but it does not follow that where a burglary was committed but nothing was actually taken, the attempt to commit theft by taking will be a lesser included offense which the defendant is entitled to have charged. Cannon v. State, 167 Ga. App. 225, 305 S.E.2d 910 (1983).

Theft by taking was not a lesser included offense of burglary where the defendant did not indicate that defendant believed the items in defendant's possession belonged to another nor did defendant admit to having the requisite intent to steal. McNeese v. State, 186 Ga. App. 410, 367 S.E.2d 235 (1988).

Theft as lesser included offense of robbery when wallet taken from extremely intoxicated victim. — In a probation revocation case after the defendant removed a wallet from the pocket of an extremely intoxicated victim, the evidence did not support a showing that the defendant had committed the offense of robbery under O.C.G.A. § 16-8-40(a), only the lesser included offense of theft under O.C.G.A. § 16-8-2; even if the evidence showed robbery by sudden snatching, the victim was not aware of the taking before the crime was completed and there was no evidence of constructive force supplied by intimidation, threat, or other means. Franklin v. State, 286 Ga. App. 288, 648 S.E.2d 746 (2007).

When a defendant is indicted for robbery by force, it is not error to charge robbery by sudden snatching if the trial judge confines the elements of the crime to those charged in the indictment. Searcy v. State, 168 Ga. App. 233, 308 S.E.2d 621 (1983).

Theft by taking charge did not merge with an armed robbery charge because under O.C.G.A. § 16-8-2 theft by taking requires the intent to deprive the owner of property, while armed robbery is a completely separate offense, which under O.C.G.A. § 16-8-41 is complete once the property is taken. Miller v. State, 174 Ga. App. 42, 329 S.E.2d 252 (1985).

When the armed robbery involved the taking of currency at gunpoint from the immediate possession of a convenience store cashier who was attempting to make a nightly bank deposit, while the theft

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conviction involved the subsequent taking of the cashier's automobile, the evidence establishing the commission of the one crime is not the same as the evidence which established commission of the other crime, and defendant's contention that the theft conviction should have merged with the armed robbery conviction is without merit. Miller v. State, 183 Ga. App. 563, 359 S.E.2d 359 (1987).

Theft by taking convictions merged with armed robbery convictions. — When the same evidence that was used to prove the armed robbery charges against the defendant was also used to prove the theft by taking charges and the property in question was taken from the victims' possession in the same incident in a store and constituted a single crime, the theft by taking offenses were lesser included offenses of the armed robbery offenses as a matter of fact pursuant to O.C.G.A. § 16-1-6(1) and should have merged into those convictions for sentencing purposes. Phanamixay v. State, 260 Ga. App. 177, 581 S.E.2d 286 (2003).

No merger with Securities Act violation. — Defendant's convictions for theft by taking under O.C.G.A. § 16-8-2 and for violating the Georgia Securities Act of 1973, O.C.G.A. § 10-5-12 et seq., did not merge for sentencing purposes because the language of the statutes indicated that the crimes were separate offenses as a matter of law and because while theft required that the victim sustain a loss, a securities violation did not. Branan v. State, 285 Ga. App. 717, 647 S.E.2d 606 (2007).

Motor vehicle theft is not separate crime from general theft statute. Searcy v. State, 162 Ga. App. 695, 291 S.E.2d 557 (1982).

Theft by taking did not merge with entering an automobile. — Because: (1) the defendant was properly sentenced for felony theft by taking as the defendant admitted to the accusation which valued the items taken at greater than $100; and (2) the offenses of theft by taking and entering an automobile with intent to commit theft did not merge for purposes of sentencing as each offense required the proof of different facts, the sentence imposed by the trial court was upheld. Neslein v. State, 288 Ga. App. 234, 653 S.E.2d 825 (2007).

O.C.G.A. § 15-11-63(a)(2)(E) does not require proof of a second or subsequent "adjudication" of delinquency to authorize the imposition of restrictive custody; rather, O.C.G.A. § 15-11-63(a)(2)(E) authorizes restrictive custody when a child is found to have committed a second or subsequent "violation" of O.C.G.A. §§ 16-8-2 though 16-8-9, if the property which was the subject of the theft was a motor vehicle. In the Interest of L.J., 279 Ga. App. 237, 630 S.E.2d 771 (2006).

In a prosecution for felony theft by taking of a van, the trial court was entitled to conclude that the victim was an innocent purchaser for value, believing the seller to be the owner, the defendant's claim to the contrary notwithstanding; moreover, pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the testimony of a single witness was sufficient to establish this fact. Coursey v. State, 281 Ga. App. 494, 636 S.E.2d 669 (2006).

Theft by taking motor vehicle and theft by retaining motor vehicle were mutually exclusive. — When the defendant was convicted of theft by taking a motor vehicle and theft by retaining a motor vehicle, the offenses were mutually exclusive so the convictions were reversed and remanded for a new trial, and the trial court's merger of the offenses for sentencing was an insufficient remedy. Campbell v. State, 275 Ga. App. 8, 619 S.E.2d 720 (2005).

Scope of statute. — Language "regardless of the manner in which said property is taken or appropriated," renders O.C.G.A. § 16-8-2 sufficiently broad to encompass thefts or larcenies perpetrated by deception, as prohibited under O.C.G.A. § 16-8-3, and theft by conversion, as prohibited under O.C.G.A. § 16-8-4, the punishment for all of which is identical, as provided in O.C.G.A. § 16-8-12. Ray v. State, 165 Ga. App. 89, 299 S.E.2d 584 (1983).

When the evidence at trial was sufficient to establish commission of the crime of theft by taking, and the evidence also may have shown theft by deception, the

phrase "regardless of the manner in which the property is taken or appropriated" rendered the theft by taking statute sufficiently broad to encompass thefts perpetrated by deception. Thus, the evidence was sufficient to authorize a conviction on that charge. Lundy v. State, 195 Ga. App. 682, 394 S.E.2d 559 (1990).

Merger inappropriate. — With regard to a defendant's convictions for six counts of theft by taking, in violation of O.C.G.A. § 16-8-2, and six counts of felony theft by conversion, in violation of O.C.G.A. § 16-8-4(a), because there was sufficient evidence to prove each count as a separate and distinct act, merger was inappropriate and the defendant was properly convicted on all 12 counts. Kohlhaas v. State, 284 Ga. App. 79, 643 S.E.2d 350 (2007).

Evidence and Inferences

Venue not established by the evidence. — Sufficient evidence supported the defendant's conviction for theft by taking since the evidence showed that the defendant never used the funds borrowed for relocating the Florida plant, as promised, and the loan was secured with equipment that the defendant did not own; however, the prosecution failed to prove venue was proper in Dodge County, Georgia, since although the contracts were executed in Dodge County, there was no evidence that the defendant exercised any control over the $ 350,000 in Dodge County. Davis v. State, 326 Ga. App. 279, 754 S.E.2d 815 (2014).

Evidence of additional stolen goods would be admissible as evidence of system of mutually dependent crimes. Bishop v. State, 155 Ga. App. 611, 271 S.E.2d 743 (1980).

Types of evidence admissible regarding embezzlement. — In trial for embezzlement, it is permissible to prove acts of extravagance on part of accused, the amount and sources of the accused's income, the amount reasonably necessary to maintain self and family in the manner in which they were maintained during the period of controversy, fraudulent practices on the accused's part to increase the accused's income and cover up defalcations, and other like matters, not only on the question of intent, but also to show the accused's bent of mind for the commission of the particular offense charged in the bill of indictment on trial. Walker v. State, 156 Ga. App. 842, 275 S.E.2d 755 (1980).

Jury was authorized to consider the extravagance of large-scale gambling on a policeman's salary as evidence which tended to show the appellant's intent, motive, plan, scheme, and bent of mind. Walker v. State, 156 Ga. App. 842, 275 S.E.2d 755 (1980).

Like criminal acts by an embezzler have been admitted to show fraudulent intent and are an exception to the general rule enunciated in former Code 1933, § 38-202 (see now O.C.G.A. § 24-4-404). Walker v. State, 156 Ga. App. 842, 275 S.E.2d 755 (1980).

Ownership of stolen property must be alleged directly and not by way of inference and is properly laid as of the date when the offense was committed. McKee v. State, 200 Ga. 563, 37 S.E.2d 700 (1946) (decided under former Code 1933, § 26-2603).

"Lawful possession." — In a prosecution of theft by taking, the state was entitled to the unrebutted assumption that the appropriate city officials had authorized the defendant to collect fines and bonds in accordance with the requirements of the city charter. Wilson v. State, 211 Ga. App. 486, 439 S.E.2d 701 (1993).

It can be inferred from fact that goods were on sale in supermarket that property was owned by supermarket. Earley v. State, 155 Ga. App. 576, 271 S.E.2d 709 (1980).

Inference of fact. — Rule of evidence to the effect that where stolen goods are found in the possession of a defendant charged with larceny or kindred offenses recently after the commission of the offense, such fact authorizes the jury to infer that the accused is guilty unless such possession is explained to its satisfaction, constitutes an inference of fact and not of law, and is based upon a circumstantial fact from which the inference of guilt may be drawn in the absence of satisfactory explanation. Wakefield v. State, 76 Ga. App. 271, 45 S.E.2d 675 (1947) (decided under former Code 1933, § 26-2603).

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When the defendant was found, two hours after the theft of an automobile temporarily left with the motor running in front of a liquor store, driving the automobile away from another liquor store, is sufficient evidence on such a hearing that the defendant stole the vehicle. Hulett v. State, 150 Ga. App. 367, 258 S.E.2d 48 (1979) (decided under former Code 1933, § 26-1813).

Evidence about the defendant's burning the victim's car after the defendant took the car reflected on the defendant's "intention of depriving [the victim] of the property," and was admissible. Braswell v. State, 245 Ga. App. 602, 538 S.E.2d 492 (2000).

Proof of possession of stolen property which is not recent would not alone authorize conviction, but is a circumstance which may always go to the jury. Harper v. State, 60 Ga. App. 684, 4 S.E.2d 734 (1939) (decided under former Code 1933, § 26-2603).

While recent possession of stolen goods, unexplained, will justify a conviction for larceny, the mere possession of goods several months subsequent to the time the goods were alleged to have been stolen, and a failure to satisfactorily account for such possession, will not alone authorize a conviction. Harper v. State, 60 Ga. App. 684, 4 S.E.2d 734 (1939) (decided under former Code 1933, § 26-2603).

Inference raised by unaccounted for possession of recently stolen goods. — Recent possession of stolen goods unexplained to the satisfaction of the jury and especially when accompanied by false statements as to the person from whom received authorizes a conviction of larceny. Stocks v. State, 119 Ga. App. 837, 168 S.E.2d 893 (1969).

Possession of recently stolen goods, unaccounted for, raises an inference that the possessor is the one who stole the goods, and if the accused does not want this inference to arise in the accused's case, the accused must account for the accused's possession. Horton v. State, 228 Ga. 690, 187 S.E.2d 677 (1972).

Recent possession of stolen goods without reasonable explanation will authorize conviction of theft by taking. Peacock v. State, 131 Ga. App. 651, 206 S.E.2d 582 (1974); Bigby v. State, 184 Ga. App. 94, 360 S.E.2d 751 (1987).

When a theft, whether by simple larceny, burglary, or robbery, is proven, recent unexplained possession of stolen goods by the defendant creates an inference of fact sufficient to convict. This is true without direct proof or other circumstantial evidence that the defendant committed the theft. Lockett v. State, 153 Ga. App. 569, 266 S.E.2d 236 (1980).

Recent possession of stolen goods, coupled with other evidence linking the defendant with theft, negated the propriety of a directed verdict of acquittal on a charge of theft by taking. Rautenberg v. State, 178 Ga. App. 165, 342 S.E.2d 355 (1986).

Inference alone insufficient for conviction. — Although there is still validity to the long-established rule that proof of recent, unexplained possession of stolen goods by the defendant is sufficient to create an inference that the defendant is guilty of the burglary of the goods, proof of recent, unexplained possession is not automatically sufficient to support a conviction for burglary. Rogers v. State, 185 Ga. App. 211, 363 S.E.2d 846 (1987).

Improper inference of criminal association. — State should not have been permitted to cross-examine the defendant as to whether the defendant was aware of an acquaintance's past criminal indictment for running stolen goods. Busbee v. State, 210 Ga. App. 17, 435 S.E.2d 60 (1993).

When only evidence supporting conviction is proof of possession of stolen goods. — Evidence of recent unexplained possession of a stolen vehicle is sufficient in itself to support a conviction for the theft by taking. Callahan v. State, 148 Ga. App. 555, 251 S.E.2d 790 (1978).

When apprehended, the appellant was the driver of the recently stolen van. In the absence of a satisfactory explanation of appellant's possession of the stolen vehicle, this evidence was sufficient in itself to support a conviction for theft by taking. Warfle v. State, 157 Ga. App. 196, 276 S.E.2d 689 (1981).

The more-likely-than-not test is the ap-

propriate one to employ in determining the due-process validity of allowing the factfinder to presume or infer an ultimate or essential element fact from an evidentiary or basic fact. Under this test, it is rational to allow the factfinder to infer that the defendant is guilty of burglary based on proof of defendant's recent, unexplained possession of stolen goods. If the only evidence supporting the conviction is the evidence giving rise to the inference or presumption, however, then such evidence must establish the offense beyond a reasonable doubt in order to be sufficient to support the conviction. Rogers v. State, 185 Ga. App. 211, 363 S.E.2d 846 (1987).

Submitting invoices to state with large markups. — When the state contends the defendant committed theft by deception when the defendant submitted false invoices to the General Assembly, but the invoices contained a statement of charges for services rendered and taken as a whole and compared with the billings to the defendant there was a very large markup, that is not a false statement, and there was no theft by taking under O.C.G.A. §§ 16-8-2 and 16-8-3. Gordon v. State, 257 Ga. 335, 359 S.E.2d 634 (1987).

Defendant's conviction for theft by taking in violation of O.C.G.A. § 16-8-2 was proper under former O.C.G.A. § 24-3-14 (see now O.C.G.A. § 24-8-803) because the business records exception did not require that the person laying the foundation for the admission of business records be the custodian of the records. Instead, the statute required only that the record offered to prove an act or transaction be made in the regular course of business and that it was the regular course of business to make the record at the time of the act or transaction; the witness's lack of personal knowledge regarding how the records were created did not render the records inadmissible, but merely affected the weight given to the evidence. Loyal v. State, 300 Ga. App. 65, 684 S.E.2d 124 (2009).

Goods obtained under color of official position. — Simply because defendant went through appropriate channels and obtained surplus law enforcement property under color of defendant's position as chief of police did not mean that defendant could not be convicted of theft by taking. Spray v. State, 223 Ga. App. 154, 476 S.E.2d 878 (1996).

Trial court did not err in sustaining objection to cross-examination. — Trial court did not abuse the court's discretion in sustaining the state's objection to the defendant's cross-examination of a company president regarding the president's efforts to reduce tax liability because the defendant never testified that the defendant was being rewarded for helping the president minimize tax liability, and some of the questions to which the state objected related to tax advice the president received from the president's accounting firm, which would have shed no light on the defendant's actions. Gautreaux v. State, 314 Ga. App. 103, 722 S.E.2d 915 (2012).

Whether or not defendant's explanation of possession was satisfactory or reasonable was jury question. Warfle v. State, 157 Ga. App. 196, 276 S.E.2d 689 (1981).

Instruction not comment on defendant's failure to testify. — An instruction stating that guilt of the defendant can be inferred from possession of recently stolen property unaccounted for by defendant cannot properly be construed as a comment on the defendant's failure to testify. Horton v. State, 228 Ga. 690, 187 S.E.2d 677 (1972).

When evidence supports finding of theft by deception. — One may be indicted and convicted under former Code 1933, § 26-1802 (see now O.C.G.A. § 16-8-2) for theft by taking if the evidence supports a finding of guilt under former Code 1933, § 26-1803 (see now O.C.G.A. § 16-8-3) for theft by deception. Elliott v. State, 149 Ga. App. 579, 254 S.E.2d 900 (1979).

Evidence sufficient for conviction of theft by snatching. — Identification testimony was sufficient to establish beyond a reasonable doubt that defendant was the perpetrator of the offenses of theft by sudden snatching and aggravated assault with intent to rob. Tolbert v. State, 180 Ga. App. 703, 350 S.E.2d 51 (1986).

Error in admitting similar transaction evidence required reversal. — While state presented sufficient evidence

Evidence and Inferences (Cont'd)

of the victim's age to support assault charge under O.C.G.A. § 16-5-21(a)(1), because the trial court clearly erred in admitting evidence of two burglaries defendant committed in 1998 as similar transactions to help prove the issue of identity, the defendant's aggravated assault, burglary, robbery, theft, and battery convictions were reversed. Usher v. State, 290 Ga. App. 710, 659 S.E.2d 920 (2008).

Evidence of similar transaction admissible. — Given the similarities between the theft of a car and the theft of a second vehicle only hours after the car was stolen, evidence of either theft would be admissible as a similar transaction of the other to show bent of mind, intent, and course of conduct; both crimes occurred in the same city and on the same date, both involved the theft of foreign-made, mid-size sedans, and the state presented evidence from which the jury could infer that, like the car, the keys had been left in the second vehicle at the time the car was stolen, and the keys from both cars were missing when the cars were recovered. Ferguson v. State, 307 Ga. App. 232, 704 S.E.2d 470 (2010).

Evidence of previous convictions. — When the trial was conducted by the court without a jury, there was no need for a separate hearing to consider prior similar crimes (two previous convictions for shoplifting) before the crimes were admitted. Lark v. State, 190 Ga. App. 821, 380 S.E.2d 505 (1989).

Indictments for two previous convictions for shoplifting were sufficient on their face to show the remaining elements of the required foundation and the convictions were admissible as going to the defendant's state of mind, when the defendant admitted walking out of the store with the clothing on this occasion one year later. Lark v. State, 190 Ga. App. 821, 380 S.E.2d 505 (1989).

Evidence sufficient to support conviction. — See Hicks v. State, 169 Ga. App. 542, 314 S.E.2d 113 (1984); McIlhenny v. State, 172 Ga. App. 419, 323 S.E.2d 280 (1984); Thomas v. State, 177 Ga. App. 366, 339 S.E.2d 599 (1985); Rucker v. State, 177 Ga. App. 779, 341 S.E.2d 228 (1986); Hayes v. State, 177 Ga. App. 889, 341 S.E.2d 709 (1986); Benton v. State, 178 Ga. App. 239, 342 S.E.2d 722 (1986); Milford v. State, 178 Ga. App. 792, 344 S.E.2d 505 (1986); Phinazee v. State, 182 Ga. App. 45, 354 S.E.2d 671 (1987); Eady v. State, 182 Ga. App. 293, 355 S.E.2d 778 (1987); Murphy v. State, 182 Ga. App. 791, 357 S.E.2d 147 (1987); McKenzie v. State, 187 Ga. App. 840, 371 S.E.2d 869, cert. denied, 187 Ga. App. 907, 371 S.E.2d 869 (1988); Howell v. State, 188 Ga. App. 425, 373 S.E.2d 216, cert. denied, 188 Ga. App. 912, 373 S.E.2d 216 (1988); Eads v. State, 193 Ga. App. 262, 387 S.E.2d 591 (1989); Hicks v. State, 196 Ga. App. 180, 396 S.E.2d 33 (1990); Davis v. State, 223 Ga. App. 346, 477 S.E.2d 639 (1996); Massalene v. State, 224 Ga. App. 321, 480 S.E.2d 616 (1997); Jordan v. State, 224 Ga. App. 181, 480 S.E.2d 228 (1996); Massalene v. State, 224 Ga. App. 321, 480 S.E.2d 616 (1997); Dorillas v. State, 224 Ga. App. 336, 480 S.E.2d 351 (1997); Rice v. State, 226 Ga. App. 770, 487 S.E.2d 517 (1997); Holland v. State, 232 Ga. App. 284, 501 S.E.2d 829 (1998); Shores v. State, 240 Ga. App. 189, 522 S.E.2d 515 (1999); Travis v. State, 243 Ga. App. 77, 532 S.E.2d 430 (2000); Chastain v. State, 244 Ga. App. 84, 535 S.E.2d 25 (2000); Jaber v. State, 243 Ga. App. 562, 533 S.E.2d 767 (2000); Parker v. State, 247 Ga. App. 722, 544 S.E.2d 542 (2001); Goss v. State, 247 Ga. App. 520, 544 S.E.2d 206 (2001); Kier v. State, 247 Ga. App. 431, 543 S.E.2d 801 (2000); Shaw v. State, 247 Ga. App. 867, 545 S.E.2d 399 (2001); Knight v. State, 246 Ga. App. 299, 540 S.E.2d 254 (2000); Mullinax v. State, 273 Ga. 756, 545 S.E.2d 891 (2001); Thomas v. State, 249 Ga. App. 571, 549 S.E.2d 408 (2001); Tukes v. State, 250 Ga. App. 117, 550 S.E.2d 678 (2001).

Evidence sufficient to enable rational trier of fact to find the defendant guilty beyond a reasonable doubt of theft by taking and recklessly causing harm to or endangering bodily safety of another person. Lucas v. State, 183 Ga. App. 637, 360 S.E.2d 12 (1987).

Jury was authorized to conclude from the evidence that the defendant accosted the victim in the mall parking lot, forced

her to accompany him to a secluded area where he raped and murdered her, then took her jewelry, her pocket book, and her automobile, and used her credit cards the next day. Williams v. State, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

Testimony of an accomplice and the evidence corroborating the accomplice's testimony were sufficient to justify a rational trier of fact to find the defendant guilty beyond a reasonable doubt of burglary and theft of a motor vehicle. Thurston v. State, 186 Ga. App. 881, 368 S.E.2d 822 (1988).

Evidence demonstrating that the defendant was seen removing two small medicinal items and retaining those items for a period of time inside the store's premises was sufficient to satisfy a finding under O.C.G.A. § 16-8-2 that the defendant appropriated the subject goods, though the items were not ultimately recovered from the defendant's person. Moore v. State, 208 Ga. App. 458, 430 S.E.2d 835 (1993).

Videotapes of the defendant taking the victim's purse and using the victim's credit card, the defendant's company photograph and the ID testimony of a clerk at the store where the purse was stolen, were sufficient evidence to convict defendant for a violation of O.C.G.A. § 16-8-2. Green v. State, 223 Ga. App. 467, 477 S.E.2d 895 (1996).

Proof that defendant cashed or deposited into defendant's own account more than $500 worth of unauthorized checks was sufficient to support the jury's verdict that defendant committed theft by taking in violation of O.C.G.A. § 16-8-2. Jordan v. State, 242 Ga. App. 547, 528 S.E.2d 858 (2000).

Evidence was sufficient to sustain theft by taking conviction, where the evidence showed that the defendant made withdrawals which far exceeded the amounts the defendant knew had been deposited, despite the fact that the jury had evidence from which it could infer that the defendant could have made a mistake by relying on the availability of the funds. Smith v. State, 255 Ga. App. 580, 565 S.E.2d 904 (2002).

Defendant was convicted of felony theft by taking under O.C.G.A. §§ 16-8-2 and 16-8-12(a)(1) for taking more than $500 from potential buyers of ecstasy pills and then fleeing with the money without delivering the promised pills, since there was sufficient evidence that defendant took more than $500 despite defendant's claim that the money was counterfeit after one of the buyers testified that the buyer contributed $1,000 of real money to the total that was given to defendant. Camero v. State, 257 Ga. App. 109, 570 S.E.2d 405 (2002).

Evidence that defendant had taken his former wife's car keys and had driven off in the former wife's car after defendant committed battery on the former wife and her mother, that the former wife had not given defendant permission to take the car, and that defendant refused to return the car even though the former wife begged defendant to do so was sufficient to support defendant's conviction of theft by taking a motor vehicle. Richardson v. State, 256 Ga. App. 30, 567 S.E.2d 693 (2002).

Evidence was legally sufficient to support defendant's conviction for theft by taking a motor vehicle as the evidence, viewed in the light most favorable to the verdict, showed that defendant took a vehicle belonging to a man who had left it in a friend's front yard, unlocked and with the key in the ignition, especially since defendant was identified as having been in an accident with the truck on the same day, and was chased the next day as defendant drove the truck by a police officer who was on the lookout for the stolen truck and saw that defendant was driving it. Brown v. State, 259 Ga. App. 819, 578 S.E.2d 516 (2003).

When at the time the defendant sold a victim a factoring agreement, the defendant had substantial debt and no immediate prospects of re-paying the money within the 90 days provided for in the note, and nine months after the investment was made, presented the victim with a check to reimburse the victim that was dishonored, the evidence was sufficient to support the defendant's conviction of theft by taking. Rasch v. State, 260 Ga. App. 379, 579 S.E.2d 817 (2003).

Evidence was sufficient to support de-

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fendant's conviction for theft by taking as it showed the defendant was in recent and unexplained possession of a lighter belonging to the victim's spouse, as well as other items taken from the victim's residence, that the residence from which the items were taken was adjacent to and accessible on foot from a wooded area where the defendant was seen around the time the crimes occurred, and similar transaction evidence showed the defendant had previously received items stolen from homes in the area. Gray v. State, 260 Ga. App. 197, 581 S.E.2d 279 (2003).

Evidence was sufficient to support defendant's convictions of two counts of armed robbery, two counts of theft by taking, three counts of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2), three counts of simple battery, three counts of kidnapping, and two counts of possessing a firearm during the commission of a crime since: (1) there was evidence that defendant entered a store, placed a knife to the neck of one of the three victims, forced that victim to the back of the store, aided another assailant who was armed with a gun to bind the victims and drag them to the back of the store, and stole money and other items from two of the victims; (2) defendant confessed to the crimes during interviews with law enforcement officials; and (3) defendant's confessions were corroborated by the testimony of one of the victims who, despite earlier being unable to identify the robbers, ultimately identified defendant as one of the robbers. The corroborating victim's initial inability to identify defendant posed an issue of credibility for the jury's resolution and did not require reversal. Phanamixay v. State, 260 Ga. App. 177, 581 S.E.2d 286 (2003).

Victim's testimony that defendant took the victim's car and drove away, and the testimony of a police officer that the car was recovered only after police pursuit of the vehicle and apprehension of the occupants, was sufficient to support defendant's conviction for theft by taking. Newton v. State, 261 Ga. App. 762, 583 S.E.2d 585 (2003).

Evidence was sufficient to support defendant's convictions for malice murder, theft by taking, and financial transaction card fraud, as the evidence authorized any rational trier of fact to find defendant guilty of those crimes beyond a reasonable doubt; the evidence showed that defendant struck the victim multiple times with a wrench, causing the victim's death, that the defendant was in possession of a laptop computer that had been missing from the victim's office, and that defendant had used the victim's credit, posing as the victim's spouse, on the day the victim died. Baugh v. State, 276 Ga. 736, 585 S.E.2d 616 (2003).

There was sufficient evidence to identify the semi-tractor and trailer described in count one of the petition and in the proof at trial as being one and the same, and the misidentification did not mislead or misinform defendant or leave defendant subject to subsequent prosecution for the same offense, and thus was not a fatal variance; the evidence was sufficient to support the juvenile judge's adjudication of delinquency based on all the counts alleged in the petition. In the Interest of J.D.T., 262 Ga. App. 860, 586 S.E.2d 748 (2003).

Evidence that unauthorized withdrawals were made from a victim's account using the victim's account and social security numbers, which were on the victim's bank statements, that defendant's mailbox was near the victim's, and that for each withdrawal there was a corresponding deposit into defendant's account on the same day, sufficiently supported defendant's conviction for theft by taking. Westbrooks v. State, 263 Ga. App. 566, 588 S.E.2d 335 (2003).

Evidence supported defendant's conviction for theft of trailers and tires being delivered in the trailers where defendant and a codefendant were seen moments after having returned one of the missing trailers, where they subsequently tried to flee from the police, where defendant's explanation for defendant's presence at the scene was undermined by other testimony, where a note in defendant's pocket described the crime scene, and where defendant and the codefendant gave conflicting accounts of their travel plans; the fact that one trailer was withheld temporarily

and later returned with half its load missing did not mean that that trailer was not "taken." Howard v. State, 263 Ga. App. 593, 588 S.E.2d 793 (2003).

Defendant's boasting that the defendant stole the victim's cell phone, coupled with the victim's testimony that the phone was missing, provided ample circumstantial evidence to support the defendant's convictions of entering an auto with intent to commit a theft, and of theft. In the Interest of M.C.A., 263 Ga. App. 770, 589 S.E.2d 331 (2003).

When the defendant, who was not in custody at the time, volunteered an explanation as to why the defendant possessed a weapon without authority, no Miranda warning was necessary and the evidence was sufficient to show that the defendant inflicted a shot upon the defendant's person in a government building with a weapon that defendant took from police custody in violation of O.C.G.A. §§ 16-7-24(a) and 16-8-2; therefore, the trial court's findings were not clearly erroneous. McClendon v. State, 264 Ga. App. 174, 590 S.E.2d 189 (2003).

Evidence that defendant abandoned the project, promised to return the unearned portion of the down payment, and then failed to do so was sufficient to support a conviction for theft by taking. Smith v. State, 265 Ga. App. 57, 592 S.E.2d 871 (2004).

Evidence that defendant was given a key to the victim's apartment, that there was no forced entry, that defendant admitted being in close proximity to the closet where the stolen bank was located, and that defendant had not returned the key to the apartment to the leasing office on the date in question was sufficient to support a conviction for theft by taking. Pitmon v. State, 265 Ga. App. 655, 595 S.E.2d 360 (2004).

Evidence was sufficient to support defendant's conviction for theft by taking in violation of O.C.G.A. § 16-8-2 as defendant took a car and its contents, including a victim's handgun, with the intent to deprive the owners of the property; the evidence included: (1) testimony as to the gunman's size; (2) testimony that the car's rims were found at defendant's home; (3) testimony that a victim's cell phone made calls to defendant's home; (4) an accomplice's reference to the gunman as "B"; and (5) similar transaction evidence of another carjacking, involving a car of the make and color as a car used in the hijacking of the victims' car. Mullins v. State, 267 Ga. App. 393, 599 S.E.2d 340 (2004).

When the defendant, according to the defendant's love interest, drove a stolen vehicle onto the victim's property through a locked gate, parked near a building where objects were stolen, and got into the vehicle and drove away, and the owner testified that the owner had not given the defendant permission to take the objects that were stolen, there was sufficient evidence to convict the defendant of criminal trespass in violation of O.C.G.A. § 16-7-21(a), burglary in violation of O.C.G.A. § 16-7-1(a), and theft by taking in violation of O.C.G.A. § 16-8-2. Sexton v. State, 268 Ga. App. 736, 603 S.E.2d 66 (2004).

There was sufficient evidence to support defendant juvenile's adjudication as delinquent for acts which, if committed by an adult, would have constituted three counts of theft by taking. Evidence that three youths were overheard in the car lot talking about stealing cars and that they fled when they saw police, coupled with the circumstantial evidence that several vehicles were hot and parked in a different area than originally parked, was sufficient evidence to show the commission of the crime of theft by taking. In the Interest of S.D.T.E., 268 Ga. App. 685, 603 S.E.2d 316 (2004).

Testimony of a store's loss prevention employee as to the ownership and value of coats stolen by the defendant, and testimony by the employee that the employee saw the defendant take the coats, place the coats in a bag, and flee from the store was sufficient to support a theft by shoplifting conviction. Lanier v. State, 269 Ga. App. 284, 603 S.E.2d 772 (2004).

Evidence supported the defendant's conviction for theft by taking because the defendant pawned a TV and two VCRs stolen from a home within hours of the crime and a mode of operation was proven from evidence that the defendant pled guilty to a similar burglary in which a door was also kicked in while the home-

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owner was absent during the day and valuable items were taken from the master bedroom. Jefferson v. State, 273 Ga. App. 61, 614 S.E.2d 182 (2005).

Evidence was sufficient to support the defendant's conviction for theft by taking as a rational trier of fact was authorized to conclude that the defendant obtained the victim's money by telling the victim that the defendant was going to invest the money for the victim and then took that money and sent the money to entities defendant controlled, thus depriving the victim of the lawful use of that money. Gould v. State, 273 Ga. App. 155, 614 S.E.2d 252 (2005).

Evidence supported the defendant's theft by taking a motor vehicle conviction as the defendant was seen driving a city truck that was kept behind a locked fence at a city landfill, the chain on the lock was cut, the defendant was not authorized to enter the landfill when it was locked, and defendant was selling items out of the truck. Sadberry v. State, 273 Ga. App. 257, 614 S.E.2d 885 (2005).

Convictions for theft, aggravated assault, and making a terroristic threat was supported by evidence because the defendant admitted to taking gas cans, raised a machete to scare or strike the defendant's sibling, the sibling was frightened and ran, and the defendant then threatened both of the defendant's siblings that if either called the sheriff the defendant would return and kill the siblings. Turner v. State, 273 Ga. App. 535, 615 S.E.2d 603 (2005).

Evidence was sufficient to support defendant's convictions for concealment of a death and theft by taking as the evidence showed that the defendant directed the customer of a salon the defendant operated, who had a fight with a person with whom the defendant had been living, to dispose of the person's body after the customer shot the person to death following an argument at the defendant's home and that the defendant told people that the person had left after an argument; too, the evidence showed that the defendant had taken the person's sports memorabilia collection and a camera, and, thus, was guilty of theft by taking. James v. State, 274 Ga. App. 498, 618 S.E.2d 133 (2005).

Evidence was sufficient to support a conviction for misdemeanor theft by taking since the defendant broke into the victim's residence, took a gun valued at $80.00, and left a blood trail back to the defendant's own residence next door and when the defendant's sibling turned the stolen gun into police after the sibling found the gun in the defendant's residence. Meeks v. State, 274 Ga. App. 517, 618 S.E.2d 152 (2005).

Evidence was sufficient to support the defendant's theft by taking conviction as defendant's unexplained possession of stolen tools, which defendant pawned soon after the thefts, supported the conviction. Drake v. State, 274 Ga. App. 882, 619 S.E.2d 380 (2005).

Evidence that a person matching the defendant's description was seen driving a victim's car out of a parking lot, that the car was later found at an address the defendant had given on a job application, that property stolen from other victims was found in the car, and that the defendant's thumbprint matched a fingerprint found on that property was sufficient to convict the defendant of theft by taking a motor vehicle, theft by retaining a motor vehicle, and theft by retaining stolen property. Campbell v. State, 275 Ga. App. 8, 619 S.E.2d 720 (2005).

Because an accomplice's testimony was corroborated by the defendant's recent possession of a stolen boat as well as the defendant's flight from the scene of the crime, the evidence was sufficient to convict the defendant of theft by taking; consequently, the trial court properly denied the defendant's motion for a new trial. Johnson v. State, 275 Ga. App. 161, 620 S.E.2d 433 (2005).

Defendant's conviction for felony theft by taking over $500.00 was supported by the evidence as defendant was accused of stealing over $500.00 in the aggregate over a 35-month period; the state could aggregate the amount of money stolen over a period of time into one count in an accusation. Parham v. State, 275 Ga. App. 528, 621 S.E.2d 532 (2005).

Because the defendant promised—orally and in writing—to use the victims'

money to acquire tire hauling containers, but instead used the money for other purposes, the jury was entitled to infer criminal intent and to find the defendant guilty of theft by taking under O.C.G.A. § 16-8-2 or as a party to the crime of theft by taking under O.C.G.A. § 16-2-20. Matthiessen v. State, 277 Ga. App. 54, 625 S.E.2d 422 (2005).

As the state presented direct, and not circumstantial, evidence from the victims supporting the jury's finding of guilt, when this testimony was coupled with that from the police officers involved, substantial and sufficient evidence supported a conviction for armed robbery and related offenses; the fact that the defendant offered another explanation for the defendant's presence at the scene did not render the other evidence insufficient or circumstantial. Bakyayita v. State, 278 Ga. App. 624, 629 S.E.2d 539 (2006).

Evidence was sufficient to prove that a juvenile was a party to theft by taking a motor vehicle since, even though there was no direct evidence that the juvenile was at the crime scene, the juvenile was with three other juveniles when the juveniles were seen driving and riding in vehicles that were later discovered to have been stolen from a repair shop storage facility since a witness testified that the vehicles exited a driveway near the shop shortly before one of the of the vehicles broke down, that the vehicle broke down a few hundred feet from the shop, and that the second vehicle circled back, since the juveniles gave conflicting stories about the owner of the broken down vehicle, and since the key to the second vehicle was found in the juvenile's pocket; the juvenile court could have inferred from the location of the broken down vehicle that both vehicles had just been taken from the shop by the four juveniles. In the Interest of R.F., 279 Ga. App. 708, 632 S.E.2d 452 (2006).

Evidence supported a defendant's convictions for fleeing and attempting to elude a police officer as an underlying offense for felony murder, theft by taking, vehicular homicide, disregarding a traffic control device, failing to stop at a stop sign, and reckless driving as: (1) the defendant stole a vehicle and was spotted by an officer shortly after the vehicle was reported as stolen; (2) when the officer began to follow the vehicle, the vehicle rapidly accelerated; (3) the officer followed the stolen vehicle for several blocks, with both vehicles traveling between 60-70 miles per hour; (4) the vehicle continued to accelerate after the officer turned on the officer's blue lights and siren; (5) when the stolen vehicle ran a red light, the vehicle struck a car, killing the driver; and (6) the officer and the owner of the stolen vehicle identified the defendant as the person driving the stolen vehicle. Ferguson v. State, 280 Ga. 893, 635 S.E.2d 144 (2006).

There was sufficient evidence, both direct and circumstantial, to support the defendant's conviction for theft by taking, and other related charges, since the victim testified that the defendant took the victim's vehicle and the jury was charged on the law of parties to a crime; the victim testified that the perpetrators took the victim's keys and that when the victim freed oneself sufficiently to look outside, the victim's car was gone. Bills v. State, 283 Ga. App. 660, 642 S.E.2d 352 (2007).

Based on the defendant's concession that the state's evidence tended to show an inference of the defendant's guilt in making a false claim against the county as to money the county allegedly owed to the defendant, and despite a claim that the facts supported the conclusion that the county's aquatic center director was the culpable party, when the defendant pointed to no evidence proving such, convictions for criminal attempt to commit theft by taking and first-degree forgery were supported by the evidence. Brown v. State, 285 Ga. App. 453, 646 S.E.2d 289 (2007), cert. denied, No. S07C1503, 2007 Ga. LEXIS 672 (Ga. 2007).

There was sufficient evidence to support the defendant's convictions of theft by taking; records showed that the defendant, a business manager, had received payments for a car but had never credited the payments to the business, and the defendant had made a loan to a fictitious person, then issued a check that was purportedly endorsed and cashed by the fictitious person. Ruppert v. State, 284 Ga. App. 456, 643 S.E.2d 892 (2007).

Evidence supported the defendant's

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convictions of malice murder and of theft by taking when: the victim was found dead in a motel room that the victim and the defendant shared; DNA taken from under the victim's fingernails matched samples taken from the defendant; there was evidence that the defendant drove the victim's pickup truck away from the motel and left the truck at a friend's house; and a bloodstain on the truck abandoned by the defendant contained a transfer bloodstain that matched the victim's blood. Teal v. State, 282 Ga. 319, 647 S.E.2d 15 (2007).

In a bench trial, because conflicts in the evidence were for the trial court, as the trier of fact, and not the court of appeals to resolve, the defendant's convictions for theft by taking a motor vehicle and possessing cocaine were not subject to reversal on appeal based on the conflicts. Marshall v. State, 286 Ga. App. 86, 648 S.E.2d 674 (2007).

Evidence was sufficient to support a conviction of theft by taking when an investigator hired by a company to investigate a sudden increase in company expenditures found that the defendant, a manager at the company, had written numerous company checks for personal use, diverted funds to the defendant's family, and falsified at least one loan; the jury was entitled to disbelieve the defendant's testimony that the company had authorized the defendant's expenditures. Lewis v. State, 287 Ga. App. 379, 651 S.E.2d 494 (2007).

Because the question of the defendant's intent to steal was for the jury to decide, the pattern jury charge issued by the trial court was not erroneous and the defendant was properly barred from impeaching the informant through the use of prior convictions in the absence of certified copies of the convictions, the defendant's theft by taking conviction was affirmed on appeal. Dudley v. State, 287 Ga. App. 794, 652 S.E.2d 840 (2007), cert. denied, No. S08C0319, 2008 Ga. LEXIS 168 (Ga. 2008).

Evidence supported the defendant's convictions of burglary, kidnapping with bodily injury, rape, aggravated assault, robbery, and theft by taking when a treating physician stated that the 86-year-old victim's injuries, including blood inside her vagina and bruises and contusions on her vagina, were consistent with forcible penetration; when the defendant admitted entering the victim's home, removing her clothing, restraining her with electrical cords, hitting her, putting a plastic bag over her head, forcing her from one room to another, and taking her money and her car; and when DNA from the defendant matched the DNA of two hair roots found on the victim's living room floor. Smith v. State, 291 Ga. App. 545, 662 S.E.2d 323 (2008).

Evidence that the defendant punched the victim in the jaw to force the victim to exit the victim's car, drove away, and admitted stealing the car to police was sufficient to convict the defendant of theft by taking in violation of O.C.G.A. § 16-8-2. Bridges v. State, 293 Ga. App. 783, 668 S.E.2d 293 (2008).

Evidence supported convictions for aggravated assault, theft by taking, and felony murder when the evidence showed that the defendant pulled the victim out of the victim's car, beat the victim with a pistol, stole the car, and deliberately backed over the victim; before the crime, the defendant told an eyewitness to those acts that the defendant planned to rob the victim; and the defendant used the victim's phone after the victim's death. Lupoe v. State, 284 Ga. 576, 669 S.E.2d 133 (2008).

Evidence was sufficient to support the defendant's convictions for, inter alia, malice murder, theft by taking an automobile, and possession of a firearm by a convicted felon as the defendant admitted to a cellmate and to a cousin's roommate that the defendant fatally shot the cousin when the cousin told the defendant to move out of a shared apartment; there was also physical evidence, the recovery of the gun used in the incident, and witness testimony that supported the conviction. Jackson v. State, 284 Ga. 826, 672 S.E.2d 640 (2009).

Restaurant was robbed, the manager was fatally shot, and the manager's car was stolen. As the defendant's accomplice, the defendant's cellmate, and an officer

testified that the defendant admitted committing the murder, the evidence was sufficient to convict the defendant of malice murder, armed robbery, and theft by taking. Patterson v. State, 285 Ga. 597, 679 S.E.2d 716 (2009), cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010).

Evidence was sufficient to support a guilty verdict for felony theft by taking given the testimony of the victim, the police officers, the pawnbroker, and the videotape of the crime. Sheppard v. State, 300 Ga. App. 631, 686 S.E.2d 295 (2009).

Evidence was sufficient to convict the defendant of theft by taking of a motorcycle, a helmet and jacket, and a truck because keys to the truck were found in the defendant's motel room, keys to the motorcycle were found in the truck, and witnesses tied the defendant to both the truck and the motorcycle. McClain v. State, 301 Ga. App. 844, 689 S.E.2d 126 (2010).

Evidence that a defendant kept a pick-up truck for over a year after completing repairs to the truck and that the defendant was using it as a residence, despite the fact that the owner made repeated attempts to contact the defendant about getting the truck back, was sufficient to sustain defendant's conviction of theft in violation of O.C.G.A. § 16-8-2. Thornton v. State, 301 Ga. App. 784, 689 S.E.2d 361 (2009).

Evidence was sufficient to convict the defendant of criminal trespass and theft by taking because the defendant was found at a recycling facility trying to sell pieces of the victim's aluminum awning, which the defendant had previously been told was not trash, but belonged to a laundry establishment. Jackson v. State, 301 Ga. App. 863, 690 S.E.2d 195 (2010).

Trial court did not err in denying the defendant's motion for a directed verdict because the evidence was sufficient for a rational trier of fact to infer that the defendant acted with criminal intent and to find the defendant guilty of theft by taking in violation of O.C.G.A. § 16-8-2, and whether the defendant intended to deprive the victims of their property was a question for the trier of fact, who was not required to believe the defendant's testimony; the manner in which the property was appropriated was irrelevant, and even if the trial court had accepted the defendant's claim that the defendant lawfully appropriated the trailer, the evidence supported a finding that although the defendant could have had lawful possession of the truck initially, the defendant failed to return the truck, or even provide the victims with the location of the truck upon their demands. Rushing v. State, 305 Ga. App. 629, 700 S.E.2d 620 (2010).

Circumstantial evidence was sufficient to authorize the jury to exclude every reasonable hypothesis except that the defendant was guilty of theft by taking because an ATM was removed from a bank's property without authorization, defendant's vehicle was observed at the bank approximately two hours before the theft was reported and shortly after the alarm was activated; tire tracks at the scene matched the tire prints on the defendant's vehicle, the vehicle had a tow strap with a large metal hook tied to it, scrape marks consistent with a heavy object being drug on the pavement led from the ATM's location in the direction of a nearby grassy lot, where the ATM was later found, and the defendant possessed black electrical tape and gloves upon the defendant's arrest; the jury was authorized to consider the defendant's flight from the scene and police as circumstantial evidence of defendant's guilt. Tauch v. State, 305 Ga. App. 643, 700 S.E.2d 645 (2010).

Although under Georgia law, a defendant could not be convicted solely upon the uncorroborated testimony of an accomplice, former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the evidence corroborated some particulars of the accomplice's testimony implicating the codefendants in the charged crimes since all three of the victims from the three separate gas stations provided descriptions of their assailants that generally matched the codefendants and the accomplice, and all three victims also testified that their assailants brandished a handgun and a shotgun, which were indeed the weapons that were found at the scene where the stolen SUV crashed and where the accomplice was arrested. Accordingly, the evi-

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dence corroborating the accomplice's testimony was sufficient to authorize the jury's determination that the codefendants were guilty beyond a reasonable doubt as parties to armed robbery, O.C.G.A. § 16-8-41, hijacking a motor vehicle, O.C.G.A. § 16-5-44.1, aggravated assault, O.C.G.A. § 16-5-21, theft by taking, O.C.G.A. § 16-8-2, theft by receiving, O.C.G.A. § 16-8-7, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106. Daniels v. State, 306 Ga. App. 577, 703 S.E.2d 41 (2010).

Defendant was properly convicted of theft by taking a motor vehicle in violation of O.C.G.A. § 16-8-2 because the evidence was sufficient to permit a rational jury to conclude beyond a reasonable doubt that the defendant stole a car; the jury was shown a video recording of the theft, the defendant admitted to a police officer that the defendant was the person depicted in the recordings walking near the car, the defendant stole another vehicle only hours after the car was stolen, and it was assumed that the jury concluded that the defendant was untruthful when the defendant denied stealing the car. Ferguson v. State, 307 Ga. App. 232, 704 S.E.2d 470 (2010).

Rational trier of fact was authorized to find that the evidence was sufficient to exclude every reasonable hypothesis except that of the defendant's guilt and to conclude beyond a reasonable doubt that the defendant was guilty of theft by taking, O.C.G.A. § 16-8-2, because there was evidence that the defendant was alone for 20 minutes or more on the floor of the house where the money was kept and where no cleaning was to be performed; while there was circumstantial evidence that also implicated another house cleaner, reasonable jurors could have found from the evidence that the hypothesis that the house cleaner took the money was excluded based on testimony that the defendant had been alone in the area of the house where the money was kept, and there was no such evidence regarding the house cleaner. Cookston v. State, 309 Ga. App. 708, 710 S.E.2d 900 (2011).

Evidence was sufficient to convict a defendant of theft by taking from the defendant's employer based on an investigator's testimony that the defendant stole a box of 50 new golf club heads from the employer. The fact that the employer was aware of the planned theft and allowed the theft to proceed did not constitute consent to the taking. Baker v. State, 311 Ga. App. 532, 716 S.E.2d 580 (2011).

Evidence was sufficient to support the defendant's conviction for theft by taking, under O.C.G.A. § 16-8-2, because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told them what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. Donald v. State, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Defendant was properly convicted of felony theft by taking in violation of O.C.G.A. § 16-8-2 because the evidence was sufficient to prove that the indigent defense money the defendant received was the property of a law firm; an agreement existed between the defendant and the firm for the payment of indigent defense monies to the firm. Clarke v. State, 317 Ga. App. 471, 731 S.E.2d 100 (2012).

Evidence including DNA evidence, the victim's testimony regarding the nature of the attack and description of the attacker, and the store surveillance video of an individual who wore clothing similar to that worn by the attacker and who appeared to be the same race as the attacker,

supported the defendant's convictions for rape, kidnapping, armed robbery, theft by taking, and three counts of possession of a gun during the commission of a crime. Glaze v. State, 317 Ga. App. 679, 732 S.E.2d 771 (2012).

Victim's testimony that the defendant approached the victim, thrust a gun about six inches from the victim's face, took the victim's cell phone and keys, and told the victim to "get out of here", while waving a gun, was sufficient to support the defendant's convictions for armed robbery, possession of a firearm during the commission of a crime, aggravated assault, and theft by taking. Wright v. State, 319 Ga. App. 723, 738 S.E.2d 310 (2013).

Conviction for theft by taking was supported by evidence that the defendant, without permission from the rightful owner, made use of real property by charging rent to tenants and that the value of the property taken was over $500. Harris v. State, 324 Ga. App. 411, 750 S.E.2d 721 (2013).

Evidence that the defendant and two others pulled the victim over, took the victim's vehicle and gun, grabbed the victim from behind and struck the victim, and took both the victim's vehicle and gun supported the defendant's convictions for robbery and theft by taking. Chambers v. State, 327 Ga. App. 663, 760 S.E.2d 664 (2014).

Evidence that the defendant's DNA was found on a soda can left inside the victim's house after the burglary, the victim's stolen property was found in a house where the defendant was residing, and the defendant fled when officers tried to arrest the defendant was sufficient so support the defendant's convictions for burglary and theft by taking. Barstad v. State, 329 Ga. App. 214, 764 S.E.2d 453 (2014).

Testimony of a store's loss prevention officer as to the price of the phone that was taken was sufficient to support the defendant's felony conviction. Mendez v. State, 327 Ga. App. 497, 759 S.E.2d 574 (2014).

Evidence was sufficient to convict the defendant of false imprisonment, theft by taking, and three counts of battery because the defendant locked the victim in the victim's room, struck the victim in the face, hit the victim in the back of the head with a blunt object, threw the victim to the floor when the victim tried to escape, and took the victim's cellphone. Pierre v. State, 330 Ga. App. 782, 769 S.E.2d 533 (2015).

Evidence that the victim and a neighbor saw the defendant sitting on the motorcycle without a helmet minutes after the theft and witnessed the defendant's flight on the motorcycle when the victim's confronted the defendant, supported the defendant's conviction for theft by taking. Newby v. State, 338 Ga. App. 588, 791 S.E.2d 92 (2016).

Evidence that the defendant misled a victim into believing that the defendant was an American father and businessman who was having financial difficulty in Malaysia and needed money to pay a hotel bill so that the defendant would not be arrested and could return to the defendant's children in the United States was sufficient to support a conviction for theft by taking. Akintoye v. State, 340 Ga. App. 777, 798 S.E.2d 720 (2017).

Evidence that the defendant was given a check to deliver to a consultant but deposited the check into the defendant's own account was sufficient for any rational trier of fact to find beyond a reasonable doubt that the defendant had unlawfully appropriated the check, supporting a conviction for theft by taking. Green v. State, 342 Ga. App. 862, 805 S.E.2d 469 (2017).

Circumstantial evidence, including that a house was burglarized, the defendant sold jewelry stolen from the house at two local pawn shops, and the defendant had a car the same as the one seen leaving the house on the day of the burglary, was sufficient to uphold the jury's conclusion that the defendant had committed burglary and theft. Harvey v. State, 344 Ga. App. 761, No. A17A1789, 2018 Ga. App. LEXIS 133 (2018).

Evidence was sufficient to convict the defendant of theft by taking as the defendant drove away from the scene of the shooting in the vehicle belonging to the victim's girlfriend without the girlfriend's permission and despite the girlfriend's attempts to stop the defendant. Jones v. State, No. S18A0263, 2018 Ga. LEXIS 202 (Apr. 16, 2018).

Evidence and Inferences (Cont'd)

Evidence sufficient for theft by taking and racketeering. — Evidence was sufficient to convict the defendant on 29 counts of theft by taking and racketeering because the defendant, while the director and a fiduciary of the animal shelter, transferred a series of donations intended for the animal shelter into the defendant's own personal bank accounts; the defendant expressly admitted that the subject transactions involved donation money intended for and belonging to the animal shelter; two members of the Board of Directors of the animal shelter testified unequivocally that the defendant was never authorized to solicit funds and deposit the funds into the defendant's personal bank accounts; and the racketeering charge was predicated upon four separate indicted incidents of theft by taking. Kilby v. State, 335 Ga. App. 238, 780 S.E.2d 411 (2015), cert. denied, No. S16C0653, No. S16C0653, 2016 Ga. LEXIS 437 (Ga. 2016).

Sufficient evidence supported the defendant's conviction for theft by taking based on the evidence showing that without authorization from the employer, the defendant wrote numerous checks to the defendant and the defendant's brother that exceeded the pay to which they were entitled and used the employer's bank card to make several unauthorized purchases that were not for business use. Hettrick v. State, 334 Ga. App. 115, 778 S.E.2d 369 (2015).

Evidence was sufficient to convict the defendant of theft by taking because the defendant accepted money from the victim for the purpose of constructing cabinets, did not complete the cabinets or provide the victim with what had been completed, and failed to return any money to the victim; and the jury was authorized to infer that the defendant acted with fraudulent intent and to find the defendant guilty. Graham v. State, 337 Ga. App. 664, 788 S.E.2d 555 (2016).

Evidence sufficient for theft from bank. — Evidence sustained defendant bank teller's conviction, where defendant's cash drawer showed a $300 shortage and machine tapes indicated that the defendant had given incorrect credit to depositors of checks. Green v. State, 182 Ga. App. 695, 356 S.E.2d 673 (1987).

Although circumstantial in nature, evidence that a defendant had a computerized key that allowed the defendant to access and service ATM machines from which money was taken and that the defendant had used the defendant's access card after hours on those machines was sufficient for a jury to convict the defendant on two counts of theft by taking. Rogers v. State, 292 Ga. App. 90, 663 S.E.2d 789 (2008).

Evidence supported the defendant's conviction of theft by taking. From the defendant's conduct at a bank and the defendant's continued participation in a scheme in which the defendant retained a portion of the money taken from an individual's grandparent's account, the jury could conclude that the defendant was equally involved in the scheme with the individual. Williams v. State, 297 Ga. App. 150, 676 S.E.2d 805 (2009).

Evidence sufficient for theft by taking from employer. — Evidence that the defendant lied to employer to get initial possession of the employer's car and that the defendant used the car to flee the state was sufficient to authorize conviction for theft by taking. Romano v. State, 233 Ga. App. 149, 503 S.E.2d 380 (1998).

Evidence was sufficient to support the defendant's conviction for theft by taking through the defendant's breach of fiduciary obligations as the evidence showed the defendant, who worked for a construction company, was hired to manage an apartment complex the company had built after the defendant persuaded the company's owner that another man was not trustworthy enough to be hired and thereafter kept some of the rent money the defendant collected from the tenants even though the defendant was supposed to turn that money over to the owner. Leary v. State, 256 Ga. App. 639, 569 S.E.2d 593 (2002).

There was sufficient circumstantial evidence to convict the defendant of theft by taking under O.C.G.A. § 16-8-2 after the defendant was to close the salon and deposit the money at that time; the money was not deposited six times, and the de-

fendant offered inconsistent explanations as to how the money disappeared. Matthews v. State, 257 Ga. App. 886, 572 S.E.2d 391 (2002).

Evidence was sufficient to convict defendant of criminal attempt to commit theft by taking, in violation of O.C.G.A. § 16-8-2 and O.C.G.A. § 16-4-1, when defendant admitted submitting or being involved in submitting false applications for matching fund contributions from defendant's employer to an organization defendant created. Brown v. State, 268 Ga. App. 629, 602 S.E.2d 158 (2004).

Jury was authorized to infer that the defendant, a Federal Highway Administration (FHA) employee, falsified three purchase orders authorizing payment of FHA funds for the defendant's college courses under the pretense that the orders were for supplies and services with knowledge that such payment was not authorized. The evidence was sufficient for the jury to find the defendant guilty of theft by taking in violation of O.C.G.A. § 16-8-2. Brown v. State, 302 Ga. App. 641, 692 S.E.2d 9 (2010).

Theft by taking by misrepresenting oneself as professional. — Evidence was legally sufficient to support the defendant's convictions for misdemeanor theft in violation of O.C.G.A. § 16-8-2 and for practicing dentistry without a license in violation of an earlier version of O.C.G.A. § 43-11-50, when the defendant held oneself out as a dentist to numerous individuals, obtained loans for business ventures involving a dentistry practice, obtained services for the dentist practice which the defendant did not pay for, and performed services on patients; the jury resolved the credibility and weight of the evidence issues pursuant to former O.C.G.A. § 24-9-80 (see now O.C.G.A. § 24-6-620). McMillan v. State, 266 Ga. App. 729, 598 S.E.2d 17 (2004), overruled in part by Gidwell v. State, 279 Ga. App. 114, 630 S.E.2d 621 (2006).

Theft by taking involving misuse of checks. — Defendant's conviction for theft by taking was supported by sufficient circumstantial evidence since: (1) the defendant purchased items from a store with a check, returned one of the items, and received an instant credit on the defendant's check card; (2) the defendant then stopped payment on the original check; (3) the defendant's question as to whether there was any way that the matter could be taken care of could have been interpreted as evidence of an intent to deprive the store of the store's property; and (4) the defendant had an invalid cashier's check delivered to the manager to pay for the items. Massey v. State, 269 Ga. App. 152, 603 S.E.2d 431 (2004).

Evidence that the defendant was involved in numerous wire transfers for products or services that were not produced or tendered, thousands of checks made out to different individuals were deposited into the defendant's bank account, and the defendant had two large deposits in the defendant's possession when arrested was sufficient to support the defendant's convictions for theft by taking. Raymond v. State, 322 Ga. App. 404, 745 S.E.2d 689 (2013).

Theft of a utility trailer. — When the owner of a stolen utility trailer testified that the owner had purchased the utility trailer for $1,100 and had made improvements to the trailer, this testimony alone was sufficient to establish that the trailer had some value at the time the trailer was stolen, which was all that was necessary to sustain a conviction for theft by taking; thus, the defendant was properly convicted of misdemeanor theft by taking. Simmons v. State, 287 Ga. App. 68, 651 S.E.2d 359 (2007).

Evidence supported a conviction for theft by taking of a utility trailer. The jury was authorized to find unsatisfactory the defendant's explanation that the defendant had agreed to buy the trailer from a third party and had taken possession of the trailer but had not paid for the trailer because the third party had not yet given the defendant title documents. Boivin v. State, 298 Ga. App. 411, 680 S.E.2d 415 (2009).

Insufficient amount for felony conviction for theft by taking. — Although defendant was properly convicted of theft by taking, the evidence was insufficient to prove that the theft was of a felony amount since the witness testified to an amount under $100. Harris v. State, 328 Ga. App. 852, 763 S.E.2d 133 (2014).

Evidence and Inferences (Cont'd)

Evidence insufficient to support conviction on one count, but sufficient for the others. — Defendant's convictions on various counts of financial transaction card theft and theft by taking were upheld on appeal as sufficient evidence established that, with regard to the two victims, the defendant was the only possible person to have taken the money and/or credit cards and/or identification cards from one victim's purse and the other victim's center car console. However, one conviction for theft by taking currency was reversed on appeal as the victim who alleged that the defendant stole the victim's wallet testified that the victim never kept cash in the wallet, and the indictment specifically stated that currency was taken. Allen v. State, 293 Ga. App. 439, 667 S.E.2d 215 (2008).

Evidence insufficient to support conviction. — Defendant could not be convicted of unlawfully appropriating the "property of another" on evidence showing that defendant had been allowed to take a cellular phone from a sales office with only an invoice indicating that payment was due in ten days and that defendant was subsequently billed for this and another purchase made on account. Gill v. State, 197 Ga. App. 558, 398 S.E.2d 833 (1990).

Plaintiff could not recover for theft by taking based on a claim that in purchasing a new car plaintiff was charged for services not received since there was no allegation or evidence that the amounts charged were paid by plaintiff involuntarily. Taylor Auto Group, Inc. v. Jessie, 241 Ga. App. 602, 527 S.E.2d 256 (1999).

Evidence was insufficient to support conviction for theft by taking because the state failed to exclude other explanations for the disappearance of the money in question and the evidence showed nothing more than the defendants' presence in the wrong place at the wrong time. Locklear v. State, 249 Ga. App. 104, 547 S.E.2d 764 (2001).

Because no evidence was presented that defendant converted the victim's funds for defendant's own use or cashed the victim's check and because the state did not exclude every other reasonable hypothesis, the evidence was insufficient to convict defendant of theft by taking, under O.C.G.A. § 16-8-2; consequently, the trial court erred in denying defendant's motion for a directed verdict of acquittal. Hydock v. State, 275 Ga. App. 122, 619 S.E.2d 807 (2005).

Evidence did not support the finding that a juvenile defendant had committed theft by taking. Although there was circumstantial evidence that the defendant had a key to the home from which items were taken and had been in and out of the home at the time of the theft, the defendant testified that the defendant had left the door unlocked and returned to the home to find the home ransacked; the circumstantial evidence supported the defendant's version of the facts as well as the state's and thus did not warrant a finding of guilt under former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6). In the Interest of M.H., 288 Ga. App. 663, 655 S.E.2d 249 (2007).

Because the evidence failed to support a finding that the defendant, a mortgage consultant, did not intend to perform the services paid for by a client, only that conviction, out of eight entered by the jury, and the restitution order attached to the conviction, had to be reversed. Patterson v. State, 289 Ga. App. 663, 658 S.E.2d 210 (2008).

Evidence was insufficient to convict the defendant of criminal attempt to commit theft by taking by a fiduciary as the relationship between the defendant and the employer was merely that of employer-employee because, although the defendant was responsible for creating invoices, the defendant did not have authority to act for the employer beyond weighing the metals and assigning to the weight a dollar amount that had been previously fixed by the employer; and the defendant could not negotiate with the customers or independently determine how much the metals were worth; thus, although the conviction for criminal attempt to commit theft by taking stood, the felony sentence, based on the defendant being a fiduciary, was reversed. Scott v. State, 344 Ga. App. 412, 810 S.E.2d 613 (2018).

Evidence supporting robbery by force. — Evidence that defendant

grabbed cashier's arm when the cashier opened cash register to give defendant change was sufficient to support a conviction of robbery by force, rather than theft by taking, even if the cashier managed to escape defendant's grasp before defendant took any money from the register. Garner v. Victory Express, Inc., 214 Ga. App. 652, 448 S.E.2d 719 (1994).

Theft by taking motor vehicle. — Defendant's motion for a directed verdict of acquittal in trial for theft by taking a motor vehicle was properly denied because the jury properly assessed the evidence, although conflicting, and found each fact necessary to make out the state's case; trial counsel failed to preserve error regarding exclusion of a portion of the victim's videotaped interview; and a photographic lineup included people of the same general age and race as defendant and was not impermissibly suggestive. Sherls v. State, 272 Ga. App. 152, 611 S.E.2d 780 (2005).

Defendant, who was the executrix of a will, was properly found guilty of theft by taking under O.C.G.A. § 16-8-2 of estate funds because unexplained counter and ATM withdrawals from two estate accounts totalling over $100,000 were made and over $75,000 was deposited into the defendant's personal bank account during the same time period. Christian v. State, 288 Ga. App. 546, 654 S.E.2d 452 (2007).

Identity of owner not required in theft of motor vehicle. — Although a vehicle stolen by two defendants from the person who was sitting in the vehicle was owned by a third person who did not testify, the identity of the owner was not a material element of the crime that was required to be alleged and proved under O.C.G.A. § 16-8-2. Kollie v. State, 301 Ga. App. 534, 687 S.E.2d 869 (2009).

Evidence was sufficient to support the defendant's conviction for theft by taking because, although the victim testified that the victim told the defendant to "take everything" prior to escaping from the defendant, there was evidence from which a reasonable juror could conclude that the defendant had already taken the victim's car and that the victim's subsequent relinquishment of the car was not done willingly; when the defendant drove away and returned on foot only after parking the vehicle at the defendant's cousin's house, the jury was authorized to find that the defendant intended to deprive the victim of the car's use, if even temporarily. Payne v. State, 301 Ga. App. 515, 687 S.E.2d 851 (2009).

Insufficient evidence of theft by taking of motor vehicle. — In a juvenile's adjudication as delinquent for theft by taking the juvenile's sister's car, although the juvenile admitted taking the car, the state failed to prove venue and failed to prove that the taking was unlawful as required by O.C.G.A. § 16-8-2. The officer's testimony that the sister said the taking was without the sister's permission was inadmissible hearsay and was insufficient to support the adjudication even though the evidence was admitted without objection. In the Interest of E.C., 311 Ga. App. 549, 716 S.E.2d 601 (2011).

Evidence that a defendant showed an interest in a car that was for sale and took a test drive and returned the car, that the car was stolen the next day, that the defendant was found driving the car hours after the car was stolen using a duplicate key, and that the defendant fled from an officer was sufficient to authorize the defendant's conviction for theft by taking (automobile) in violation of O.C.G.A. § 16-8-2(a). Kelly v. State, 313 Ga. App. 582, 722 S.E.2d 175 (2012).

Jury Instructions

Charging entire statute. — Trial court did not err in charging the jury with the entirety of the theft by taking statute. Wilson v. State, 211 Ga. App. 486, 439 S.E.2d 701 (1993).

Charge that jury might infer intent from proof of defendants' acts did not constitute error as impermissibly shifting burden to defendant. Rittenberry v. State, 155 Ga. App. 213, 270 S.E.2d 379 (1980).

When purchaser of goods not chargeable under section. — When the sole "interest" that the merchants had in the goods was a right to future payment pursuant to the sales contract, the property did not belong to "another," and the defendant could not be charged under former Code 1933, § 26-1802 (see now O.C.G.A. § 16-8-2), unless the facts fell

Jury Instructions (Cont'd)

within the rule that if one, meaning to steal another's goods, fraudulently prevails on the latter to deliver the goods to that person, under the understanding that the property in them is to pass, the person commits neither larceny nor any other crime by the taking, unless the transaction amounts to an indictable cheat. Elliott v. State, 149 Ga. App. 579, 254 S.E.2d 900 (1979).

Failure to charge on theft by taking required new trial. — When the evidence on behalf of the defendant denied the charge of armed robbery, and was such that it would have authorized the jury to find the defendant guilty of either of the two lesser offenses of robbery by intimidation or theft by taking, the failure of the trial court to charge on robbery by intimidation and theft by taking required the grant of a new trial. Hensley v. State, 228 Ga. 501, 186 S.E.2d 729 (1972).

Evidence showing both unlawful taking and unlawful conversion. — It is reversible error to authorize in charge conviction of unlawful taking based upon evidence also showing unlawful conversion. Robinson v. State, 152 Ga. App. 296, 262 S.E.2d 577 (1979).

When there is no evidence whatsoever to authorize the jury to find misdemeanor grade of theft by taking (value of the goods taken being $100.00) (now $200.00 or less) the court does not err in failing to charge the jury they might recommend the defendant be punished for a misdemeanor under the charge. Richardson v. State, 144 Ga. App. 416, 240 S.E.2d 917 (1977).

Judge is not required to charge jury on lesser offense of criminal trespass in the absence of a specific request by defense counsel. Martin v. State, 143 Ga. App. 875, 240 S.E.2d 231 (1977).

When not error to fail to charge on theft by taking. — When the state's evidence requires a verdict of guilty of robbery by sudden snatching, and the defendant's evidence if believed would require an acquittal on the ground of mistaken identity, it is not error to fail to charge on the offense of theft by taking. Hinton v. State, 127 Ga. App. 108, 192 S.E.2d 717 (1972); Teague v. State, 169 Ga. App. 285, 312 S.E.2d 818 (1983), aff'd, 252 Ga. 534, 314 S.E.2d 910 (1984).

Defendant's claim of error in the failure to instruct the jury on theft by taking was rejected as the defendant failed to request an instruction on theft by taking as a lesser included offense of robbery. Young v. State, 280 Ga. 65, 623 S.E.2d 491 (2005).

Because the elements of theft by taking could not be inferred from the defendant's testimony, the trial court did not err in denying the defendant's requested instruction on the same as a lesser included offense; moreover, any error in failing to give this requested instruction was harmless given the overwhelming evidence that the defendant committed a burglary. Goldberg v. State, 280 Ga. App. 600, 634 S.E.2d 419 (2006), aff'd, 282 Ga. 542, 651 S.E.2d 667 (2007).

Because the undisputed facts showed that the victim was conscious of the crime as the crime was being committed, the trial court's refusal to charge the jury on theft by taking as a lesser-included offense of robbery by snatching was not erroneous. Bettis v. State, 285 Ga. App. 643, 647 S.E.2d 340 (2007), cert. denied, No. S07C1535, 2007 Ga. LEXIS 862 (Ga. 2007).

Because the trial court properly instructed the jury on both the crimes of armed robbery and theft by taking, and expressly stated that in the event that it did not believe that the defendant was guilty of armed robbery beyond a reasonable doubt, it could convict on the lesser offense of theft by taking, given that the evidence was sufficient to authorize a finding of guilt on the armed robbery charge, the jury was authorized to reject the defendant's claim that the victim knowingly assisted in the planning and perpetration of the crime. Hester v. State, 287 Ga. App. 434, 651 S.E.2d 538 (2007).

Because a defendant either committed burglary or committed no crime at all, a charge on the lesser included offense of theft by taking was not required. Holt v. State, 293 Ga. App. 477, 667 S.E.2d 645 (2008).

Trial court did not err in refusing to give an instruction on theft by taking as a lesser included offense of robbery by sud-

den snatching as the victim's testimony was sufficient to support the charge of robbery by snatching and the defense was that another individual committed the crime. Copeland v. State, 325 Ga. App. 668, 754 S.E.2d 636 (2014).

Trial court did not err by failing to charge the jury on unarmed robbery or theft by taking as lesser-included offenses to armed robbery in light of the overwhelming evidence of the defendant's guilt and the failure to give the lesser-included instructions neither created any reasonable likelihood that the state's burden of proving all essential elements of armed robbery was lessened, or that the charge as given likely affected the outcome of the proceedings. Boccia v. State, 335 Ga. App. 687, 782 S.E.2d 792 (2016).

Not error not to charge theft by taking unless evidence authorizes such. — It is not error to fail to charge the defendant with theft by taking, as a lesser offense included in a charge of armed robbery or robbery by intimidation, unless the evidence authorizes a finding of the lessor offense. Sanders v. State, 135 Ga. App. 436, 218 S.E.2d 140 (1975).

Theft by taking charge justified. — Since entering an automobile was a lesser-included offense of theft by taking as a matter of fact, the trial court did not err in instructing the jury on the lesser-included offense where the facts supported both offenses. Williams v. State, 255 Ga. App. 775, 566 S.E.2d 477 (2002).

Armed robbery properly charged. — Person who commits armed robbery is not necessarily entitled to obtain charge as to theft by taking. Shepherd v. State, 234 Ga. 75, 214 S.E.2d 535 (1975).

When the state's evidence clearly warranted a charge on armed robbery, which was given, and there was no evidence of the lesser offense of theft by taking, there was no error in failing to give the requested charge. Shepherd v. State, 234 Ga. 75, 214 S.E.2d 535 (1975); Edwards v. State, 209 Ga. App. 304, 433 S.E.2d 619 (1993).

Failure to give limiting instructions as to "unlawful taking." — When the state charged the defendant with "unlawful taking" method of theft by taking, the trial court committed reversible error in giving the entirety of O.C.G.A. § 16-8-2 in a charge to the jury, emphasizing and explaining words in a method of commission of the offense which was not charged, and failing to give a limiting instruction concerning which method could be considered by the jury. Gaines v. State, 177 Ga. App. 795, 341 S.E.2d 252 (1986).

Failure to charge on affirmative defense. — Trial court did not err in failing to charge the jury that an affirmative defense to a prosecution for theft by a public officer arose if the defendant, a sheriff, acted under an honest claim of right to the property or service involved pursuant to O.C.G.A. § 16-8-10(2), because the defendant could not have had an honest claim of right to the county's property. Dorsey v. State, 279 Ga. 534, 615 S.E.2d 512 (2005).

Failure to charge jury on issue of character of defendant was reversible error, where defendant's character was an issue in the trial of the case. Chastain v. State, 177 Ga. App. 236, 339 S.E.2d 298 (1985).

No possibility jury based verdict on incorrect theory. — Since the court did not charge the jury that theft by taking could consist of the unlawful appropriation of property lawfully obtained, and thus there was no possibility that the jury based its verdict on that theory rather than the theory alleged in the indictment — theft by taking, the state's evidence, was amply sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that at the time defendant made the withdrawals at issue, the defendant was well aware that defendant was obtaining funds which did not belong to defendant and which defendant had no right to receive. Mullen v. State, 203 Ga. App. 170, 416 S.E.2d 784 (1992).

Instruction to infer guilt based on recent possession. — Trial court's instruction to the jurors that they could infer defendant's guilt to robbery or auto theft from defendant's possession of a victim's car keys unless there was a reasonable explanation for that possession did not unconstitutionally shift the burden of proof to defendant. Johnson v. State, 277 Ga. 82, 586 S.E.2d 306 (2003).

Jury Instructions (Cont'd)

While the evidence was sufficient to support the defendant's conviction of theft by taking of a motor vehicle under O.C.G.A. § 16-8-2, the trial court's jury charge—regarding an inference arising from the defendant's recent possession of a stolen truck—effectively shifted the burden of persuasion to the defendant in violation of the due process clause; the error was not harmless as the error applied to an element of the crime that was at issue in the trial: whether the defendant was the person who stole the truck. Ward v. State, 312 Ga. App. 609, 718 S.E.2d 915 (2011).

Charge barred by statute of limitations. — Trial court did not err by granting the defendant's motion for plea in bar dismissing the charges of conversion of sales and use taxes, theft by taking, and false swearing against the defendant because the charges were not brought within four years of the dates on which the crimes were allegedly committed as required by O.C.G.A. § 17-3-1. State v. Crowder, 338 Ga. App. 642, 791 S.E.2d 423 (2016).

Charge not warranted. — When the state's evidence established all of the elements of burglary and defendant, testifying in defendant's own behalf, admitted all of the allegations of the indictment, the lesser included offense of theft by taking was not raised by the evidence and it was not error to fail to charge the jury on this lesser crime as a possible verdict. Crawford v. State, 181 Ga. App. 454, 352 S.E.2d 635 (1987).

Trial court did not err in failing to instruct the jury that the amount of cash stolen could have been less than $500.00 because defense counsel specifically agreed that no charge on the value of the stolen money was necessary and because the undisputed evidence revealed that the amount of money stolen was more than $500.00. Turner v. State, 276 Ga. App. 620, 624 S.E.2d 244 (2005).

While the prosecution against the defendant on charges of burglary, theft by taking, and criminal trespass included both direct and circumstantial evidence, convictions on those charges were not reversed merely because the trial court failed to charge former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6) as the defendant failed to request that charge. Rodriguez v. State, 283 Ga. App. 752, 642 S.E.2d 705 (2007).

Evidence did not support a charge on theft by taking, O.C.G.A. § 16-8-2, as a lesser included offense of robbery by sudden snatching, O.C.G.A. § 16-8-40(a)(3), because the evidence showed that the victim was conscious of the crime as the crime was being committed; even if the victim did not actually see the defendant pick up the wallet, when the victim saw the defendant running toward the exit of a store with the wallet the victim gave chase but was unable to stop the defendant. Brown v. State, 309 Ga. App. 511, 710 S.E.2d 674 (2011).

Jury charge held proper. — Jury instruction stating, "A person commits the offense of theft by taking when that person unlawfully takes any property of another with the intention of depriving the other person of the property regardless of the manner in which the property is taken or appropriated," was proper. Taken as a whole, the charge conformed to the indictment and stated the law accurately when the charge omitted the possibility that the defendant had misappropriated money after having lawful possession of the money. Dudley v. State, 287 Ga. App. 794, 652 S.E.2d 840 (2007), cert. denied, No. S08C0319, 2008 Ga. LEXIS 168 (Ga. 2008).

Punishment

Classification of punishment determined by value of property taken. — There are not two crimes of theft by taking, one being a misdemeanor and the other being a felony. There is only one such crime, and upon conviction for it, the punishment only is determined by the value of the property taken. Mack v. Ricketts, 236 Ga. 86, 222 S.E.2d 337 (1976).

Value was not an element of the crime of theft by taking as proscribed by former Code 1933, § 26-1802 (see O.C.G.A. § 16-8-2), the value of stolen items was relevant only for purposes of distinguishing between a misdemeanor and a felony.

Stancell v. State, 146 Ga. App. 773, 247 S.E.2d 587 (1978); Hight v. State, 221 Ga. App. 574, 472 S.E.2d 113 (1996).

Value is not element, per se, of statute defining theft by taking. Value, is however, relevant in ascertaining punishment to be imposed. Thus, value can be an issue in any theft case, in the same manner as an element of the substantive offense itself. Bryan v. State, 148 Ga. App. 428, 251 S.E.2d 338 (1978); Wilson v. Reed, 246 Ga. 743, 272 S.E.2d 699 (1980).

While defendant claimed the trial court erred in sentencing defendant for felony theft by taking because the evidence was insufficient to show the property stolen exceeded $500, defense counsel conceded at trial that the victim's testimony that the victim had over $600 in the victim's purse provided sufficient evidence to support felony sentencing. Grindle v. State, 265 Ga. App. 717, 595 S.E.2d 549 (2004).

Despite the defendant's claim that reversible error was premised on the state's failure to comply with the required notice upon filing two charges of felony theft by taking, as the indictment failed to specifically allege either that the value of the items stolen exceeded $500, or that the items were motor vehicles, Georgia law did not establish two classifications for theft by taking crimes, but a determination as to the felony or misdemeanor status of a charge was based on the value of the property taken; moreover, because the defendant failed to furnish the appellate court with a transcript, it was left with no other alternative but to presume the trial judge properly considered the evidence in imposing sentence. Conley v. State, 281 Ga. App. 841, 637 S.E.2d 438 (2006), cert. denied, No. S07C0315, 2007 Ga. LEXIS 67 (Ga. 2007).

Defendant's felony sentence for theft by taking under O.C.G.A. §§ 16-8-2 and 16-8-12(a) had to be vacated because, although the state proved that the defendant took certain software belonging to the defendant's employer, which the defendant was not permitted to copy, the state failed to prove the value of the software so the defendant could only receive a misdemeanor sentence; the value of the software was not an element of the crime but only determined whether the defendant was punished for a felony or a misdemeanor. DuCom v. State, 288 Ga. App. 555, 654 S.E.2d 670 (2007), cert. denied, No. S08C0598, 2008 Ga. LEXIS 383 (Ga. 2008).

Though there was sufficient evidence to support a finding that a juvenile committed an act of theft by taking, because the state failed to offer evidence as to the stolen property's value, the juvenile court erred in finding that the juvenile committed an act of felony theft by taking. Thus, the case required a remand for an adjudication of delinquency and a disposition thereof to be entered against the juvenile for committing an act which would have supported a conviction for the offense of misdemeanor theft by taking since the value of the stolen property only was relevant as to the conviction's classification as a felony versus a misdemeanor. In the Interest of J. S., 296 Ga. App. 144, 673 S.E.2d 645 (2009).

Defendant, who was convicted of theft by taking of eight or nine aluminum tire rims, was properly sentenced for felony theft because the prosecution established that the value of the rims exceeded $500 since lay testimony of the victim provided that used rims were valued at between $150 and $175 each so that the total value of the eight to nine rims taken exceeded $1,000. Perdue v. State, 300 Ga. App. 588, 685 S.E.2d 489 (2009).

Trial court did not err in imposing a felony sentence pursuant to O.C.G.A. § 16-8-12(a)(1) after the defendant was convicted of theft by taking in violation of O.C.G.A. § 16-8-2 for stealing lumber and other materials from a builder's job site because the evidence was sufficient for the trial court to determine that the fair cash market value of the property at the time and place of the theft exceeded $500 when according to the builder, the cost of the materials was $450, and the cost of the labor to construct the jigs was approximately $200, bringing the total value of the stolen property to $650; the builder clearly established knowledge, experience, and familiarity with the value of the property and, thus, established reasons for the value, having an opportunity for forming such an opinion. Partin v. State, 302 Ga. App. 589, 692 S.E.2d 32 (2010).

Punishment (Cont'd)

Felony sentence imposed by the trial court was vacated, and the case was remanded because, although the State of Georgia proved beyond a reasonable doubt that the defendant committed the offense of theft by taking under O.C.G.A. § 16-8-2, as the owner of the stolen property testified as to seeing the defendant take the property, the state's evidence was insufficient under O.C.G.A. § 16-8-12 to establish that the current fair market value of the stolen items exceeded $500. Porter v. State, 308 Ga. App. 121, 706 S.E.2d 620 (2011).

Charge of receiving stolen goods is equal charge to theft by taking and punishment is same. McRoy v. State, 131 Ga. App. 307, 205 S.E.2d 445 (1974).

Theft by taking a motor vehicle. — O.C.G.A. § 16-8-12(a)(5)(A) allowed the trial court to sentence defendant to not less than one nor more than 20 years' imprisonment for theft of a motor vehicle, and the court properly sentenced defendant to 10 years' imprisonment even though the state did not offer evidence to prove the value of the vehicle defendant took. Martin v. State, 266 Ga. App. 190, 596 S.E.2d 705 (2004).

Pretrial intervention program on related charges did not bar prosecution. — Prosecution of the defendants for theft by taking and criminal trespass in Calhoun County, O.C.G.A. §§ 16-7-21(b) and 16-8-2, was not prohibited by double jeopardy based on their prior entry into a pretrial intervention program under O.C.G.A. § 15-18-80(b) following charges of theft by receiving stolen property, O.C.G.A. § 16-8-7(a), in Irwin County because there was no prosecution in Irwin County within the meaning of O.C.G.A. §§ 16-1-3(14) and 16-1-8(a)(1)-(2). Palmer v. State, 341 Ga. App. 433, 801 S.E.2d 300 (2017).

Separate sentences for separate offenses. — Given that an indictment properly charged the defendant with committing two thefts, approximately one year apart, involving property from two different owners and each requiring proof of facts or elements not required to establish the other offense, those offenses were distinct and separate enough that imposition of a sentence for each crime was proper. Conley v. State, 281 Ga. App. 841, 637 S.E.2d 438 (2006), cert. denied, No. S07C0315, 2007 Ga. LEXIS 67 (Ga. 2007).

Sentence as a recidivist proper. — Upon convictions for armed robbery, possession of a firearm during the commission of a crime, and theft by taking, the trial court did not err in denying a motion to vacate an illegal sentence, despite the claim that the defendant was improperly punished as a recidivist, as nothing supported the argument that the defendant received an enhanced punishment based on an uncertified, non-final disposition from the State of Louisiana; moreover, a trial court was authorized to sentence a defendant to life imprisonment for armed robbery, even when that defendant was not a recidivist. Jefferson v. State, 279 Ga. App. 97, 630 S.E.2d 528 (2006).

Trial court did not err in considering the defendant's prior guilty plea in sentencing the defendant as a recidivist after the defendant was convicted of felony theft by taking because the state, by tendering the certified copy of the plea, met the state's initial burden of proving that the defendant had entered the guilty plea. Sheppard v. State, 300 Ga. App. 631, 686 S.E.2d 295 (2009).

Scrivener's error was held moot. — Because a scrivener's error regarding the sentence entered upon the defendant's plea to five counts of theft by taking had already been corrected by the trial court, the sentence imposed was upheld, and any claim of error was rendered moot. Manley v. State, 287 Ga. App. 358, 651 S.E.2d 453 (2007), cert. denied, 2008 Ga. LEXIS 94 (Ga. 2008).

Juvenile's sentence under O.C.G.A. § 15-11-63 vacated. — Although the state argued that a juvenile had been adjudicated on five separate petitions setting out five separate felonies, because the record revealed that adjudication had occurred on only two prior occasions for acts which, if done by an adult, would have been felonies, the juvenile's sentence under O.C.G.A. § 15-11-63(a)(2)(B)(vii) was vacated, and the case was remanded for resentencing. In the Interest of P.R., 282 Ga. App. 480, 638 S.E.2d 898 (2006).

Evidence sufficient for juvenile's delinquency adjudication. — Testimony from the victims of three auto thefts, along with statements given by defendant juvenile, were legally sufficient to support the defendant's delinquency adjudication for acts which, if committed by an adult, would constitute the crimes of burglary and theft by taking-vehicle. In the Interest of E.J., 292 Ga. App. 69, 663 S.E.2d 411 (2008).

Merged counts for sentencing. — Two counts of armed robbery and two counts of theft by taking should have been merged into one armed robbery conviction. When a single victim was robbed of multiple items in a single transaction, there was only one robbery, and the same evidence was used to prove both the theft and the armed robbery charges. Wells v. State, 294 Ga. App. 277, 668 S.E.2d 881 (2008).

Sentence of 111 years proper. — When the defendant was convicted of aggravated assault, burglary, theft by taking, and carrying a concealed weapon, the trial court properly imposed a 111-year sentence of imprisonment, which was within the statutory limits and which was the maximum possible. The presumption of vindictiveness was absent when a trial court imposed a greater penalty after trial than the court would have after a guilty plea; furthermore, the trial court explained that the court imposed the sentence because the defendant's actions were life-threatening, because the jury convicted the defendant of entering the dwelling with intent to commit murder because the defendant's actions against one victim, the defendant's parent, had escalated from the defendant's previous misdemeanor crimes against the parent, and because the defendant displayed no remorse. Townes v. State, 298 Ga. App. 185, 679 S.E.2d 772 (2009).

Alien's sentence and impact on immigration sentence. — After an alien was sentenced to a four-year confinement term, to be served on probation, for a Georgia felony theft by taking conviction, the four-year probationary period the alien served for the sentence counted toward the alien's term of imprisonment for purposes of applying 8 U.S.C. § 1101(a)(43)(G). The Board of Immigration Appeals and the immigration judge correctly found that the alien qualified as an aggravated felon, removable under 8 U.S.C. § 1227(a)(2)(A)(iii). Amaya-Flores v. United States AG, 595 Fed. Appx. 958 (11th Cir. Dec. 29, 2014) (Unpublished).

Sentence differing from plea agreement. — Following the state agreeing to dismiss the RICO and theft charges against the defendant in exchange for a guilty plea to one misdemeanor count of hindering and obstructing a law enforcement officer conditioned upon the defendant testifying truthfully at the trial against the co-defendants, the trial court erred by imposing a sentence upon the defendant which differed from the understood terms of the negotiated plea. Lewis v. State, 330 Ga. App. 412, 767 S.E.2d 771 (2014).

Restitution order proper. — Defendant, who pled guilty to theft by taking under O.C.G.A. § 16-8-2, could not argue that the trial court failed to consider the factors in O.C.G.A. § 17-14-10 in making a restitution order as the defendant did not meet the burden of proof under O.C.G.A. § 17-14-7 in establishing the defendant's expenses as the defendant only told the court that the defendant had to make monthly payments; the defendant made no response when asked if the defendant could make house payments and the like if half the defendant's monthly income was applied to the restitution order. Wimpey v. State, 297 Ga. App. 182, 676 S.E.2d 831 (2009).

OPINIONS OF THE ATTORNEY GENERAL

Former Code 1933, should not be used to attempt to collect a debt owed to the Department of Transportation; the legislature did not intend that a criminal proceeding be used in this manner. 1969 Op. Att'y Gen. No. 69-505.

Department may bring criminal proceedings against condemnee un-

der former Code 1933, § 26-1802 (see O.C.G.A. § 16-8-2) if condemnee severs trade fixtures from a condemned parcel of property and carries them away, even though such fixtures are paid for by the department in condemnation proceedings. 1969 Op. Att'y Gen. No. 69-505.

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Larceny, § 13.

C.J.S. — 52B C.J.S., Larceny, §§ 1 et seq., 15, 85, 88.

ALR. — Appropriation of property after obtaining possession by fraud as larceny, 26 A.L.R. 381.

Assisting in transportation or disposal of property known to have been stolen as rendering one guilty of larceny, 29 A.L.R. 1031.

Larceny or embezzlement by one spouse of other's property, 55 A.L.R. 558.

What amounts to embezzlement or larceny within fidelity bond, 56 A.L.R. 967.

Acceptance of defendant's note or other contractual obligation as affecting charge of embezzlement or larceny, 70 A.L.R. 208.

Appropriation or removal without payment of property delivered in expectation of immediate cash payment, as criminal offense, 83 A.L.R. 441.

Offense of larceny, embezzlement, robbery, or assault to commit robbery, as affected by defendant's intention to take or retain money or property in payment of, or as security for, a claim, or to collect a debt, or to recoup gambling losses, 116 A.L.R. 997.

Distinction between larceny and embezzlement, 146 A.L.R. 532.

Gambling or lottery paraphernalia as subject of larceny, burglary, or robbery, 51 A.L.R.2d 1396.

Embezzlement by independent collector or collection agency working on commission or percentage, 56 A.L.R.2d 1156.

Taking and pledging or pawning, another's property as larceny, 82 A.L.R.2d 863.

Criminal responsibility for embezzlement from corporation by stockholder owning entire beneficial interest, 83 A.L.R.2d 791.

Automobiles: elements of offense defined in "joyriding" statutes, 9 A.L.R.3d 633.

Criminal prosecution based upon breaking into or taking money or goods from vending machine or other coin-operated machine, 45 A.L.R.3d 1286.

Construction and effect, in false imprisonment action, of statute providing for detention of suspected shoplifters, 47 A.L.R.3d 998.

What amounts to "exclusive" possession of stolen goods to support inference of burglary or other felonious taking, 51 A.L.R.3d 727.

Changing of price tags by patron in self-service store as criminal offense, 60 A.L.R.3d 1293.

Asportation of motor vehicle as necessary element to support charge of larceny, 70 A.L.R.3d 1202.

Receiver of stolen goods as accomplice of thief for purposes of corroboration, 74 A.L.R.3d 560.

Retaking of money lost at gambling as robbery or larceny, 77 A.L.R.3d 1363.

Validity and construction of statute providing criminal penalties for failure of contractor who has received payment from owner to pay laborers or materialmen, 78 A.L.R.3d 563.

Embezzlement, larceny, false pretenses, or allied criminal fraud by a partner, 82 A.L.R.3d 822.

Modern status: instruction allowing presumption or inference of guilt from possession of recently stolen property as violation of defendant's privilege against self-incrimination, 88 A.L.R.3d 1178.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 A.L.R.3d 1309.

What constitutes "recently" stolen property within rule inferring guilt from unexplained possession of such property, 89 A.L.R.3d 1202.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 A.L.R.4th 971.

Joyriding or similar charge as lesser-included offense of larceny or similar charge, 78 A.L.R.5th 567.

What constitutes tax-deductible theft loss under 26 USCS § 165, 98 A.L.R. Fed. 229.

What constitutes violation of 15 USCS § 714m(c), proscribing larceny or conversion of property owned by or pledged to Commodity Credit Corporation, 109 A.L.R. Fed. 871.

State criminal prosecution against medical practitioner for fraud in connection with claims under Medicaid, Medicare, or similar welfare program for providing medical services, 79 A.L.R.6th 125.

16-8-3. Theft by deception.

(a) A person commits the offense of theft by deception when he obtains property by any deceitful means or artful practice with the intention of depriving the owner of the property.

(b) A person deceives if he intentionally:

(1) Creates or confirms another's impression of an existing fact or past event which is false and which the accused knows or believes to be false;

(2) Fails to correct a false impression of an existing fact or past event which he has previously created or confirmed;

(3) Prevents another from acquiring information pertinent to the disposition of the property involved;

(4) Sells or otherwise transfers or encumbers property intentionally failing to disclose a substantial and valid known lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not a matter of official record; or

(5) Promises performance of services which he does not intend to perform or knows will not be performed. Evidence of failure to perform standing alone shall not be sufficient to authorize a conviction under this subsection.

(c) "Deceitful means" and "artful practice" do not, however, include falsity as to matters having no pecuniary significance, or exaggeration by statements unlikely to deceive ordinary persons in the group addressed. (Code 1933, § 26-1803, enacted by Ga. L. 1968, p. 1249, § 1.)

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article, "A Comprehensive Analysis of Georgia RICO," see 9 Ga. St. U.L. Rev. 537 (1993). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions decisions under former Penal Code 1910, §§ 703, 719 and former Code 1933, §§ 26-3918, 26-7408, 26-7409, and 26-7410, as they read prior to revision of the title by Ga. L. 1968, p. 1249, are included in the annotations for this Code section.

Intent to defraud is gist of offense. McElmurray v. State, 76 Ga. App. 604, 47 S.E.2d 139 (1948) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

It must be shown that victim defrauded as result of scheme and device to defraud. Cohen v. State, 101 Ga. App. 23, 112 S.E.2d 672 (1960) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Essential requisites in offense of cheating and swindling by false representations are: (a) that the representations were made; (b) that they were knowingly and designedly false; (c) that they were made with intent to deceive and defraud; (d) that they did deceive and defraud; (e) that they related to an existing fact or past event; (f) that the party to whom the false statements were made, relying on their truth, was thereby induced to part with the party's property. It is incumbent upon the state to prove all of these elements of the offense; and if any one is lacking in the proof, the offense is not made out. Diamond v. State, 52 Ga. App. 184, 182 S.E. 813 (1935) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410); Chandler v. State, 80 Ga. App. 550, 56 S.E.2d 794 (1949) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Purpose of Code section. — Former Code 1933 (see now O.C.G.A. § 16-8-3) had as its purpose solely the punishment of fraud, and not the creation of a remedy for the collection of debts or the compelling of the performance of contracts. Bullard v. State, 60 Ga. App. 33, 2 S.E.2d 725 (1939) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Purpose of this law is not to enforce the contract to perform services, but to punish the fraudulent procurement of money, or other thing of value, under the contract. Banton v. State, 57 Ga. App. 173, 194 S.E. 827 (1938) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Offense declared in present O.C.G.A. § 16-8-3(b)(5) is not for failure to perform service or pay debts, but for fraudulently procuring money or other thing of value. Bullard v. State, 60 Ga. App. 33, 2 S.E.2d 725 (1939) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

No representation to person defrauded is necessary. — Any deceitful means or artful practice may embrace either false and fraudulent representations, or other deceitful and fraudulent conduct which cheats and defrauds the prosecutor. In other words, one may be guilty of cheating and swindling although one made no representation whatever to the person defrauded. Hadden v. State, 73 Ga. App. 23, 35 S.E.2d 518 (1945) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Effect of whether or not ownership passes with possession of goods. — If one, meaning to steal another's goods, fraudulently prevails on the latter to deliver them to the person, under the understanding that the property in them is to pass, the person commits neither larceny, nor any other crime, by the taking, unless the transaction amounts to an indictable cheat; but if, with the like intent, the person fraudulently gets leave to take the possession only, and takes and converts the whole to self, the person becomes guilty of larceny, because, while the per-

son's intent is thus to appropriate the property, the consent, which the person fraudulently obtained, covers no more than the possession. Thompson v. State, 67 Ga. App. 240, 19 S.E.2d 777, cert. denied, 317 U.S. 667, 63 S. Ct. 72, 87 L. Ed. 536 (1942) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

If by fraud (deceitful means and artful practice) a person is induced to part with the person's goods, meaning to relinquish the person's property in them as well as possession, the person who thus obtains them may be chargeable with a cheat at the common law or under the statutes against false pretenses, yet not with larceny, because, it is assumed, the owner having actually consented to part with ownership, there was no trespass in the taking; but this doctrine refers only to cases in which the ownership of the goods is meant by the owner, to pass with them. Thompson v. State, 67 Ga. App. 240, 19 S.E.2d 777, cert. denied, 317 U.S. 667, 63 S. Ct. 72, 87 L. Ed. 536 (1942) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

If the one consents to part with merely possession, another who takes them intending a theft goes beyond the consent, and irrespectively of the question of fraud commits larceny. Thompson v. State, 67 Ga. App. 240, 19 S.E.2d 777, cert. denied, 317 U.S. 667, 63 S. Ct. 72, 87 L. Ed. 536 (1942) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Pecuniary loss is essential element. — It is essential to the legality of a conviction for cheating and swindling that the person alleged to have been defrauded and cheated shall have sustained some pecuniary loss. Turnipseed v. State, 53 Ga. App. 194, 185 S.E. 403 (1936) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410); Wilson v. State, 84 Ga. App. 703, 67 S.E.2d 164 (1951) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

When a defendant was accused of obtaining a settlement on a false tort claim from a corporation, which settlement was actually paid by the corporation's insurer, it was inferable that the company paid the insurance carrier premiums to pay the company's losses, and that these premiums were "jumped up" at the end of the year in accordance with the injuries settled for. Turnipseed v. State, 53 Ga. App. 194, 185 S.E. 403 (1936) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

When a debtor executes to two creditors separate mortgages to secure debts due to them respectively, and it appears that in procuring the credit to secure which the last mortgage was executed the debtor represented to the mortgagee that the property mortgaged was unencumbered, such misrepresentation cannot be made the basis of a prosecution under former Code 1933 unless it be shown that in consequence thereof the second mortgagee has been in fact defrauded, and that in extending the credit upon the faith of such misrepresentation the second mortgage has sustained a loss. Daniel v. State, 63 Ga. App. 12, 10 S.E.2d 80 (1940) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Evidence showing that the prosecutor who paid the defendant's note to the bank received security therefor, and failing to show that such security was not sufficient to cover the prosecutor's loss, is insufficient to support a verdict of guilty. Wilson v. State, 84 Ga. App. 703, 67 S.E.2d 164 (1951) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

When the evidence merely shows that representations were made by the defendant that defendant owned certain property and that it was unencumbered by mortgages or liens, and upon the faith of these representations a mortgage was taken when in fact there was a valid recorded mortgage on the same property, this alone does not prove loss, for if both mortgages were foreclosed, the property sold at public outcry, it might bring more than the amount of both debts for which the mortgages were given to secure. Daniel v. State, 63 Ga. App. 12, 10 S.E.2d 80 (1940) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Fraud in the payment of a preexisting debt cannot be made the foundation of a charge of cheating and swindling where such fraud does not deprive the prosecutor of any right, property, money or other

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thing of value. Wilson v. State, 84 Ga. App. 703, 67 S.E.2d 164 (1951) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Evidence that the defendant and another individual approached the prosecutor, and by making false and fraudulent representations as to the solvency of a certain corporation and the value of its stock when in fact, the stock had no value, as defendant should have known, induced the said prosecutor to exchange merchandise of the value of $4,800.00 for 200 shares of stock, thus defrauding the prosecutor out of that sum of money, was sufficient to support a conviction under the provisions for cheating and swindling. Thrailkill v. State, 103 Ga. App. 189, 118 S.E.2d 837 (1961) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Victims' pecuniary loss not required. — Even though bank ultimately sustained no monetary loss, the defendant's conviction for theft by deception and attempted theft by deception was sustained. Bishop v. State, 223 Ga. App. 422, 477 S.E.2d 422 (1996).

Proof of ownership as element of crime. — When there is no proof that the victim, at the time of the commission of the offense charged, was the legal owner of the money or that the victim was in the "technical possession" of the property or that the victim had such a special interest in the property as would sustain a finding of ownership, the proof does not conform with an essential allegation of this offense and the variance is fatal. Henley v. State, 59 Ga. App. 595, 2 S.E.2d 139 (1939) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Civil fraud and theft by deception have different elements and showing that there are jury issues as to fraud does not necessarily show that there are jury issues as to theft by deception; a failure to show the level of intent needed for proving theft by deception would preclude a jury issue on that crime as a predicate act for RICO purposes, defeating a RICO claim. Avery v. Chrysler Motors Corp., 214 Ga. App. 602, 448 S.E.2d 737 (1994).

It was error to charge the jury with language from O.C.G.A. § 16-8-3 in a civil action involving the misappropriation of assets in connection with the sale of an accounting firm. Crews v. Wahl, 238 Ga. App. 892, 520 S.E.2d 727 (1999).

Theft by deception and civil fraud have different elements and are not necessarily proved by the same evidence; thus, for purposes of RICO, the absence of civil fraud does not mean also the absence of criminal fraud, i.e., theft by deception. Willis v. First Data Pos, Inc., 245 Ga. App. 121, 536 S.E.2d 198 (2000).

No private right of action. — In a declaratory judgment case in which three intended beneficiaries alleged that an insurance company violated O.C.G.A. §§ 16-8-2, 16-8-3, and 16-8-4, those criminal statutes did not create a private cause of action. Am. Gen. Life & Accident Ins. Co. v. Ward, 509 F. Supp. 2d 1324 (N.D. Ga. Mar. 12, 2007).

Mortgage borrower could not bring civil claims against a loan servicer under O.C.G.A. §§ 16-8-2, 16-8-3, and 16-8-4, which were criminal statutes prohibiting theft by taking, by conversion, and by deception; the statutes did not purport to create a private cause of action. Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012).

In a case in which a car buyer appealed a district court's entry of summary judgment in favor of a lender, the Georgia criminal statutes for trespassing and theft, O.C.G.A. §§ 16-7-21, 16-8-2, and 16-8-3, did not expressly provide for a civil remedy and, thus, a civil remedy could not arise from a violation of those statutes. Goia v. Citifinancial Auto, 499 Fed. Appx. 930 (11th Cir. Dec. 3, 2012) (Unpublished).

Civil liability for damages. — Plaintiff failed to plead a claim to recover damages for conversion under O.C.G.A. § 51-10-6 based on a violation of two criminal statutes — theft by conversion of payments for property improvements and theft by taking — as the plaintiff did not allege any of the necessary elements to establish the violations and did not allege that the defendant was charged with or found guilty of a violation of those statutes. Harlander v. Turner (In re Turner), No. 15-04037-EJC, 2017 Bankr. LEXIS

917 (Bankr. S.D. Ga. Mar. 31, 2017).

Former laws distinguished. — Even though O.C.G.A. § 16-8-3 evolved from former cheating laws, there are significant differences between them and the trial court did not err in refusing to charge the jury on its elements of the offense under former laws. Arnold v. State, 210 Ga. App. 843, 437 S.E.2d 844 (1993).

State court had jurisdiction over prosecution of defendant charged with theft by deception involving nine checks, each written for less than $280. Cartwright v. State, 229 Ga. App. 385, 494 S.E.2d 99 (1997).

Benefit to defendant not required. — State was not required to show that the defendant's received a benefit in a prosecution of theft by deception. Arnold v. State, 210 Ga. App. 843, 437 S.E.2d 844 (1993).

Defendant cannot avoid conviction because a portion of representations may not have been criminal since the representatives were made in connection with other representations which were found by the jury to have been criminal. Cross v. State, 126 Ga. App. 346, 190 S.E.2d 561 (1972).

Part of inducements not deceptive. — Inducement relied upon for conviction need only be a part of the inducements under which the defrauded person parted with money. Ray v. State, 165 Ga. App. 89, 299 S.E.2d 584 (1983).

Victims' lack of diligence no defense. — Bank's failure to follow the bank's own procedures in holding out-of-town checks afforded no defense to a defendant prosecuted for theft by deception and attempted theft by deception in a check kiting scheme. Bishop v. State, 223 Ga. App. 422, 477 S.E.2d 422 (1996).

"Services" construed. — Obligation to install carpeting, being part of one inseparable agreement along with the carpet's sale, constituted "services" within the purview of former Code 1933, § 26-1803 (see now O.C.G.A. § 16-8-3). Cross v. State, 126 Ga. App. 346, 190 S.E.2d 561 (1972).

Claim for future payment. — Defendant's convictions of two counts of theft by deception, O.C.G.A. § 16-8-3, had to be reversed; the defendant's claims that the defendant would have money in the future to cover checks written for two vehicles bore on future performance and were not actionable as theft by deception; however, the defendant's convictions on two other counts of theft by deception were affirmed as the defendant's acts of obtaining money from a victim by creating the impression that the money was to be used to buy a vehicle in which ownership would be shared and agreeing to perform roofing work which the defendant had no intention of completing constituted theft by deception. Brady v. State, 267 Ga. App. 351, 599 S.E.2d 313 (2004).

Simultaneous employment by two companies. — Evidence was insufficient to support defendant's conviction on charges that the defendant had obtained wages from two employers through the creation of a false impression of fact since the evidence did not establish that the defendant's employment with either of the two companies in question had been conditioned on any express promise or representation by the defendant to the effect that the defendant would work exclusively for those companies and both employers denied that the defendant had received any compensation to which the defendant was not entitled. Wilburn v. State, 201 Ga. App. 61, 410 S.E.2d 321 (1991).

Former Code 1933, § 26-1803 (see now O.C.G.A. § 16-8-3) did not provide for imprisonment for debt. Clontz v. State, 140 Ga. App. 440, 231 S.E.2d 454 (1976).

Sufficiency of indictment. — When an indictment for cheating and swindling and not a presentment is being considered, it is not necessary that the very words of the pretense be set out; it is sufficient to state the effect of the pretense correctly; hence the indictment need not allege whether the pretense was spoken or written. Turnipseed v. State, 53 Ga. App. 194, 185 S.E. 403 (1936) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

When the allegation is that a corporation was defrauded, or attempted to be defrauded, it is sufficient to set out the name of such corporation, without designating any particular individual, officer,

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or agent of such corporation to whom the representations or false pretenses were made. Turnipseed v. State, 53 Ga. App. 194, 185 S.E. 403 (1936) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

While it is necessary in an indictment to allege the ownership of the moneys obtained, yet if, from the allegations of the indictment as a whole, it is clearly inferable to whom the money belonged, the absence of an express allegation to that effect is no reason for quashing the indictment. Scott v. State, 53 Ga. App. 61, 185 S.E. 131 (1936), aff'd, 184 Ga. 164, 190 S.E. 582 (1937) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Indictment which alleges that the defendant conspired with others to defraud and cheat a named corporation by falsely representing that another person was injured by the agents of such corporation, and thereby did cheat and defraud that corporation, states the offense of cheating and swindling. Scott v. State, 53 Ga. App. 61, 185 S.E. 131 (1936), aff'd, 184 Ga. 164, 190 S.E. 582 (1937) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

When it was consistent with the language of an indictment charging the defendant with cheating and swindling that there was not a false representation of an existing fact, but only a false estimate of the value of certain used cars, accounts, and notes, on the basis of which a third party was induced to lend defendant money, the statement of such an erroneous opinion, even if untrue or false, would not sustain the indictment. Carr v. State, 60 Ga. App. 590, 4 S.E.2d 500 (1939) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Variance in a specific allegation which referred to the manner in which the offense was committed would be fatal. Farmer v. State, 208 Ga. App. 198, 430 S.E.2d 397 (1993).

It was not necessary to note any corporate involvement on an indictment because, whether or not the defendant acted on the defendant's own behalf or on behalf of the defendant's alleged corporation or both, the defendant could be convicted of theft by deception by defendant's deceitful representations. Arnold v. State, 210 Ga. App. 843, 437 S.E.2d 844 (1993).

Indictment alleging that $250,000 loan was in "lawful currency" when in fact the amount was given to the defendant in the form of a check was not fatally defective. Arnold v. State, 210 Ga. App. 843, 437 S.E.2d 844 (1993).

Trial court erred in quashing an indictment for counts of residential mortgage fraud, in violation of O.C.G.A. § 16-8-102, and counts of felony theft by deception, in violation of O.C.G.A. § 16-8-3, because: (1) certain allegations between counts in the indictment were mere surplusage and did not invalidate the indictment; (2) the indictment was not duplicitous under O.C.G.A. § 16-1-7(a)(2); (3) the indictment was sufficient pursuant to the requirements of O.C.G.A. § 17-7-54(a) to withstand general and special demurrers as each count sufficiently stated the offense; and (4) each count was sufficient to charge each of the named defendants as either the actual perpetrator or as a party to the crime pursuant to O.C.G.A. §§ 16-2-20(a) and 16-2-21. State v. Corhen, 306 Ga. App. 495, 700 S.E.2d 912 (2010).

Theft by deception as lesser included offense of robbery by sudden snatching. — In a prosecution for robbery by sudden snatching, where the evidence showed that defendant took cigarettes from the counter while the store clerk was distracted and did not show that the clerk was fraudulently induced to part with the cigarettes, the trial court's failure to give requested charge on theft by deception was not error. King v. State, 214 Ga. App. 311, 447 S.E.2d 645 (1994).

Venue. — In a prosecution for theft by deception, venue was proper where the evidence showed that defendant's agent obtained a check for defendant in the forum county at the defendant's direction and subjected it to defendant's control. Arnold v. State, 210 Ga. App. 843, 437 S.E.2d 844 (1993).

Evidence was sufficient to establish venue in Hall County for a theft by deception charge because a witness testified

that at the defendant's request, the witness placed a check in the mailbox at a rental house, and that occurred the same day the defendant cashed the check; the police officer who responded to the witness's call testified that the house was located in Hall County. Forrester v. State, 315 Ga. App. 1, 726 S.E.2d 476 (2012).

Defendant's conviction for theft by deception, in violation of O.C.G.A. § 16-8-3, was reversed because no evidence was presented that the defendant had exercised control over the wire transfer funds in Morgan County, Georgia, where the trial was had on the charge. Davis v. State, 322 Ga. App. 826, 747 S.E.2d 19 (2013).

State's burden of proof. — When one is indicted for cheating and swindling by false representation as to one's ownership of a large quantity of a certain class of goods, a part of which one seeks to sell and does sell, for future delivery, collecting the purchase price and afterwards failing to deliver the quantity of goods sold, the state carries the burden of proving, not only that the representation was made substantially as alleged in the indictment, but also that it was falsely and fraudulently made. Ray v. State, 44 Ga. App. 763, 162 S.E. 861 (1932) (decided under former Penal Code 1910, §§ 703, 710).

Merger. — Evidence supported the trial court's judgment that the defendant committed felony theft by deception when the defendant lied about obtaining a bank loan so the defendant could purchase three pieces of equipment, took the equipment from the owner to have it inspected, and kept the equipment without paying for it. However, the trial court erred when it convicted defendant of three counts of felony theft by deception because, although each piece of equipment was worth more than $500, the same evidence was used to prove all three counts and the counts merged, as a matter of fact, into one offense. Pettiford v. State, 265 Ga. App. 874, 595 S.E.2d 673 (2004).

No merger with securities violations. — Trial court did not err in failing to merge the theft by conversion counts under O.C.G.A. § 16-8-3, and the securities violation counts under O.C.G.A. § 10-5-12 filed against the defendant because the state had to prove separate facts to find the defendant guilty of the theft by conversion offenses and the violations of the Georgia Securities Act, O.C.G.A. § 10-5-1 et seq. Furthermore, the securities violation counts were complete before the theft conversion occurred. Lavigne v. State, 299 Ga. App. 712, 683 S.E.2d 656 (2009).

No merger when multiple thefts from same victim. — In a prosecution for theft by deception, O.C.G.A. § 16-8-3, the trial court did not err in not merging counts involving multiple thefts involving the same victim, because when the defendant took money from a victim the offense of theft by deception was completed. When the defendant later took more money from the same victim, the defendant committed yet another theft by deception. Arnold v. State, 293 Ga. App. 395, 667 S.E.2d 167 (2008).

After the defendant was convicted on 52 counts related to the defendant's theft of more than $600,000 as the operator of a Ponzi scheme, although the trial court did not err in failing to merge the defendant's convictions for theft by conversion and theft by deception into the defendant's convictions for theft by taking, because theft by taking proscribed certain criminal conduct generally, while theft by conversion and theft by deception were specific crimes, the defendant's convictions for theft by taking merged into the defendant's convictions for theft by conversion and theft by deception; thus, the defendant's sentences for theft by taking were vacated, and the case was remanded to the trial court for resentencing. Mathis v. State, 343 Ga. App. 206, 807 S.E.2d 4 (2017).

Defenses. — When a defendant is charged with the offense of being a common cheat and swindler by means of specific false representations, which the defendant is alleged to have made, the fact that the party alleged to have been defrauded did not exercise reasonable diligence in preventing the fraud affords no defense to the accused. Suggs v. State, 69 Ga. App. 383, 25 S.E.2d 532 (1943) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Any lack of diligence by the victims in

General Consideration (Cont'd)

failing to obtain a title examination of the proposed collateral offered by the defendant as part of defendant's scheme was not a defense to the charge of theft by deception. Arnold v. State, 210 Ga. App. 843, 437 S.E.2d 844 (1993).

Restitution and repentance is no bar to prosecution. — Offense of obtaining money in goods of another by using any deceitful means or artful practice is complete as soon as the owner is thus deprived of property, and subsequent repentance and restitution on the part of the wrongdoer will constitute no bar to a prosecution of the wrongdoer. Green v. State, 52 Ga. App. 18, 182 S.E. 74 (1935) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Other inducements causing owner to part with property. — Deceitful means and artful practice by which an indictment charges the victim was defrauded and cheated need not be the sole inducement which caused the victim to part with property. Proof that the means and practice were relied upon and constituted in part such inducement will authorize a conviction, though there may have been other contributing inducements. Suggs v. State, 69 Ga. App. 383, 25 S.E.2d 532 (1943) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Second prosecution for theft by receiving not barred by double jeopardy. — Because the defendant failed to affirmatively show that the prosecutor had any actual knowledge regarding approximately $300,000 worth of jewelry items found in a toolbox located at the defendant's residence upon an eviction, which were the subject of a second theft prosecution involving jewelry the defendant had stolen, the second prosecution regarding those items was not barred on double jeopardy grounds. White v. State, 284 Ga. App. 805, 644 S.E.2d 903 (2007), cert. denied, 2007 Ga. LEXIS 564 (Ga. 2007).

Similar transaction notice not required. — In a defendant's prosecution for theft by deception under O.C.G.A. § 16-8-3 for a $600 ATM withdrawal from the victim's account, the state was not required to give similar transaction notice under Ga. Unif. Super. Ct. R. 31.1 and 31.3 as to a $200 ATM withdrawal and check theft because that conduct was evidence of the entire res gestae of the crime and those incidents were part of a single transaction. Parks v. State, 294 Ga. App. 646, 669 S.E.2d 684 (2008).

Cited in Stull v. State, 230 Ga. 99, 196 S.E.2d 7 (1973); Partain v. State, 129 Ga. App. 213, 199 S.E.2d 549 (1973); Andrews v. State, 130 Ga. App. 2, 202 S.E.2d 246 (1973); Dunphy v. State, 131 Ga. App. 615, 206 S.E.2d 524 (1974); Franklin Life Ins. Co. v. Hill, 136 Ga. App. 128, 220 S.E.2d 707 (1975); Taylor v. State, 136 Ga. App. 317, 221 S.E.2d 224 (1975); Roberts v. State, 137 Ga. App. 208, 223 S.E.2d 208 (1976); Jones v. State, 137 Ga. App. 612, 224 S.E.2d 473 (1976); Finley v. State, 139 Ga. App. 495, 229 S.E.2d 6 (1976); Croy v. Skinner, 410 F. Supp. 117 (N.D. Ga. 1976); Flinchum v. State, 141 Ga. App. 59, 232 S.E.2d 396 (1977); Eubanks v. State, 141 Ga. App. 569, 234 S.E.2d 95 (1977); Eubanks v. State, 144 Ga. App. 152, 241 S.E.2d 6 (1977); State v. Eubanks, 239 Ga. 483, 238 S.E.2d 38 (1977); Freedman v. United States, 437 F. Supp. 1252 (N.D. Ga. 1977); Perdue v. State, 147 Ga. App. 648, 249 S.E.2d 657 (1978); Conroy v. State, 155 Ga. App. 576, 271 S.E.2d 726 (1980); Change v. State, 156 Ga. App. 316, 274 S.E.2d 711 (1980); Hancock v. State, 158 Ga. App. 829, 282 S.E.2d 401 (1981); McNeil v. State, 159 Ga. App. 441, 283 S.E.2d 658 (1981); Davidson v. American Fitness Ctrs., Inc., 171 Ga. App. 691, 320 S.E.2d 824 (1984); Pelligrini v. State, 174 Ga. App. 84, 329 S.E.2d 186 (1985); Smith v. State, 174 Ga. App. 744, 331 S.E.2d 91 (1985); Holt v. State, 184 Ga. App. 664, 362 S.E.2d 464 (1987); Kimble v. State, 209 Ga. App. 36, 432 S.E.2d 636 (1993); State v. Schuman, 212 Ga. App. 231, 441 S.E.2d 466 (1994); Ragsdale v. South Fulton Mach. Works, Inc. (In re Whitacre Sunbelt, Inc.), 211 Bankr. 411 (Bankr. N.D. Ga. 1997); Elder v. State, 230 Ga. App. 122, 495 S.E.2d 596 (1998); Markowitz v. Wieland, 243 Ga. App. 151, 532 S.E.2d 705 (2000); Morrison v. State, 248 Ga. App. 785, 546 S.E.2d 312 (2001); First Data POS, Inc. v. Willis, 273 Ga. 792,

546 S.E.2d 781 (2001); Schoenbaum Ltd. Co., LLC v. Lenox Pines, LLC, 262 Ga. App. 457, 585 S.E.2d 643 (2003); Faillace v. Columbus Bank & Trust Co., 269 Ga. App. 866, 605 S.E.2d 450 (2004); Patterson v. State, 289 Ga. App. 663, 658 S.E.2d 210 (2008); Cisco v. State, 285 Ga. 656, 680 S.E.2d 831 (2009); Ledford v. Peeples, 568 F.3d 1258 (11th Cir. 2009); Summit Auto. Group, LLC v. Clark Kia Motors Ame., Inc., 298 Ga. App. 875, 681 S.E.2d 681 (2009); McKissick v. S. O. A., Inc., 299 Ga. App. 772, 684 S.E.2d 24 (2009).

Larceny After Trust

Conversion of property entrusted to another. — Where one entrusted with money by another fraudulently converts it to that person's own use, the person is guilty of larceny after trust, though he may have fraudulently induced the delegation of the trust with intent to so convert the money. Cole v. State, 95 Ga. App. 129, 97 S.E.2d 383 (1957) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

If a person, fraudulently intending to get possession of the money of another and appropriate the money to the person's own use, by false representations induces the owner to deliver the money to the person for the purpose of being applied for the owner's use or benefit, and then appropriates the money in pursuance of the original intent, the person is guilty of both larceny after trust delegated and simple larceny, and may be prosecuted for, and convicted of, either offense. Cordovano v. State, 61 Ga. App. 590, 7 S.E.2d 45 (1940); Cole v. State, 95 Ga. App. 129, 97 S.E.2d 383 (1957) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

When one voluntarily obtains money from another to be entrusted to that person for the use of the owner and the person violates the entrustment and fails to return the money, the person is guilty of larceny after trust. Cole v. State, 95 Ga. App. 129, 97 S.E.2d 383 (1957) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Contracts to Perform Services

Prima-facie case. — To make out a prima-facie case the state must prove, among other things, a definite contract that the defendant failed to perform the services so contracted for, without good and sufficient cause and that defendant failed to return the money so advanced, with interest thereon, at the time said labor was to be performed, without good and sufficient cause, and all to the loss and damage to the hirer. Banton v. State, 57 Ga. App. 173, 194 S.E. 827 (1938) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Fraudulent conduct of defendant is gist of crime, not merely failure to perform contract. Bullard v. State, 60 Ga. App. 33, 2 S.E.2d 725 (1939); Broddus v. State, 65 Ga. App. 27, 14 S.E.2d 607 (1941) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Dispute as to amount due after services perfomed a civil, not criminal, matter. — Trial court's findings in favor of a customer on the customer's counterclaim for malicious prosecution in a contractor's breach of contract and trover claim were upheld as the evidence established that the contractor had signed a sworn affidavit stating that the customer committed criminal fraud by not paying for an installed fence on the customer's property and refused to pay when the amount due was merely in dispute and the customer had, in fact, tendered a check for a portion of the amount due indicating that the remaining balance was in dispute. The fact that the contractor's execution of those false statements had consequences not intended, namely that the customer spent two nights in jail, was insufficient to absolve the contractor's liability for making the statements. Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

Sufficiency of indictment. — An indictment based on a failure to repay an advance on a contract should allege a definite contract, for a definite length of time, for a definite consideration, in order to enable the accused to defend against the charge. Bullard v. State, 60 Ga. App. 33, 2 S.E.2d 725 (1939) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

An indictment must allege that the failure to repay any advances made was with-

Contracts to Perform Services (Cont'd)

out good and sufficient cause. Bullard v. State, 60 Ga. App. 33, 2 S.E.2d 725 (1939) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Insufficient contractual allegations. — When the contract alleged does not specify any terms other than to perform services as a sharecropper, such allegation is too indefinite as to the terms of the contract, the amount and kind of labor to be performed, the prices to be paid therefor, or any obligations assumed by the parties. Bullard v. State, 60 Ga. App. 33, 2 S.E.2d 725 (1939) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Defendant's theft by deception conviction, based upon a promise to provide brokerage services, was reversed on appeal as the state, which elected to base the state's accusation on a promise for brokerage services, failed to show any consideration for those services; as a result, no brokerage contract existed, and absent such, no theft by deception based upon a promise of brokerage services resulted. Campbell v. State, 286 Ga. App. 72, 648 S.E.2d 684 (2007).

Sufficiency of proof. — Mere proof that the defendant failed to carry out the contract does not give rise to a presumption that defendant did so without good and sufficient cause nor is such an essential element supplied by statements of the hirer that defendant knew of no good reason why the laborer did not comply with the contract. Banton v. State, 57 Ga. App. 173, 194 S.E. 827 (1938) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Evidence presented during a hearing held to determine if the defendant's probation should be revoked did not show that the defendant did not intend to fulfill the terms of the defendant's agreement to locate a car for a buyer, or that the defendant had a fraudulent intent when the defendant wrote a post-dated check that was dishonored when the buyer presented the check for payment; the appellate court reversed the trial court's judgment finding that the defendant committed theft by deception and revoking the defendant's probation. Young v. State, 265 Ga. App. 425, 594 S.E.2d 667 (2004).

Deceitful Representation of Existing Fact or Past Event

Scope of deception. — "Any deceitful means or artful practice" may embrace either false and fraudulent representations, or other deceitful and fraudulent conduct which cheats and defrauds the prosecutor. Ray v. State, 165 Ga. App. 89, 299 S.E.2d 584 (1983).

Deceit must refer to present or past event and not to future promise. Harris v. State, 141 Ga. App. 213, 233 S.E.2d 21 (1977).

Default on a promise to pay for goods in the future cannot be the basis of theft by deception because the representation must refer to a presently existing fact. Harris v. State, 141 Ga. App. 213, 233 S.E.2d 21 (1977).

Statement that the accused intended thereafter to do a particular thing, made at the time of and in connection with certain other statements as to a past fact, shown to have been false, does not remove from the accused the consequences which the law attaches to false representations made with intent to deceive, and by which one is defrauded and cheated. Harris v. State, 141 Ga. App. 213, 233 S.E.2d 21 (1977).

Representation by one that the person has title to a certain automobile, made for the purpose of inducing another to purchase it, if false within the knowledge of the person who makes the representation, is within the statute against cheating and swindling. Diamond v. State, 52 Ga. App. 184, 182 S.E. 813 (1935) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

False promise of future performance. — As the language embodied within former Code 1933, § 26-1803 (see now O.C.G.A. § 16-8-3(b)(1)) contemplated a deceitful representation as to an existing fact or past event, a false promise of future performance cannot be grounds for theft by deception prosecution. Croy v. State, 133 Ga. App. 244, 211 S.E.2d 183 (1974).

Promise of future performance cannot

serve as the basis of a theft by deception prosecution. An essential element of the offense of theft by deception is that the false representation must bear upon an existing fact or past event. Elliott v. State, 149 Ga. App. 579, 254 S.E.2d 900 (1979).

Representations that the defendant was getting a loan and would pay for the goods when the defendant received the proceeds pertained to the future and, even if false and fraudulent, cannot be the basis of a prosecution for cheating and swindling. Elliott v. State, 149 Ga. App. 579, 254 S.E.2d 900 (1979).

Conviction under O.C.G.A. § 16-8-3(b)(1) is authorized only when there is a deceitful misrepresentation regarding "an existing fact or past event," and a false promise of future performance cannot be the basis for a conviction. Robinson v. State, 198 Ga. App. 431, 401 S.E.2d 621 (1991).

In this malicious prosecution action, probable cause existed for the warrant because the customer's written statement, along with the appliance repair company's invoice confirming the customer's story that the refrigerator was not repaired, gave the sergeant probable cause for the misdemeanor charge of theft by deception under Georgia law. Davis v. Lang, No. 17-10069, 2017 U.S. App. LEXIS 16589 (11th Cir. Aug. 30, 2017) (Unpublished).

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Future promise to pay. — Defendant did not commit theft by deception under O.C.G.A. § 16-8-3 by failing to pay for groceries the defendant received upon a promise to pay the following Friday as the defendant made no false representation as to an existing fact. Mathis v. State, 161 Ga. App. 251, 288 S.E.2d 317 (1982).

Failure to inform of lien. — Trial court properly denied the defendant's motion for directed verdict as to seven counts of taking by theft as the state proved the defendant committed theft by deception regarding construction agreement and the theft by taking statute was broad enough to encompass theft by deception; theft by deception required a person to intentionally create or confirm an existing fact or past event which is false and which the accused knew or believed to be false and the defendant did so by creating the impression that the couple was paying for a house on which there was no construction lien when the defendant knew that was not true. McMahon v. State, 258 Ga. App. 512, 574 S.E.2d 548 (2002).

Failure to Correct False Impression

Proving failure to correct false impression. — To prove paragraph (b)(2) of O.C.G.A. § 16-8-3, the prosecution must prove everything the prosecution must prove in paragraph (b)(1) plus the additional element of defendant's "failure to correct" the false impression the defendant created. Sassoon v. State, 138 Ga. App. 172, 225 S.E.2d 732 (1976).

Properly charging creating false impression. — Proper charge under former Code 1933, § 26-1803 (see now O.C.G.A. § 16-8-3) should explain that creating a false impression does not necessarily require a false statement; but on the other hand, the character of the person to whom the impression is directed is critical. Vickers v. State, 124 Ga. App. 752, 186 S.E.2d 157 (1971).

Application

No probable cause to issue arrest warrant for theft by deception. — As a contractor's dispute with a homeowner over a bill for building a fence was a civil matter, and the Georgia Constitution prohibits imprisonment for debt, a magistrate lacked probable cause to issue a warrant to arrest the homeowner for theft by deception. Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

Evidence did not establish theft by deception. — There was no merit in defendants' argument that the evidence in a land sale transaction established the crime of theft by deception, rather than theft by conversion. The criminal act that

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occurred in the transaction was not the obtaining of the money from the victims, since the victims got exactly what was represented to them and defendants kept none of the money for themselves. Instead, the crime occurred when defendants having obtained the funds for a "specified application," used the victims' money to purchase shares in the property for themselves, thereby converting the funds from their intended and agreed-upon application to defendants' own use. Cochran v. State, 204 Ga. App. 602, 420 S.E.2d 32, cert. denied, 204 Ga. App. 921, 420 S.E.2d 32 (1992).

Theft by deception conviction was reversed, since defendant, who owned an auto dealership, had no intent to write bad checks to vehicle wholesaler, but simply lacked the ability to fund them when presented for payment; routine had been established between the two parties, and both had an understanding that defendant would eventually make good on the debts. Ellerbee v. State, 256 Ga. App. 848, 569 S.E.2d 902 (2002).

District court did not err by granting the company summary judgment on Georgia RICO claim because the company produced three sworn statements asserting that the two letters demanding payment and threatening the probationer's arrest were sent because of a clerical error and not with the intent to deceive the probationer into paying money the probationer did not owe. The probationer failed to allege or present any evidence that an employee of the company acted with specific intent to commit theft by deception. McGee v. Sentinel Offender Servs., LLC, 719 F.3d 1236 (11th Cir. 2013).

Employee's civil claim against an employer for failure to pay agreed-upon severance under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., based on theft by deception, O.C.G.A. § 16-8-3(a), failed because there was no evidence that the employee relied on the allegedly inadequate severance checks sent to the employee or that the employee was actually deceived by the checks. Vernon v. Assurance Forensic Accounting, LLC, 333 Ga. App. 377, 774 S.E.2d 197 (2015), cert. denied, No. S15C1837, 2015 Ga. LEXIS 864 (Ga. 2015).

Submitting invoices to state with large markups. — When the state contends the defendant committed theft by deception when the defendant submitted false invoices to the General Assembly, but the invoices contained a statement of charges for services rendered and taken as a whole and compared with the billings to the defendant there was a very large markup, that is not a false statement, and there was no theft by taking under O.C.G.A. §§ 16-8-2 and 16-8-3. Gordon v. State, 257 Ga. 335, 359 S.E.2d 634 (1987).

Destruction of bills disclosing unit prices. — When the state contends that the defendant's destruction of order envelopes from suppliers which disclosed unit prices was an effort to conceal the alleged falsity of the invoices, it was held that the discarding of the bills received by the defendant did not constitute preventing another from acquiring information contemplated by O.C.G.A. § 16-8-3(b)(3). Gordon v. State, 257 Ga. 335, 359 S.E.2d 634 (1987).

Evidence of other transactions or crimes is admissible as tending to show fraudulent intent and scheme on the part of the accused to obtain the property of others without paying for the property, and as warranting an inference that the transaction in the case on trial was made in pursuance of the same general purpose. Thompson v. State, 67 Ga. App. 240, 19 S.E.2d 777, cert. denied, 317 U.S. 667, 63 S. Ct. 72, 87 L. Ed. 536 (1942) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Any lack of diligence by the victims in failing to obtain a title examination of the proposed collateral offered by the defendant as part of defendant's scheme was not a defense to the charge of theft by deception. Arnold v. State, 210 Ga. App. 843, 437 S.E.2d 844 (1993).

Altering water meter to defraud city. — Evidence that the defendant conspired with a named individual, operator of a laundry, to defraud the city out of a large quantity of water by altering a water meter on the laundry premises for consideration authorized a conviction for cheat-

ing and swindling. Thompson v. State, 67 Ga. App. 240, 19 S.E.2d 777, cert. denied, 317 U.S. 667, 63 S. Ct. 72, 87 L. Ed. 536 (1942) (decided under former Code 1933, §§ 26-3918, 26-7408, 26-7409, 26-7410).

Allegations of bid-rigging scheme sufficient. — State adequately alleged the predicate act of theft by deception when the state presented elaborate details of an anticompetitive bid-rigging scheme which injured Georgia school districts by causing the districts to pay anticompetitive prices for milk. Georgia ex rel. Bowers v. Dairymen, Inc., 813 F. Supp. 1580 (S.D. Ga. 1991).

No evidence services provided worth less than amount paid. — Court of appeals erred by holding that the defendant's felony conviction for theft by deception, based on a failure to fully perform, could stand absent proof of the value of the work performed by the defendant; the conviction as to one count was not supported by evidence as the state failed to show that the services provided were worth less than the amount the defendant was paid. Stratacos v. State, 293 Ga. 401, 748 S.E.2d 828 (2013).

Elderly as victim of theft by deception. — Evidence that the defendant told an 82-year-old victim that the defendant was the victim's grandson and needed bail money, thereby obtaining $6,500, was sufficient to support the defendant's conviction for theft by deception. Akintoye v. State, 340 Ga. App. 777, 798 S.E.2d 720 (2017).

Evidence sufficient to support conviction. — See Davis v. State, 180 Ga. App. 299, 349 S.E.2d 29 (1986); Hammitt v. State, 183 Ga. App. 382, 359 S.E.2d 4 (1987); Harrell v. State, 192 Ga. App. 876, 386 S.E.2d 676, cert. denied, 192 Ga. App. 902, 386 S.E.2d 676 (1989); Ramey v. State, 239 Ga. App. 620, 521 S.E.2d 663 (1999).

Deception by use of checks. — Evidence that defendant's accomplice deposited checks from defendant's closed account and then withdrew cash and defendant's admission, later withdrawn, that defendant knew there was no money in the closed account, that defendant gave checks on that account to defendant's accomplice, knowing that the accomplice was going to deposit them, that defendant and the accomplice planned to split the cash the accomplice received, and that defendant drove the accomplice to the bank to deposit some of the checks, was sufficient to support defendant's conviction for theft by deception. Westbrooks v. State, 263 Ga. App. 566, 588 S.E.2d 335 (2003).

With regard to a defendant's convictions on three counts of deposit account fraud and two counts of theft by deception, there was sufficient circumstantial evidence to support the convictions on two counts of deposit account fraud and both counts of theft by deception based on the defendant delivering two checks to two banks and receiving funds in exchange for the checks, which were subsequently dishonored; the defendant's failure to repay the funds as demanded; and the defendant's implausible story that the checks were from business partners whom the defendant had never met from another country. One count of deposit account fraud regarding a second check presented to one of the banks in the amount of $301,392 was not supported by the evidence as the prosecution failed to present any evidence that the defendant received anything of value in return for the check since the check was dishonored immediately and the defendant received no funds for that check. Vadde v. State, 296 Ga. App. 405, 674 S.E.2d 323 (2009), cert. denied, No. S09C1087, 2009 Ga. LEXIS 348 (Ga. 2009); cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010); reh'g denied, 559 U.S. 998, 130 S. Ct. 1756, 176 L. Ed. 2d 224 (2010).

Sufficient evidence supported the defendant's convictions for two counts of theft by deception based on the defendant withdrawing the contents of two bank accounts after depositing checks from other banks into the accounts that were eventually dishonored because the dishonored checks were properly admitted into evidence without testimony from the payor banks as the checks became the business records of the bank from which funds were withdrawn since there was testimony that the bank received, relied upon, and retained the checks in the regular course of the bank's business as well as testimony

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from the bank establishing a foundation for admitting the checks. Ross v. State, 298 Ga. App. 525, 680 S.E.2d 435 (2009).

Deceiving pawn shops on ownership of pawned goods. — Evidence was sufficient to support defendant's conviction of theft by deception because defendant represented defendant as the legal owner of stolen tools, defendant did not disclose to pawn shops that defendant had stolen the tools, and, relying on those misrepresentation, the pawn shops purchased the items. Drake v. State, 274 Ga. App. 882, 619 S.E.2d 380 (2005).

Evidence was sufficient to find defendant guilty of theft by deception as defendant, a customer, had falsely charged two drills to a construction company, the customer's vehicle was then traced to a woman located with defendant, and defendant gave a written statement admitting to purchasing the drills and charging them to the construction company. Tyler v. State, 275 Ga. App. 115, 619 S.E.2d 804 (2005).

Deception in representing oneself as an attorney. — Sufficient evidence existed to support defendant's convictions for theft by deceitful means, in violation of O.C.G.A. § 16-8-3, because defendant held the defendant out as an attorney and took title and possession of an elderly person's vehicle in payment for the legal services rendered; the state was not obligated to prove the value of the vehicle for purposes of imposition of a felony sentence under O.C.G.A. § 16-8-12(a)(5)(A), as the motor vehicle was valued at more than $100.00. Marks v. State, 280 Ga. 70, 623 S.E.2d 504 (2005).

Deception in acquiring loan. — Defendant's filling out of a loan application with an Internet lender for the purchase of a vehicle by falsely using the defendant's father's social security number, which caused the lender to issue a check that was used for the payment of the vehicle, provided sufficient evidence for a conviction under O.C.G.A. § 16-8-3 even though the lender stopped payment prior to purchase; the document received by the defendant from the lender was a "check" within the definition under O.C.G.A. § 11-3-104(f), as it referenced itself in that manner and was drawn on a bank. Scott v. State, 277 Ga. App. 876, 627 S.E.2d 904 (2006).

Deception by misappropriation of funds. — There was sufficient evidence to support the defendant's convictions of theft by deception; records showed that the defendant, a business manager, had misappropriated the proceeds of a fictitious loan to the defendant's own use and had satisfied a loan to the defendant by crediting payments from another account. Ruppert v. State, 284 Ga. App. 456, 643 S.E.2d 892 (2007).

There was sufficient evidence supporting a conviction for theft by deception under O.C.G.A. § 16-8-3. The defendant drove an accomplice to a store, got a slipcover, obtained the sticker necessary to return the slipcover for a refund, and transferred the slipcover to the accomplice, directing the accomplice to present the slipcover for a refund; therefore, the defendant directly committed acts in furtherance of the crime and aided in the crime's commission under O.C.G.A. § 16-2-20. Bruster v. State, 291 Ga. App. 490, 662 S.E.2d 265 (2008).

Evidence was sufficient to convict the defendant of theft by deception in violation of O.C.G.A. § 16-8-3(a) because the defendant told the buyer of a stolen trailer that the title was good and that the defendant's spouse had owned the trailer for two years, even though the defendant knew that the spouse had recently taken the trailer from another person's home. Green v. State, 301 Ga. App. 866, 689 S.E.2d 132 (2010).

Evidence was sufficient to support the defendant's conviction for theft by deception in violation of O.C.G.A. § 16-8-3(a) because the evidence showed that at a motel the defendant obtained payment for a stolen laptop after representing the laptop to be marketable and not stolen. Fields v. State, 310 Ga. App. 455, 714 S.E.2d 45 (2011).

Sufficient evidence supported the defendant's theft by deception convictions as there was no requirement that the state prove the value of the work done; the state presented adequate proof that there was a contract price, that the defendant received

money under the terms of the contract, that the defendant did not intend to perform all of the contracted services, and that the defendant did not return the money. Stratacos v. State, 312 Ga. App. 783, 720 S.E.2d 256 (2011).

Deception in representation of animal shelter. — Evidence was sufficient to convict the defendant of felony theft by deception, instead of misdemeanor theft, as a party because the defendant unlawfully obtained $1,500 from 25 listed individuals by creating a false impression that the animal shelter was a no-kill shelter and that payment of funds would ensure that the listed individual's animal would not be euthanized; and all sponsorship money, whether in the form of cash or other payment, was directed to and controlled by the defendant, who retained sole discretion to determine the money's direction and use. Kilby v. State, 335 Ga. App. 238, 780 S.E.2d 411 (2015), cert. denied, No. S16C0653, No. S16C0653, 2016 Ga. LEXIS 437 (Ga. 2016).

Alleging authority to rent property sufficient for conviction. — Conviction for theft by deception was supported by evidence that the defendant deceived tenants by claiming the defendant had authority to rent premises when the defendant did not. Harris v. State, 324 Ga. App. 411, 750 S.E.2d 721 (2013).

Offense involves dishonesty or false statement and admissible in child molestation trial. — Defendant's prior convictions for felony forgery, O.C.G.A. § 16-9-1(a), misdemeanor theft by deception, O.C.G.A. § 16-8-3(a), and misdemeanor giving a false name to a law enforcement officer, O.C.G.A. § 16-10-25, were all less than 10 years old and involved dishonesty or false statements. Therefore, those convictions were admissible in the defendant's child molestation trial under former O.C.G.A. § 24-9-84.1(b) (see now O.C.G.A. § 24-6-609). Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82 (2011).

Inducing victims to buy automobiles which defendant never delivered. — Evidence that a defendant, a car dealer, obtained more than $500 from each victim by intentionally creating the false impression that the defendant could sell the victim a vehicle at a discounted price, but never delivered any vehicles, was sufficient to establish that the defendant used deceitful means and artful practice in order to induce the victims to part with the victims' money in violation of O.C.G.A. § 16-8-3. Arnold v. State, 293 Ga. App. 395, 667 S.E.2d 167 (2008).

Evidence that investors lost money in defendant's corporation was insufficient to prove that defendant "obtained property" of another as required by O.C.G.A. § 16-8-3(a), where there was no evidence that defendant personally obtained or used the funds or that defendant received any benefit from any of the funds invested. Robinson v. State, 198 Ga. App. 431, 401 S.E.2d 621 (1991).

Fraud in stock purchase contract. — In an action for a RICO violation, plaintiffs presented evidence to create a material issue of fact as to whether defendant engaged in predicate acts of criminal fraud, i.e., theft by deception, arising from defendant's purchase of plaintiff's stock in a software development company. Willis v. First Data Pos, Inc., 245 Ga. App. 121, 536 S.E.2d 198 (2000).

Decline in value of stock not a theft. — Taxpayers' complaint for a refund was dismissed as the taxpayers were not entitled to a theft loss deduction under 26 U.S.C. § 165(e) with respect to a decline in value of publicly traded stock after the taxpayer husband exercised his stock options because they did not show that they were victims of either a theft by taking, theft by deception, theft by conversion, or theft of services under O.C.G.A. § 16-8-2, O.C.G.A. § 16-8-3, O.C.G.A. § 16-8-4, or O.C.G.A. § 16-8-5. The taxpayers were only entitled to capital loss deductions under 26 U.S.C. § 2511. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

No theft by deception in financier's actions. — After plaintiff limited liability company (LLC1), who sold its interest in another limited liability company (LLC2) to the other members in LLC2 (buyers), and alleged that the buyers defrauded LLC1's members to sign a deed conveying real property from a related leasing company to LLC2 and that the defendant financier, who financed the buyers, aided

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and abetted a breach of the buyers' fiduciary duty under O.C.G.A. § 14-11-305(1) in connection with that conveyance, the aiding and abetting claim failed because the conveyance had been required for LLC2 to obtain a loan from a bank, and absent the conveyance to enable LLC2 to secure the debt to the bank, the representations of the selling members in the loan application would have been false, subjecting the selling members to liability for bank fraud under 18 U.S.C. § 1344 or theft by deception under O.C.G.A. § 16-8-3. Ledford v. Peeples, 657 F.3d 1222 (11th Cir. 2011).

Sale of non-existent insurance. — While the illegal sale of insurance is not in and of itself a basis for a racketeer influenced and corrupt organization (RICO) action absent further evidence of fraud rising to the level of theft by deception, the repeated sale to unsuspecting consumers of non-existent insurance was the very essence of such fraud, and was exactly the type of criminally fraudulent activity masquerading as "business" that RICO was designed to address. Speir v. Krieger, 235 Ga. App. 392, 509 S.E.2d 684 (1998).

Jury Charges

Charging provisions for which there is no evidence is improper. — Charging provisions for which there is no evidence can only serve to confuse the jury and allow it to believe that defendant could be found guilty for failing to honor a promise. A proper charge should explain that creating a false impression does not necessarily require a false statement but, on the other hand, the character of the person to whom the impression is directed is critical. Vickers v. State, 124 Ga. App. 752, 186 S.E.2d 157 (1971).

Claim of right defense instruction not available. — Trial court properly did not instruct the jury, sua sponte under O.C.G.A. § 5-5-24(c), on a claim of right defense under O.C.G.A. § 16-8-10 to theft by deception charges under O.C.G.A. § 16-8-3 as a sole defense as the defendant did not object to the instructions given, and a claim of right defense was not warranted as the sole defense as the defendant testified about the reasons the defendant was prevented from completing the jobs, and that the defendant had composed a list with the defendant's pastor of how much work was done on each job, and how much the defendant owed the people. Stratacos v. State, 312 Ga. App. 783, 720 S.E.2d 256 (2011).

Punishment

Whether offense is misdemeanor or felony is material only as to sentencing. — Whether the offense of theft by deception constitutes a misdemeanor or a felony is not material to the defense, and is only material after conviction for the purpose of sentencing under the provisions of former Code 1933, § 26-1812 (see now O.C.G.A. § 16-8-12). Guy v. State, 138 Ga. App. 11, 225 S.E.2d 492 (1976).

Conviction for theft by taking. — One may be indicted and convicted under former Code 1933, § 26-1802 (see now O.C.G.A. § 16-8-2) for theft by taking if the evidence supports a finding of guilt under former Code 1933, § 26-1803 (see now O.C.G.A. § 16-8-3) for theft by deception. Elliott v. State, 149 Ga. App. 579, 254 S.E.2d 900 (1979).

Language "regardless of the manner in which said property is taken or appropriated" in O.C.G.A. § 16-8-2 renders that section sufficiently broad to encompass thefts or larcenies perpetrated by deception as prohibited by O.C.G.A. § 16-8-3. Ray v. State, 165 Ga. App. 89, 299 S.E.2d 584 (1983).

Defendant's rights against double jeopardy are not infringed upon by prosecutions and subsequent convictions for both theft by deception and theft by taking. Stone v. State, 166 Ga. App. 245, 304 S.E.2d 94 (1983).

When the evidence at trial was sufficient to establish the crime of theft by taking, and the evidence also may have shown theft by deception, the phrase "regardless of the manner in which the property is taken or appropriated" rendered the theft by taking statute sufficiently broad to encompass thefts perpetrated by deception. Thus, the evidence was sufficient to authorize a conviction on that charge. Lundy v. State, 195 Ga. App. 682, 394 S.E.2d 559 (1990).

Sentence not excessive. — Defendant's sentence for theft by deception for taking $2,611.29 from an elderly victim in a roofing scheme was within the statutory limits, and thus the defendant's sentence of 10 years, with five years probated, was not so disproportionate as to shock the conscience. Jones v. State, 325 Ga. App. 845, 755 S.E.2d 238 (2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 32 Am. Jur. 2d, False Pretenses, §§ 3, 11, 27 et seq.

C.J.S. — 35 C.J.S., False Pretenses, § 1 et seq. 52B C.J.S., Larceny, §§ 1, 60, 61.

ALR. — Obtaining money for goods not intended to be delivered as false pretense, 17 A.L.R. 199.

May offense of obtaining money or property by false pretenses or confidence game be predicated on obtaining loan or renewal thereof, 52 A.L.R. 1167.

Larceny or embezzlement by one spouse of other's property, 55 A.L.R. 558.

False representation in business transaction as within statute relating to "confidence game," 56 A.L.R. 727.

False statement as to matter of record as false pretense within criminal statute, 56 A.L.R. 1217.

Appropriation or removal without payment of property delivered in expectation of immediate cash payment, as criminal offense, 83 A.L.R. 441.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 123 A.L.R. 119; 91 A.L.R.2d 1046.

Offense of obtaining property by false pretenses predicated upon transaction involving conditional sale, 134 A.L.R. 874.

Criminal charge predicated upon fraudulently obtaining a check, note, etc., or signature thereon, from the person executing the same, 141 A.L.R. 210.

Criminal offense of obtaining property by false pretenses predicated upon transactions incident to raising of funds for benevolent or charitable purpose, 145 A.L.R. 302.

"Defalcation" within provisions of Bankruptcy Act excepting from discharge debts of fiduciary or officer, 163 A.L.R. 1008.

Obtaining payment by debtor on valid indebtedness by false representation as criminal false pretenses, 20 A.L.R.2d 1266.

False statement as to existing encumbrance on chattel in obtaining loan or credit as criminal false pretense, 53 A.L.R.2d 1215.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 91 A.L.R.2d 1046.

Attempts to commit offenses of larceny by trick, confidence game, false pretenses, and the like, 6 A.L.R.3d 241.

Criminal liability of corporation for extortion, false pretenses, or similar offenses, 49 A.L.R.3d 820.

Application of "bad check" statute with respect to postdated checks, 52 A.L.R.3d 464.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes, 77 A.L.R.3d 689.

Criminal liability for wrongfully obtaining unemployment benefits, 80 A.L.R.3d 1280.

Embezzlement, larceny, false pretenses, or allied criminal fraud by a partner, 82 A.L.R.3d 822.

Modern status of rule that crime of false pretenses cannot be predicated upon present intention not to comply with promise or statement as to future act, 19 A.L.R.4th 959.

What constitutes tax-deductible theft loss under 26 USCS sec. 165, 98 A.L.R. Fed. 229.

16-8-4. Theft by conversion.

(a) A person commits the offense of theft by conversion when, having lawfully obtained funds or other property of another including, but not limited to, leased or rented personal property, under an agreement or

other known legal obligation to make a specified application of such funds or a specified disposition of such property, he knowingly converts the funds or property to his own use in violation of the agreement or legal obligation. This Code section applies whether the application or disposition is to be made from the funds or property of another or from the accused's own funds or property in equivalent amount when the agreement contemplates that the accused may deal with the funds or property of another as his own.

(b) When, under subsection (a) of this Code section, an officer or employee of a government or of a financial institution fails to pay on an account, upon lawful demand, from the funds or property of another held by him, he is presumed to have intended to convert the funds or property to his own use.

(c)(1) As used in this subsection, the term "personal property" means personal property having a replacement cost value greater than $100.00, excluding any late fees and penalties, and includes heavy equipment as defined in paragraph (2) of Code Section 10-1-731 and tractors and farm equipment primarily designed for use in agriculture.

(2) Any person having any personal property in such person's possession or under such person's control by virtue of a lease or rental agreement who fails to return the personal property within five days, Saturdays, Sundays, and holidays excluded, after a letter demanding return of the personal property has been mailed to such person by certified or registered mail or statutory overnight delivery, return receipt requested, at such person's last known address by the owner of the personal property or by the owner's agent shall be presumed to have knowingly converted such personal property to such person's own use in violation of such lease or agreement.

(3) In the event that any personal property is not returned as provided for in the lease or rental agreement and the court orders the lessor or renter to pay replacement costs, replacement costs shall include but not be limited to:

(A) The market value of the personal property. The market value shall be established by the owner of the property by providing from a supplier of such or reasonably similar personal property a current quotation of the value of the personal property which is of like quality, make, and model of the personal property being replaced. The value to be awarded shall be the higher of:

(i) The value on the date when the conversion occurred; or

(ii) The value on the date of the trial;

(B) All rental charges from the date the rental agreement was executed until the date of the trial or the date that the property was recovered, if recovered; and

(C) Interest on the unpaid balance each month at the current legal rate from the date the court orders the lessor or renter to pay replacement costs until the date the judgment is satisfied in full.

(4) If as a part of the order of the court the lessor or renter is placed on probation, supervision of said probation shall not be terminated until all replacement costs, fees, charges, penalties, interest, and other charges are paid in full. All payments relative to this Code section shall be made to the appropriate court of jurisdiction and the court shall make distribution to the owner within 30 days of receipt thereof.

(5) In the event that the owner incurs any expenses in the process of locating a lessor or renter who did not return any personal property according to the lease or rental agreement, the court shall provide that the lessor or renter reimburse the owner for those expenses which may include, but not be limited to, credit reports, private detective fees, investigation fees, fees charged by a law enforcement agency for such services as police reports, background checks, fees involved with swearing out a warrant for incarceration, and any other bona fide expenses. (Code 1933, § 26-1808, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 16; Ga. L. 1988, p. 763, § 1; Ga. L. 1994, p. 650, § 1; Ga. L. 1997, p. 414, §§ 1, 2; Ga. L. 2000, p. 1589, § 4.)

Cross references. — Form of complaint for actions based on allegation of conversion, § 9-11-111. Theft by conversion of funds collected for benefit of state pursuant to laws relating to revenue and taxation, § 48-1-5.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the 2000 amendment to this section is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For annual survey of criminal law, see 58 Mercer L. Rev. 83 (2006).

For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 126 (1994).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Penal Code 1910, § 186 and former Code 1933, §§ 26-2801, 26-2803, 26-2805, 26-2806, 26-2808, 26-2809, and 26-2812, as they read prior to revision of title by Ga. L. 1968, p. 1249, are included in the annotations for this Code section. Additionally, decisions under former § 16-8-19 are included in the annotations for this Code section.

Constitutionality. — See Jackson v. State, 234 Ga. 621, 216 S.E.2d 864 (1975).

Trial court correctly held that the provisions, defining the crime of conversion of leased personal property, were not unconstitutional, either as written or as applied in this case. Laster v. Star Rental, Inc., 190 Ga. App. 1, 378 S.E.2d 320, cert. denied, 493 U.S. 829, 110 S. Ct. 97, 107 L. Ed. 2d 61 (1989) (decided under former § 16-8-19).

Theft-by-conversion statute is not unconstitutionally vague and provides more than adequate notice to a person of ordinary intelligence that a trustee's intentional appropriation of trust funds for the person's personal use and for speculative business ventures is criminal conduct. Connally v. State, 265 Ga. 563, 458 S.E.2d 336 (1995).

Mandatory statutory presumption in O.C.G.A. § 16-8-4(c)(2), that if the state proves that the demand letter was sent in accordance with the statute, the defendant "shall be presumed" to have committed the elements of the crime of theft by conversion of leased property, is unconstitutional. Sherrod v. State, 280 Ga. 275, 627 S.E.2d 36 (2006).

Legislative purpose of former Code 1933, § 26-1808 was to punish for the fraudulent conversion, and not for a failure to comply with a contractual obligation. It follows that the section was not unconstitutional for violating due process, creating involuntary servitude, or imprisoning for debt. Smith v. State, 229 Ga. 727, 194 S.E.2d 82 (1972) (see O.C.G.A. § 16-8-4).

Conversion at law is: "An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." Butler v. State, 84 Ga. App. 492, 66 S.E.2d 199 (1951) (decided under former Code 1933, § 26-2809).

Possession of property is lawfully obtained. — In both embezzlement and larceny after trust the possession of the accused of the property is lawfully obtained, whereas in simple larceny the possession of the property by the accused is always unlawfully obtained. Simmons v. State, 79 Ga. App. 390, 53 S.E.2d 772 (1949) (decided under former Code 1933, § 26-2803).

Embezzlement differs from larceny in that in embezzlement the accused comes into possession lawfully, whereas in larceny the property comes into the hands of the thief secretly and unlawfully. In the former there is an entrustment and in the latter there is not. Simmons v. State, 79 Ga. App. 390, 53 S.E.2d 772 (1949) (decided under former Code 1933, § 26-2803).

No private right of action. — In a declaratory judgment case in which three intended beneficiaries alleged that an insurance company violated O.C.G.A. §§ 16-8-2, 16-8-3, and 16-8-4, those criminal statutes did not create a private cause of action. Am. Gen. Life & Accident Ins. Co. v. Ward, 509 F. Supp. 2d 1324 (N.D. Ga. Mar. 12, 2007).

Mortgage borrower could not bring civil claims against a loan servicer under O.C.G.A. §§ 16-8-2, 16-8-3, and 16-8-4, which were criminal statutes prohibiting theft by taking, by conversion, and by deception; the statutes did not purport to create a private cause of action. Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012).

Sole issue is whether defendant with intent to defraud has misappropriated money with which entrusted, and the mere fact that the prosecuting witness may be indebted to other parties would have nothing to do with that issue. Gatling v. State, 102 Ga. App. 226, 115 S.E.2d 823 (1960) (decided under former Code 1933, § 26-2812).

Fraudulent intent is implicit in the definition of conversion. Corbitt v. Harris, 182 Ga. App. 81, 354 S.E.2d 637 (1987), overruled on other grounds, Lau's

Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991).

Fraudulent conversion. — Gravamen of the offense clearly is fraudulent conversion, not failure to comply with a contractual obligation. Baker v. State, 131 Ga. App. 48, 205 S.E.2d 79 (1974), later appeal, 135 Ga. App. 500, 218 S.E.2d 171 (1975).

It is the presence of a fraudulent intent that distinguishes theft by conversion from a simple breach of contract. Baker v. State, 143 Ga. App. 302, 238 S.E.2d 241 (1977).

It is essential to show a conversion of another's property to the defendant's own use in order to fit within the definition of theft by conversion (Georgia's equivalent of embezzlement). Mullis v. Walker, 7 Bankr. 563 (Bankr. M.D. Ga. 1980).

Mere proof that a project contracted for cost a designated sum over and above the contract price after the contractor's quasi-abandonment is irrelevant to a conversion charge, the question being whether the contractor took funds paid the contractor for the construction and knowingly put them to other uses. Baker v. State, 131 Ga. App. 48, 205 S.E.2d 79 (1974), later appeal, 135 Ga. App. 500, 218 S.E.2d 171 (1975).

Larceny after trust. — When an ice company entrusts the company's employee with a book of ice tickets for the purpose of selling the tickets to a customer of the company and returning to the company the money thus obtained, and the employee sells the book to the customer for $3.00 and collects the money, the employee is, in legal contemplation, entrusted by the ice company with the money collected; and when the employee returns only $1.00 to the company, and fraudulently converts the other $2.00 to the employee's own use, the employee is guilty of larceny after trust. Dukes v. State, 52 Ga. App. 200, 182 S.E. 803 (1935) (decided under former Code 1933, § 26-2809).

When one entrusted with money by another fraudulently converts the money to one's own use, one is guilty of larceny after trust, though one may have fraudulently induced the delegation of the trust with intent to so convert the money. Lewis v. State, 90 Ga. App. 53, 81 S.E.2d 856 (1954) (decided under former Code 1933, § 26-2809).

Case of larceny after a trust arises when there is an agency on the part of the person entrusted with the property of another by virtue of which the person so entrusted is to do something with the property for the principal's benefit, or where there is a bailment of some description. Dennison v. State, 91 Ga. App. 143, 85 S.E.2d 179 (1954) (decided under former Code 1933, §§ 26-2806, 26-2808).

Just settlement of debts. — When money is entrusted to a person for a specific purpose and the person in good faith retains the money in order to obtain a just settlement which grew out of matters involved in the same transaction believing the person had a right so to do the person is not guilty of larceny after trust, for theoretically, if the prosecutor would give back to the defendant the person's property, the defendant would give back to the prosecutor the person's property; in other words, there would only be a retention in good faith pending a just settlement of debts and not a fraudulent conversion which is a necessary element in larceny after trust. McJenkin v. State, 62 Ga. App. 321, 7 S.E.2d 812 (1940) (decided under former Code 1933, § 26-2809).

Embezzlement is fraudulent conversion. Mullis v. Walker, 7 Bankr. 563 (Bankr. M.D. Ga. 1980).

Former Code 1933, § 26-1808 (see O.C.G.A. § 16-8-4) provided a criminal penalty for obtaining money under lawful agreement and then knowingly converting funds to own use. Smith v. State, 229 Ga. 727, 194 S.E.2d 82 (1972).

Sufficiency of indictment. — An indictment charging in substance that a sum of money was entrusted by the owner to another to be applied to the use and benefit of the owner, and that the one to whom the money was entrusted fraudulently converted the same to one's own use without the owner's consent, was sufficient in law. Brandt v. State, 71 Ga. App. 221, 30 S.E.2d 652 (1944) (decided under former Code 1933, § 26-2809).

Sufficiency of the evidence. — Defendant's conviction of theft by conversion,

General Consideration (Cont'd)

O.C.G.A. § 16-8-4(a), was supported by sufficient evidence; evidence of defendant's failure to return a rented wood chipper, defendant's admitted lies regarding defendant's address and phone number, and defendant's flight after charges were filed was sufficient under O.C.G.A. § 16-2-6 for the jury to conclude that defendant fraudulently converted the chipper to defendant's own use. Terrell v. State, 275 Ga. App. 501, 621 S.E.2d 515 (2005).

Venue. — Venue in prosecution for larceny after trust may be laid in the county where the property was entrusted, although the physical conversion of it was in another county, where the facts of the case authorized the jury to find that the intent to convert the money was formed in the county where the property was entrusted. Price v. State, 76 Ga. App. 283, 45 S.E.2d 462 (1947) (decided under former Code 1933, § 26-2809).

When the evidence authorized the jury to infer that at the time the money was entrusted by the plaintiff for a specific purpose, in Fulton County, the defendant intended to convert the money to defendant's own use and not to apply the money to the benefit and use of the owner so entrusting the money, the venue could be laid in Fulton County. Price v. State, 76 Ga. App. 283, 45 S.E.2d 462 (1947) (decided under former Code 1933, § 26-2809).

Venue is sufficiently established in a case when the indictment charges fraudulent conversion of money to have taken place in a certain county, when the defendant makes a solemn admission in judicio that the payments were made to the defendant as charged in the indictment, and when the admission as to the place the payments were made is corroborated by slight evidence. Ramer v. State, 76 Ga. App. 678, 47 S.E.2d 174 (1948) (decided under former Code 1933, § 26-2812).

Venue in Georgia was proper, despite the car being leased by the defendant in Tennessee and the conversion taking place well before arrival in Georgia, because the defendant was seen exercising control over the car in Georgia in Gordon County; thus, venue was appropriate in that county. Jones v. State, 337 Ga. App. 687, 787 S.E.2d 330 (2016).

Statute of limitations violated. — Defendant's convictions for theft by conversion and a RICO violation were reversed because the state failed to carry the state's burden to prove that the defendant was indicted on the counts within the applicable statutes of limitation as the evidence showed that the victims, and therefore the state, had actual knowledge of the offenses more than five years prior to the June 12, 2009 indictment, and the state produced no evidence or argument to the contrary. Jannuzzo v. State, 322 Ga. App. 760, 746 S.E.2d 238 (2013).

Cited in Jackson v. State, 137 Ga. App. 192, 223 S.E.2d 239 (1976); Jones v. State, 137 Ga. App. 612, 224 S.E.2d 473 (1976); Partain v. State, 138 Ga. App. 171, 225 S.E.2d 736 (1976); Eubanks v. State, 141 Ga. App. 569, 234 S.E.2d 95 (1977); State v. Eubanks, 239 Ga. 483, 238 S.E.2d 38 (1977); Eubanks v. State, 144 Ga. App. 152, 241 S.E.2d 6 (1977); Lewis v. State, 150 Ga. App. 791, 258 S.E.2d 708 (1979); Steele v. State, 154 Ga. App. 59, 267 S.E.2d 500 (1980); Salter v. State, 163 Ga. App. 655, 294 S.E.2d 612 (1982); Greyhound Lines v. Thurston, 18 Bankr. 545 (Bankr. M.D. Ga. 1982); Exley v. State, 180 Ga. App. 821, 350 S.E.2d 829 (1986); F & M Bank v. Brinsfield, 78 Bankr. 364 (Bankr. M.D. Ga. 1987); Colonial-Interstate, Inc. v. Ayers, 83 Bankr. 83 (Bankr. M.D. Ga. 1988); Tenney v. State, 194 Ga. App. 820, 392 S.E.2d 294 (1990); Jackson v. State, 209 Ga. App. 53, 432 S.E.2d 649 (1993); Flanders v. State, 217 Ga. App. 73, 456 S.E.2d 604 (1995); Graves v. Brown, 237 Ga. App. 589, 516 S.E.2d 324 (1999); Schoenbaum Ltd. Co., LLC v. Lenox Pines, LLC, 262 Ga. App. 457, 585 S.E.2d 643 (2003); Patterson v. State, 289 Ga. App. 663, 658 S.E.2d 210 (2008).

Application

Wife's action for conversion of her property. — Trial court erred by finding that a wife could not proceed against her former husband on claims relating to his conversion of stock certificates owned solely in her name. Fleming v. Fleming,

246 Ga. App. 69, 539 S.E.2d 563 (2000).

Any private use of entrusted corporate funds, even temporary, is wrongful conversion. — An officer or agent of a corporation cannot take money of a corporation entrusted to the officer, or in the officer's possession by virtue of the officer's official relation or agency, and use it even temporarily for the officer's private benefit and avoid criminal responsibility by calling it a loan; such a transaction is a wrongful conversion, from which a fraudulent intent can be inferred. Denmark v. State, 44 Ga. App. 157, 161 S.E. 286 (1931) (decided under former Penal Code 1910, § 186).

Decline in value of stock not a theft. — Taxpayers' complaint for a refund was dismissed as the taxpayers were not entitled to a theft loss deduction under 26 U.S.C. § 165(e) with respect to a decline in value of publicly traded stock after the taxpayer husband exercised his stock options because they did not show that they were victims of either a theft by taking, theft by deception, theft by conversion, or theft of services under O.C.G.A. § 16-8-2, O.C.G.A. § 16-8-3, O.C.G.A. § 16-8-4, or O.C.G.A. § 16-8-5. The taxpayers were only entitled to capital loss deductions under 26 U.S.C. § 2511. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

Conversion by executor, administrator, guardian or trustee. — There is no authority for an executor, administrator, guardian or trustee to take the money entrusted to the trustee and convert the same to the trustee's own use. On the contrary, such conversion may amount to a crime. Thomas v. State, 87 Ga. App. 765, 75 S.E.2d 193 (1953) (decided under former Code 1933, § 26-2805).

Embezzlement by corporate officer. — An officer of a corporation may be guilty of embezzlement although the conversion is accomplished through the instrumentality of the corporation. Bailey v. State, 84 Ga. App. 839, 67 S.E.2d 830 (1951) (decided under former Code 1933, § 26-2809).

Plaintiff could not claim unlawful conversion or misappropriation of ideas with respect to customer lists since it was shown that the defendant corporation already had the lists, and that plaintiff had made no effort to protect the lists. Kitfield v. Henderson, Black & Greene, 231 Ga. App. 130, 498 S.E.2d 537 (1998).

Species of larceny after trust. — Because this is a species of larceny after trust, it is the larcenous intent, not merely the failure to pay, which must be proved. Baker v. State, 131 Ga. App. 48, 205 S.E.2d 79 (1974), later appeal, 135 Ga. App. 500, 218 S.E.2d 171 (1975).

One in possession but never in lawful possession of funds of another cannot be convicted of theft by deception. Partain v. State, 129 Ga. App. 213, 199 S.E.2d 549 (1973).

When the funds were not obtained lawfully, but were obtained unlawfully, the defendant is not guilty of theft by conversion. Callaway v. State, 165 Ga. App. 862, 303 S.E.2d 42 (1983).

Possession held lawfully obtained. — When the defendant contended that the evidence showed that when the defendant came into possession of the victims' $10,000 on July 16, 1981, the defendant did not intend to make the specified application of the funds, thereby making the defendant's acquisition of the money unlawful, removing the defendant's conduct from the scope of theft by conversion alleged in the indictment, it was held that this argument was without merit as the subjective intention to convert the funds manifested itself after July 16, 1981, when the defendant used the majority of the $10,000 to pay the defendant's personal debts. Prior to the wrongful application of the funds, the defendant had the right and responsibility to possess the victims' money with authority to use the funds for the "specified application"; i.e., for an investment which would produce tax-exempt income at a rate of 15 percent per annum. Mason v. State, 180 Ga. App. 235, 348 S.E.2d 754 (1986).

Proof of intent required for conviction. — When the state established only that the defendant rented video equipment and failed to return the equipment, but failed to show that the defendant knowingly and with fraudulent intent appropriated the equipment for defendant's own use, the evidence was insufficient to

Application (Cont'd)

convict. Barrett v. State, 207 Ga. App. 370, 427 S.E.2d 845 (1993).

Evidence that the defendant took a consignor's furniture and agreed to give the consignor $500 from the sale of the furniture, that the consignor never received the money, and that the defendant was never at the shop when the consignor attempted to speak with the defendant was insufficient to show fraudulent intent supporting the defendant's conviction. Scarber v. State, 211 Ga. App. 260, 439 S.E.2d 83 (1993).

Proof of conversion vel non. — Proof of conversion vel non lies in the explanation or failure to explain proved discrepancies between amounts received and disbursements going toward the completion of the contract. Lovell v. State, 235 Ga. App. 140, 508 S.E.2d 771 (1998).

When property is taken by government employee. — Since a defendant may be convicted as a party to the crime of conversion, without first having lawfully obtained the funds, under former Code 1933, § 26-1808 (see now O.C.G.A. § 16-8-4), it necessarily follows that the defendant may also be punished without having been a government employee if the property was taken by an officer or employee of a government institution under former Code 1933, § 26-1812 (see now O.C.G.A. § 16-8-12). Garrett v. State, 243 Ga. 322, 253 S.E.2d 741 (1979).

Grantor of deed to secure debt cannot be convicted for selling equitable interest in the property and failing to turn over the proceeds to the grantee, because defendant's retention of the equitable interest meant that an essential element of the offense, of possession of the accused of the funds of another person, was missing. King v. State, 177 Ga. App. 281, 339 S.E.2d 353 (1985).

Converted funds need not be titled in accused's name. — O.C.G.A. § 16-8-4 does not require converted funds to be titled in the accused's name; it merely sets forth that the funds or property be knowingly converted to the accused's "own use." Cochran v. State, 204 Ga. App. 602, 420 S.E.2d 32, cert. denied, 204 Ga. App. 921, 420 S.E.2d 32 (1992).

Contract debt not "convertible." — Contract debt, not being "certain" coins and bills, or some other certain physical thing representing moneys, was not subject to an act in tort for conversion. Faircloth v. A.L. Williams & Assocs., 206 Ga. App. 764, 426 S.E.2d 601 (1992).

Use of investment funds for defendant's debts. — When the state introduced evidence which authorized a finding that the defendant was given $10,000 by the victims to be used for an investment which would yield nontaxable interest at a rate of 15 percent per annum and the evidence concerning the disposition of this money showed that the defendant did not invest the $10,000 in a way so as to produce nontaxable income for the victims, but, instead converted the money to defendant's own use by paying defendant's personal debts, the evidence adduced at trial was sufficient to convince a rational finder of fact that the defendant was guilty beyond a reasonable doubt of theft by conversion. Mason v. State, 180 Ga. App. 235, 348 S.E.2d 754 (1986).

Conversion of proceeds to own use. — Even though the broker contended that the proceeds from the sale of the diamond on consignment were used to pay business debts, the court was persuaded that the broker used the proceeds for the broker's personal use, since the evidence did not show that the broker's business was a corporation and the consignment memorandum was signed with the broker's name. Sandalon v. Cook, 141 Bankr. 777 (Bankr. M.D. Ga. 1992).

Evidence was sufficient to support an inference that the defendant fraudulently converted a client's automobile premium payment to the defendant's own use for purposes of a felony theft by conversion conviction because: (1) the client gave the defendant a premium payment and received a receipt; (2) the defendant did not use the payment to pay the client's premium; (3) the defendant abandoned the insurance office without notifying the client; and (4) although the defendant purportedly established an office in another town, the defendant failed to return the client's telephone calls, and the client was unable to find the defendant in that town. Cox v. State, 275 Ga. App. 895, 622 S.E.2d 11 (2005).

Defendant's contention that the defendant could only be ordered to recompense the victims of the defendant's conversion of certain earnest money deposits for those funds the defendant used for personal expenses, as opposed to corporate expenses, lacked foundation in the law. As used in O.C.G.A. § 16-8-4(a), the language regarding the conversion of the funds for the defendant's own used did not not refer exclusively to using the funds for unapproved personal expenses; rather, it referred to using the funds for a purpose other than the purpose specified in the defendant's agreement with the victims to build homes for the victims. Hartsell v. State, 288 Ga. App. 552, 654 S.E.2d 662 (2007).

When jury authorized to find appropriation of payments. — When two payments are given to an appellant to pay for a heating system and appellant ultimately pays for the system with borrowed funds, the jury is authorized to find that the appellant appropriated the payments to the appellant's own use. Baker v. State, 143 Ga. App. 302, 238 S.E.2d 241 (1977).

Conviction for theft by taking. — Language, "regardless of the manner in which said property is taken or appropriated" in O.C.G.A. § 16-8-2 renders that section sufficiently broad to encompass theft by conversion as prohibited by O.C.G.A. § 16-8-4. Ray v. State, 165 Ga. App. 89, 299 S.E.2d 584 (1983).

Knowledge that person from whom car was borrowed was guilty of conversion was sufficient to support conviction for receiving stolen property. — Because the defendant borrowed a car in exchange for crack cocaine, and knew that the person lending the car did automobile body work for others and that the car was clearly undergoing body work, sufficient evidence supported the conviction for receiving stolen property under O.C.G.A. § 16-8-7(a); a jury could have found that the defendant knew or should have known that the lender had no authority to loan the car and that the lender had converted the car to the lender's own use by renting the car to the defendant in violation of O.C.G.A. § 16-8-4(a) prohibiting theft by conversion and O.C.G.A. § 16-8-2 prohibiting theft by taking. McKinney v. State, 276 Ga. App. 75, 622 S.E.2d 427 (2005).

Exclusion of evidence as to defendant's lifestyle held harmless error. — When the defendant was acquitted on theft by taking charges and the total amount of the checks involved in the alleged theft by conversion was only a little over $2,000, error committed by the trial court in refusing to allow the defendant to present evidence showing the defendant's lack of an extravagant lifestyle was harmless. Cook v. State, 256 Ga. 808, 353 S.E.2d 333, cert. denied, 484 U.S. 821, 108 S. Ct. 80, 98 L. Ed. 2d 42 (1987).

Ownership of property allegedly stolen is necessary averment. — Embezzlement is a species of larceny, and in prosecutions for the former offense, as in those for the latter, ownership of the property alleged to have been stolen is a necessary averment. Scarboro v. State, 207 Ga. 449, 62 S.E.2d 168 (1950) (decided under former Code 1933, § 26-2801).

There must be actual legal interest. — Embezzlement is a species of larceny; any legal interest in the property wrongfully converted, although less than the absolute title, will support an allegation of ownership, but there must be an actual legal interest, not a mere claim or expectation of interest. Scarboro v. State, 207 Ga. 449, 62 S.E.2d 168 (1950); Land v. State, 103 Ga. App. 496, 119 S.E.2d 809 (1961) (decided under former Code 1933, § 26-2801).

Continuous series of conversions is single embezzlement. — When there is a continuous series of conversions of property of the owner entrusted to the defendant, the offense may be charged in a single count of the indictment since such series of transactions constitute but a single embezzlement. Simmons v. State, 79 Ga. App. 390, 53 S.E.2d 772 (1949) (decided under former Code 1933, § 26-2803).

Sequential but entirely separate crimes authorize separate convictions. — When a contractor committed three acts of theft by conversion, based on three separate failures to apply three separate payments to the purpose specified for each such payment, three sequential but entirely separate crimes were commit-

Application (Cont'd)

ted against the same victims, authorizing a conviction and separate sentence for each. Lovell v. State, 235 Ga. App. 140, 508 S.E.2d 771 (1998).

In a garnishment action, no conversion occurred because the freezing of defendant's assets was precipitated by operation of the garnishment statute, not plaintiff's own doing. ISP Alliance, Inc. v. Physiotherapy Assocs., 238 Ga. App. 436, 519 S.E.2d 241 (1999).

Conduct was criminal conversion under insurance policy. — For purposes of an insurance policy, a customer's conduct of leasing heavy equipment from the insured, paying for the equipment with checks that were returned for insufficient funds, and failing to return the equipment constituted criminal conversion under Georgia law. Rentrite, Inc. v. Sentry Select Ins. Co., 293 Ga. App. 643, 667 S.E.2d 888 (2008).

Trial court erred in granting an insurer's motion for summary judgment in an insured's action alleging breach of contract and bad faith due to the insurer's decision to deny an insurance claim for the purported theft loss of a vehicle because there was evidence from which a jury could find that the insured's loss was covered by the theft provisions of the policy; there was evidence from which a jury could find the fraudulent intent required to commit theft by conversion in violation of O.C.G.A. § 16-8-4. Byrd v. United Servs. Auto. Ass'n, 317 Ga. App. 280, 729 S.E.2d 522 (2012).

Verdicts not mutually exclusive. — Jury verdict was not mutually exclusive because the two crimes of theft by conversion and bringing stolen property into the state logically mutually existed, that is, the evidence before the jury authorized the jury to conclude both that the defendant converted the leased car to the defendant's own use outside of Georgia and that the defendant brought the same car into Georgia. Jones v. State, 337 Ga. App. 687, 787 S.E.2d 330 (2016).

Verdicts mutually exclusive. — In finding the defendant guilty of bringing stolen property into the State of Georgia and theft by conversion of the same property, the jury necessarily reached two positive findings of fact that could not logically and mutually exist and, thus, the verdicts were mutually exclusive. Jones v. State, 302 Ga. 730, 808 S.E.2d 655 (2017).

Evidence sufficient for conviction. — See Wright v. State, 179 Ga. App. 325, 346 S.E.2d 361 (1986); Tukes v. State, 250 Ga. App. 117, 550 S.E.2d 678 (2001).

When the defendant routinely purchased property under his wife's name, the jury was authorized to conclude that the conversion which defendant was instrumental in performing was for his use. Furthermore, the evidence of defendant's conduct before, during, and after the conversion was sufficient to enable the jury to find beyond a reasonable doubt that he was a party to the codefendant's conversion of the victims' funds. Cochran v. State, 204 Ga. App. 602, 420 S.E.2d 32, cert. denied, 204 Ga. App. 921, 420 S.E.2d 32 (1992).

Evidence that the defendant gave the defendant's mother a check made out to the defendant by the victim as advance to purchase tires, and asked the mother to cash the check at the mother's bank, was sufficient to prove that the defendant converted money given to the defendant. Cottrell v. State, 210 Ga. App. 55, 435 S.E.2d 272 (1993).

Based on evidence of outlandish promises and irregular procedures found in the defendant's investment scheme, the jury was authorized to infer fraudulent intent based on the circumstances of the transaction. Sinyard v. State, 243 Ga. App. 218, 531 S.E.2d 140 (2000).

Defendant's conviction for theft by conversion was supported by sufficient evidence because the conviction did not depend on the value of the stolen property, which was relevant only for purposes of distinguishing between a misdemeanor and a felony, therefore, the owner's testimony that the televisions had some value authorized the jury to find the defendant guilty, beyond a reasonable doubt, of misdemeanor theft by conversion. Williams v. State, 328 Ga. App. 898, 763 S.E.2d 280 (2014).

Insufficient evidence to support conviction. — Insurance agent's conviction was reversed, where the agent's tes-

timony that the agent properly applied cash given the agent by a policy applicant to the purpose for which it was intended was uncontradicted by any evidence proffered by the state. Tchorz v. State, 197 Ga. App. 185, 397 S.E.2d 619 (1990).

Evidence did not authorize a finding that defendant obtained $2,500.00 from another person "under an agreement or other known legal obligation to make a specified application" thereof, where the other person freely gave the money to defendant in return for defendant's promise personally to provide certain future services and gave no specific directions as to how the money was to be applied by defendant. Hill v. State, 198 Ga. App. 1, 401 S.E.2d 48 (1990).

Criminal conviction for theft by conversion could not be sustained where the state did not prove that the defendant, a contractor who had agreed to make renovations to a house, obtained money from the complainant under an agreement to make a specified application of such funds and that defendant knowingly converted the money. Myrick v. State, 210 Ga. App. 393, 436 S.E.2d 100 (1993).

Evidence that a contractor converted money that had been paid to the contractor to construct and install cabinets in the owner's house was insufficient for conviction, where the contractor delivered a few cabinets of "shoddy construction," but there was no evidence that defendant was obligated to apply any portion of the contract price to specific materials of identifiable quality. Lovell v. State, 235 Ga. App. 140, 508 S.E.2d 771 (1998).

State of Georgia did not offer sufficient evidence at trial from which a reasonable trier of fact might have concluded beyond a reasonable doubt that the defendant, a mechanic, converted a van, which the defendant had promised to the owner of the van to repair but apparently never did, in violation of O.C.G.A. § 16-8-4(a). Thomas v. State, 308 Ga. App. 331, 707 S.E.2d 547 (2011).

Jury Instructions

Failure to charge jury on issue of character of defendant was reversible error since the defendant's character was an issue in the trial of the case. Chastain v. State, 177 Ga. App. 236, 339 S.E.2d 298 (1985).

Proper instructions. — When, on the trial of one charged with fraudulent or criminal conversion, the defendant introduced considerable evidence and made a statement to the effect that the transaction was a loan instead of an entrustment, it was not error for the court to charge the law of (a) fraudulent or criminal conversion, (b) simple or civil conversion, and (c) civil liability notwithstanding criminal liability in connection with the same transaction, nor was it error for the court to instruct the jury as to the meaning of the term conversion. Brandt v. State, 71 Ga. App. 221, 30 S.E.2d 652 (1944) (decided under former Code 1933, § 26-2809).

Sentencing

Imprisonment for conversion not unconstitutional. — Imprisonment as a sentence for a conviction of theft by conversion does not violate Ga. Const. 1983, Art. I, Sec. I, Para. XXIII, prohibiting imprisonment for debt, because the Constitution does not forbid imprisonment for criminal conduct merely because the criminal conduct also results in civil debt. Connally v. State, 265 Ga. 563, 458 S.E.2d 336 (1995).

Merger of theft by taking, conversion, and theft by deception. — After the defendant was convicted on 52 counts related to the defendant's theft of more than $600,000 as the operator of a Ponzi scheme, although the trial court did not err in failing to merge the defendant's convictions for theft by conversion and theft by deception into the defendant's convictions for theft by taking, because theft by taking proscribed certain criminal conduct generally, while theft by conversion and theft by deception were specific crimes, the defendant's convictions for theft by taking merged into the defendant's convictions for theft by conversion and theft by deception; thus, the defendant's sentences for theft by taking were vacated, and the case was remanded to the trial court for resentencing. Mathis v. State, 343 Ga. App. 206, 807 S.E.2d 4 (2017).

Merger inappropriate. — With regard to a defendant's convictions for six

Sentencing (Cont'd)

counts of theft by taking, in violation of O.C.G.A. § 16-8-2, and six counts of felony theft by conversion, in violation of O.C.G.A. § 16-8-4(a), because there was sufficient evidence to prove each count as a separate and distinct act, merger was inappropriate and the defendant was properly convicted on all 12 counts. Kohlhaas v. State, 284 Ga. App. 79, 643 S.E.2d 350 (2007).

Restitution order proper. — Because the defendant conceded to converting the funds of two victims when the defendant entered guilty pleas to two counts of theft by conversion under O.C.G.A. § 16-8-4, under O.C.G.A. § 17-14-7(b) the state was only required to establish the amounts taken from the victims that were expended on their behalf or were already repaid to the victims; the trial court's restitution order, which took those amounts into consideration, as required by O.C.G.A. § 17-14-6(a), was proper. Hartsell v. State, 288 Ga. App. 552, 654 S.E.2d 662 (2007).

Evidence was sufficient to support the trial court's determination of the amount of restitution awarded based on the rental agreements requiring the defendant to either make monthly payments on the televisions or return the televisions; the agreements provided for a total $2,797.90 in monthly payments, defendant made only $573.60 in payments, and never returned the televisions. Williams v. State, 328 Ga. App. 898, 763 S.E.2d 280 (2014).

Former Code 1933, § 26-1808 (see now O.C.G.A. § 16-8-4) did not provide for imprisonment for debt. Clontz v. State, 140 Ga. App. 440, 231 S.E.2d 454 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Embezzlement, § 1 et seq. 50 Am. Jur. 2d, Larceny, §§ 40, 91 et seq.

C.J.S. — 52B C.J.S., Larceny, §§ 58, 68.

ALR. — Intent to convert property to one's own use or to the use of third person as element of larceny, 12 A.L.R. 804.

Individual criminal responsibility of officer or employee for larceny or embezzlement, through corporate act, of property of third person, 33 A.L.R. 787.

Misappropriation by officer or employee of depository or bailee as sustaining a criminal charge against him of embezzlement of property of depositor or bailor, 45 A.L.R. 933.

What amounts to embezzlement or larceny within fidelity bond, 56 A.L.R. 967.

Appropriation or removal without payment of property delivered in expectation of immediate cash payment, as criminal offense, 83 A.L.R. 441.

Transfer of possession of personal property with owner's consent, obtained by fraud, as conversion, 95 A.L.R. 615.

Liability as to conversion of stock or securities as affected by fact that party charged with conversion was in possession of other stock or securities of same type, 104 A.L.R. 1114.

General denial by answer in action for conversion or replevin as permitting proof of special title, lien, or right of possession, 104 A.L.R. 1154.

What amounts to concealment which will prevent running of limitation against prosecution for embezzlement, 110 A.L.R. 1000.

Negative conduct as basis of claim of conversion, 116 A.L.R. 870.

What constitutes public funds or public money within embezzlement statute, 123 A.L.R. 478.

Distinction between larceny and embezzlement, 146 A.L.R. 532.

"Defalcation" within provisions of Bankruptcy Act excepting from discharge debts of fiduciary or officer, 163 A.L.R. 1008.

Nature of property or rights other than tangible chattels which may be subject of conversion, 44 A.L.R.2d 927.

Rights of owner of stolen money as against one who won it in gambling transaction from thief, 44 A.L.R.2d 1242.

Conversion by promoter of money paid for a preincorporation subscription for stock shares as embezzlement, 84 A.L.R.2d 1100.

Drawing of check on bank account of principal or employer payable to accused's

creditor as constituting embezzlement, 88 A.L.R.2d 688.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes, 77 A.L.R.3d 689.

When statute of limitations begins to run against action for conversion of property by theft, 79 A.L.R.3d 847.

Where is embezzlement committed for purposes of territorial jurisdiction or venue, 80 A.L.R.3d 514.

Bank officer's or employee's misapplication of funds as state criminal offense, 34 A.L.R.4th 547.

What constitutes tax-deductible theft loss under 26 USCS § 165, 98 A.L.R. Fed. 229.

What constitutes violation of 15 USCS § 714m(c), proscribing larceny or conversion of property owned by or pledged to Commodity Credit Corporation, 109 A.L.R. Fed. 871.

What is "property of another" within statute proscribing larceny, theft, or embezzlement of property of another, 57 A.L.R. 6th 445.

16-8-5. Theft of services.

A person commits the offense of theft of services when by deception and with the intent to avoid payment he knowingly obtains services, accommodations, entertainment, or the use of personal property which is available only for compensation. (Code 1933, § 26-1807, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Theft of telecommunication services, § 46-5-2 et seq.

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article, "Cable Theft: The Problem, The Need for Useful State Legislation and a Proposed Solution For Georgia," see 35 Emory L.J. 643 (1986).

JUDICIAL DECISIONS

Essential ingredient of offense of theft of services is intention to avoid payment. Roberson v. State, 145 Ga. App. 687, 244 S.E.2d 629 (1978); Johnson v. State, 159 Ga. App. 497, 283 S.E.2d 711 (1981); Williamson v. State, 191 Ga. App. 388, 381 S.E.2d 766 (1989).

Fraudulently obtaining apartment. — There was direct evidence that defendant obtained services, lodging, by deception, where defendant obtained an apartment by using the name of another and stolen identification. Nichols v. State, 210 Ga. App. 134, 435 S.E.2d 502 (1993).

Use of vacant apartment and use of electricity. — Surreptitious and unauthorized entrance and use of a vacant apartment is one of the forms of obtaining "accommodations" clearly encompassed within the meaning of O.C.G.A. § 16-8-5, and the surreptitious and unauthorized use of electricity or electrical energy is one of the forms of obtaining "services" within the meaning of that Code section. Phillips v. State, 204 Ga. App. 698, 420 S.E.2d 316 (1992).

State failed to show the intent necessary to warrant a conviction when the record contained the defendant's unimpeached testimony that the defendant intended to pay a babysitter for keeping the defendant's child and that the only reason the defendant did not pay was because the defendant had not received anticipated wages. Williamson v. State, 191 Ga. App. 388, 381 S.E.2d 766 (1989).

Enjoining criminal proceeding by bankruptcy court. — Bankruptcy court should refuse to enjoin a state criminal proceeding for theft of services unless that proceeding is brought in bad faith, or the proceeding is brought solely for the pur-

pose of collecting a debt. Tenpins Bowling, Ltd. v. Alderman, 32 Bankr. 474 (Bankr. M.D. Ga. 1983).

Defendant's giving false information in an application for a county-appointed attorney about the true state of defendant's finances and thereafter obtaining and accepting the services of appointed counsel was sufficient to authorize a conviction under O.C.G.A. § 16-8-5. Carter v. State, 237 Ga. App. 703, 516 S.E.2d 556 (1999).

Evidence sufficient for conviction. — See Shores v. State, 240 Ga. App. 189, 522 S.E.2d 515 (1999).

Sufficient evidence supported the defendant's theft of services conviction as the evidence permitted the jury to infer that: (1) by paying a store clerk $50 to access another credit application in order to provide the defendant with a cell phone, the defendant encouraged, hired, or procured the store clerk to engage in deception; and (2) the defendant did not intend to pay for the communications services received as a result. Jones v. State, 285 Ga. App. 822, 648 S.E.2d 133 (2007).

Evidence was sufficient to support the defendant's conviction for theft of services because the defendant engaged in the surreptitious and unauthorized use of water services since the defendant had actual knowledge that water was being provided to the residence as a result of illicit tampering with the water meter and not because the defendant had applied for water service from the county water department, and the evidence demonstrated that the department notified the defendant that it would not turn the water on, yet the defendant continued to stay in the residence, which was consistent with the defendant's use of the stolen water without the intent to pay; for purposes of O.C.G.A. § 16-8-5, there was no reason to distinguish between the theft of water services and the theft of electrical services, and the jury was entitled to conclude that it was not a reasonable hypothesis that the defendant continued to stay in the home while refraining from employing the water for its common and necessary purposes, but, rather, any rational trier of fact could conclude that the defendant engaged in the surreptitious and unauthorized use of water services. Jackson v. State, 301 Ga. App. 406, 687 S.E.2d 666 (2009).

Evidence not sufficient. — Taxpayers' complaint for a refund was dismissed, as the taxpayers were not entitled to a theft loss deduction under 26 U.S.C. § 165(e) with respect to a decline in value of publicly traded stock after the taxpayer husband exercised his stock options because they did not show that they were victims of either a theft by taking, theft by deception, theft by conversion, or theft of services under O.C.G.A. § 16-8-2, O.C.G.A. § 16-8-3, O.C.G.A. § 16-8-4, or O.C.G.A. § 16-8-5. The taxpayers were only entitled to capital loss deductions under 26 U.S.C. § 2511. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

Cited in Adams v. State, 145 Ga. App. 124, 243 S.E.2d 330 (1978); Johnson v. State, 170 Ga. App. 71, 316 S.E.2d 160 (1984); Cisco v. State, 285 Ga. 656, 680 S.E.2d 831 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 32 Am. Jur. 2d, False Pretenses, §§ 42, 43.

C.J.S. — 43A C.J.S., Inns, Hotels, and Eating Places, § 18.

ALR. — What constitutes tax-deductible theft loss under 26 USCS § 165, 98 A.L.R. Fed. 229.

16-8-5.1. Circumstances permitting inference of intent to avoid payment; exceptions.

The trier of fact may infer that the accused intended to avoid payment due for the rental or lease of any personal property in any prosecution pursuant to Code Section 16-8-2, relating to theft by taking;

16-8-3, relating to theft by deception; 16-8-4, relating to theft by conversion; or 16-8-5, relating to theft of services; if a person knowingly:

(1) Used false identification;

(2) Provided false information on a written contract;

(3) Made, drew, uttered, executed, or delivered an instrument for the payment of money on any bank or other depository in exchange for present consideration, knowing that it would not be honored by the drawee;

(4) Abandoned any property at a location that is not the location agreed upon for return and that would not be reasonably known to the owner;

(5) Returned any property to a location that would not reasonably be known to the owner without notifying the owner; or

(6) Returned any property at a time beyond posted business hours of the owner.

No person shall be convicted under Code Section 16-8-2, relating to theft by taking; 16-8-3, relating to theft by deception; 16-8-4, relating to theft by conversion; or 16-8-5, relating to theft of services; where there was an agreement to delay payment for such property or services or the accused makes payment in full within two business days after returning the property or obtaining the services. (Code 1981, § 16-8-5.1, enacted by Ga. L. 2005, p. 952, § 1/HB 236; Ga. L. 2006, p. 72, § 16/SB 465.)

16-8-5.2. Retail property fencing; civil forfeiture; related matters.

(a) As used in this Code section, the term:

(1) "Retail property" means any new article, product, commodity, item, or component intended to be sold in retail commerce.

(2) "Retail property fence" means a person or entity that buys, sells, transfers, or possesses with the intent to sell or transfer retail property that such person knows or should have known was stolen.

(3) "Value" means the retail value of the item as stated or advertised by the affected retail establishment, to include applicable taxes.

(b) A person commits the offense of retail property fencing when such persons receives, disposes of, or retains retail property which was unlawfully taken or shoplifted over a period not to exceed 180 days with the intent to:

(1) Transfer, sell, or distribute such retail property to a retail property fence; or

(2) Attempt or cause such retail property to be offered for sale, transfer, or distribution for money or other things of value.

(c) Whoever knowingly receives, possesses, conceals, stores, barters, sells, or disposes of retail property with the intent to distribute any retail property which is known or should be known to have been taken or stolen in violation of this subsection with the intent to distribute the proceeds, or to otherwise promote, manage, carry on, or facilitate an offense described in this subsection, shall have committed the offense of retail property fencing.

(d)(1) It shall not be necessary in any prosecution under this Code section for the state to prove that any intended profit was actually realized. The trier of fact may infer that a particular scheme or course of conduct was undertaken for profit from all of the attending circumstances.

(2) It shall not be a defense to violating this Code section that the property was obtained by means other than through the commission of a theft offense if the property was explicitly represented to the accused as being obtained through the commission of a theft.

(e)(1) As used in this subsection, the terms "proceeds" and "property" shall have the same meanings as set forth in Code Section 9-16-2.

(2) Any property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of this Code section and any proceeds are declared to be contraband and no person shall have a property right in them; provided, however, that notwithstanding paragraph (2) of subsection (a) of Code Section 9-16-17, no property of any owner shall be forfeited under this subsection, to the extent of the interest of such owner, by reason of an act or omission established by such owner to have been committed or omitted without knowledge or consent of such owner.

(3) Any property subject to forfeiture pursuant to paragraph (2) of this subsection shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9.

(f) Each violation of this Code section shall constitute a separate offense. (Code 1981, § 16-8-5.2, enacted by Ga. L. 2008, p. 679, § 1/HB 1346; Ga. L. 2015, p. 693, § 2-6/HB 233.)

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — Offenses arising under O.C.G.A. § 16-8-5.2 are designated as offenses for which those charged are to be fingerprinted. 2009 Op. Att'y Gen. No. 2009-1.

16-8-6. Theft of lost or mislaid property.

A person commits the offense of theft of lost or mislaid property when he comes into control of property that he knows or learns to have been lost or mislaid and appropriates the property to his own use without first taking reasonable measures to restore the property to the owner. (Code 1933, § 26-1805, enacted by Ga. L. 1968, p. 1249, § 1.)

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982).

JUDICIAL DECISIONS

Variance between indictment and proof. — When the indictment mistakenly combined the elements (date, amount, and collateral) of several different loan transactions, and the evidence presented at trial did not comport with the allegations in the indictment, the conviction was reversed. Gentry v. State, 202 Ga. App. 465, 414 S.E.2d 696 (1992).

Evidence sufficient for conviction. — Evidence that the defendant and the defendant's friend came into possession of the victim's bank deposit bag containing checks, deposit slips, and cash, which the victim had misplaced while it was being transported and which related to the victim's business, and evidence that police found checks belonging to the victim in the defendant's purse and in a bag belonging to the defendant, as well as a large amount of cash in the defendant's wallet, was sufficient to support the defendant's conviction for theft of mislaid property as the evidence showed the defendant knew the mislaid property did not belong to the defendant and nevertheless appropriated that property to the defendant's own use without first taking reasonable measures to restore the property to the owner. Shannon v. State, 258 Ga. App. 689, 574 S.E.2d 889 (2002).

Cited in English v. State, 202 Ga. App. 751, 415 S.E.2d 659 (1992).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Larceny, §§ 57, 97 et seq.

C.J.S. — 52B C.J.S., Larceny, §§ 46, 53.

ALR. — Larceny or embezzlement by appropriating money or proceeds of paper mistakenly delivered in excess of the amount due or intended, 14 A.L.R. 894.

What constitutes tax-deductible theft loss under 26 USCS § 165, 98 A.L.R. Fed. 229.

16-8-7. Theft by receiving stolen property.

(a) A person commits the offense of theft by receiving stolen property when he receives, disposes of, or retains stolen property which he knows or should know was stolen unless the property is received,

disposed of, or retained with intent to restore it to the owner. "Receiving" means acquiring possession or control or lending on the security of the property.

(b) In any prosecution under this Code section it shall not be necessary to show a conviction of the principal thief. (Laws 1833, Cobb's 1851 Digest, pp. 807, 808; Code 1863, §§ 4382, 4383; Code 1868, §§ 4420, 4421; Code 1873, §§ 4488, 4489; Code 1882, §§ 4488, 4489; Penal Code 1895, §§ 171, 172; Penal Code 1910, §§ 168, 169; Code 1933, §§ 26-2620, 26-2621; Ga. L. 1961, p. 118, § 1; Code 1933, § 26-1806, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 4.)

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986).

For comment on Gaskins v. State, 119 Ga. App. 593, 168 S.E.2d 183 (1969), see 22 Mercer L. Rev. 481 (1971).

JUDICIAL DECISIONS

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General Consideration

Constitutionality. — See Lee v. State, 239 Ga. 769, 238 S.E.2d 852 (1977).

Offense is intended to catch person who buys or receives stolen goods as distinct from the principal thief. Sosbee v. State, 155 Ga. App. 196, 270 S.E.2d 367 (1980).

Not crime involving dishonesty for impeachment purposes. — For impeachment purposes, crimes of "dishonesty" were limited to those crimes that bore upon a witness's propensity to testify truthfully; accordingly, misdemeanor theft by receiving stolen property was not a crime involving dishonesty within the meaning of former O.C.G.A. § 24-9-84.1(a)(3) (see now O.C.G.A. § 24-6-609). Adams v. State, 284 Ga. App. 534, 644 S.E.2d 426 (2007).

Failure to include "or should know" in indictment. — Defendant is not prejudiced by lack of notice or threat of double jeopardy merely because the indictment fails to contain the words "or should know." State v. Bradbury, 167 Ga. App. 390, 306 S.E.2d 346 (1983).

If offense is alleged in language of statute, this is sufficient. Anderson v. State, 113 Ga. App. 670, 149 S.E.2d 398 (1966).

O.C.G.A. § 16-8-7 fails to designate offense as either felony or misdemeanor; thus, value of goods is only relevant under O.C.G.A. § 16-8-12(a)(1) for purpose of sentencing. Pate v. State, 158 Ga. App. 395, 280 S.E.2d 414 (1981).

Relationship to other offenses. — Kidnapping, O.C.G.A. § 16-5-40(a), had no element that the accused either stole property or received stolen property; in a case where defendant kidnapped the victim, then stole the victim's car, defendant's conviction for theft by receiving the stolen car, O.C.G.A. § 16-8-7(a), was not mutually exclusive of a kidnapping con-

viction and did not preclude prosecution for the kidnapping charge. State v. Fuller, No. A03A1918, 2004 Ga. App. LEXIS 329 (Mar. 9, 2004).

Trial without waiver of indictment. — Trial court had jurisdiction over defendant being tried for the offense of theft by receiving stolen property even though defendant had not waived indictment regarding that offense, since O.C.G.A. § 17-7-70.1 allowed defendant to be tried on an accusation even when the defendant had not waived indictment. Gerrard v. State, 252 Ga. App. 767, 556 S.E.2d 131 (2001), cert. denied, 535 U.S. 1077, 122 S. Ct. 1960, 152 L. Ed. 2d 1021 (2002).

Venue proper. — Venue for defendant's theft by receiving trial was proper in Forsyth County as the deputy stopped the defendant driving a stolen car outside of a car dealership in Forsyth County; thus, the defendant exercised control over the stolen car in Forsyth County. Petty v. State, 271 Ga. App. 547, 610 S.E.2d 169 (2005).

State clearly demonstrated that venue was proper in Dawson County, Georgia for the defendant's trial for misdemeanor theft by receiving, O.C.G.A. § 16-8-7, since the defendant began driving away in a vehicle containing stolen goods. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Withdrawal of guilty plea not allowed. — When the defendant sought review of an order denying the defendant's motion to withdraw a guilty plea in two separate appeals, and both appeals were dismissed, no further appeal was authorized. Tabatabaee v. State, 266 Ga. App. 462, 597 S.E.2d 518 (2004).

Indictment sufficient. — Indictments charging two attorneys with theft by taking and by receiving in connection with a client's property transfers were sufficient in that the indictments tracked the statutory language, placed defendants on notice of the charges against the defendants, and sufficiently alleged a statute of limitations exception. Rader v. State, 300 Ga. App. 411, 685 S.E.2d 405 (2009).

There was no fatal variance between the allegations of theft by receiving and the proof because evidence that the defendant was the original thief was not uncontested; the direct and uncontested evidence did not identify the defendant as the original thief, and while an accomplice testified that the defendant was involved in shoplifting the items, the defendant was not with the accomplice and the codefendant when an officer saw them concealing clothing. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Cited in Howington v. State, 121 Ga. App. 715, 175 S.E.2d 41 (1970); Johnson v. State, 122 Ga. App. 769, 178 S.E.2d 772 (1970); Middle Ga. Livestock Sales v. Commercial Bank & Trust Co., 123 Ga. App. 733, 182 S.E.2d 533 (1971); D.P. v. State, 129 Ga. App. 680, 200 S.E.2d 499 (1973); Thomas v. State, 130 Ga. App. 613, 203 S.E.2d 922 (1974); Queen v. State, 131 Ga. App. 370, 205 S.E.2d 921 (1974); Jones v. State, 131 Ga. App. 699, 206 S.E.2d 601 (1974); Brindle v. State, 134 Ga. App. 257, 214 S.E.2d 182 (1975); Williams v. State, 135 Ga. App. 919, 219 S.E.2d 632 (1975); Mena v. State, 138 Ga. App. 722, 227 S.E.2d 411 (1976); Rogers v. State, 139 Ga. App. 656, 229 S.E.2d 132 (1976); Fair v. State, 140 Ga. App. 281, 231 S.E.2d 1 (1976); State v. Mabrey, 140 Ga. App. 577, 231 S.E.2d 461 (1976); Crowley v. State, 141 Ga. App. 867, 234 S.E.2d 700 (1977); Haugabrook v. State, 142 Ga. App. 714, 236 S.E.2d 890 (1977); Mathis v. State, 147 Ga. App. 148, 248 S.E.2d 212 (1978); Sanders v. State, 151 Ga. App. 590, 260 S.E.2d 504 (1979); United States v. Weiss, 599 F.2d 730 (5th Cir. 1979); Aldridge v. State, 153 Ga. App. 744, 266 S.E.2d 513 (1980); Mangrum v. State, 155 Ga. App. 334, 270 S.E.2d 874 (1980); Barrett v. State, 157 Ga. App. 174, 276 S.E.2d 857 (1981); Ladson v. State, 248 Ga. 470, 285 S.E.2d 508 (1981); Payne v. State, 161 Ga. App. 233, 291 S.E.2d 236 (1982); Lumpkin v. State, 249 Ga. 834, 295 S.E.2d 86 (1982); Williams v. State, 163 Ga. App. 541, 295 S.E.2d 212 (1982); Johnson v. State, 164 Ga. App. 7, 296 S.E.2d 202 (1982); Gunn v. State, 163 Ga. App. 906, 296 S.E.2d 221 (1982); Adams v. State, 164 Ga. App. 295, 297 S.E.2d 77 (1982); Jones v. Kemp, 678 F.2d 929 (11th Cir. 1982); Scott v. Donovan, 539 F. Supp. 255 (N.D. Ga. 1982); Weaver v. State, 169 Ga. App. 890, 315 S.E.2d 467 (1984); Craig v. State, 170 Ga. App. 6, 316 S.E.2d 18

General Consideration (Cont'd)

(1984); Walker v. State, 172 Ga. App. 7, 321 S.E.2d 772 (1984); Wallace v. State, 175 Ga. App. 685, 333 S.E.2d 874 (1985); Tenner v. Wallace, 615 F. Supp. 40 (S.D. Ga. 1985); Todd v. State, 184 Ga. App. 750, 362 S.E.2d 400 (1987); Crews v. State, 185 Ga. App. 494, 364 S.E.2d 625 (1988); Crumpton v. State, 185 Ga. App. 735, 365 S.E.2d 536 (1988); Curtis v. State, 190 Ga. App. 173, 378 S.E.2d 516 (1989); Davis v. State, 198 Ga. App. 375, 401 S.E.2d 581 (1991); Wright v. State, 220 Ga. App. 233, 469 S.E.2d 381 (1996); Blankenship v. State, 223 Ga. App. 264, 477 S.E.2d 397 (1996); Scruggs v. State, 227 Ga. App. 35, 488 S.E.2d 110 (1997); Brown v. State, 230 Ga. App. 190, 495 S.E.2d 858 (1998); Selley v. State, 237 Ga. App. 47, 514 S.E.2d 706 (1999); Ruffin v. State, 252 Ga. App. 289, 556 S.E.2d 191 (2001); Butler v. State, 294 Ga. App. 540, 669 S.E.2d 525 (2008); Davis v. State, 319 Ga. App. 501, 736 S.E.2d 160 (2012).

Elements of Crime

Essential elements of offense of receiving stolen goods are: (1) that the accused bought or received the goods; (2) that the goods had been stolen by some person other than the accused; (3) that at the time of so doing the accused knew the same had been stolen; and (4) that in so doing the accused acted with criminal intent. Suggs v. State, 59 Ga. App. 331, 1 S.E.2d 39 (1939); Austin v. State, 89 Ga. App. 866, 81 S.E.2d 508 (1954).

Defendant's claim that defendant acquired stolen tools worth $800.00 by trading a dog worth $50.00 was sufficient circumstantial evidence alone to authorize defendant's conviction for theft by receiving stolen property. Evidence that defendant knew that others had stolen company tools in the past supported a finding that defendant knew that the tools were stolen. Brown v. State, 265 Ga. App. 613, 594 S.E.2d 770 (2004).

Evidence was sufficient to support the defendant's conviction for theft by receiving stolen property, as the state introduced sufficient evidence to permit the jury to find that the bathtub in the back of the defendant's truck had been stolen from the house, that the defendant knew or should have known that it was stolen, and that the defendant had acquired possession of it; however, since the state did not prove that the actual fair market value of the bathtub exceeded $500.00, the trial court erred in imposing a felony sentence as only a misdemeanor sentence was authorized. DeLong v. State, 270 Ga. App. 173, 606 S.E.2d 107 (2004).

Revocation of the defendant's probation based on theft by receiving was clearly erroneous after a stolen vehicle was seen at the defendant's home and later found in a yard next door to the defendant's home, but there was no evidence that the defendant was ever in possession or control of the vehicle, which was a necessary element of theft by receiving. Gonzales v. State, 276 Ga. App. 11, 622 S.E.2d 401 (2005).

Scienter is essential element of crime of receiving stolen goods and must be proved to warrant conviction. McGill v. State, 106 Ga. App. 482, 127 S.E.2d 332 (1962).

Knowledge and intent, being peculiarly subjective, may be inferred from circumstances. Washington v. State, 96 Ga. App. 844, 101 S.E.2d 885 (1958).

While the test of guilt in the offense of knowingly receiving stolen goods is not what an ordinarily reasonable man would believe, but what the defendant did in fact know, nevertheless, the jury may consider all the circumstances of the case in drawing its inference as to such knowledge. Hardy v. State, 100 Ga. App. 88, 110 S.E.2d 82 (1959).

Because the defendant borrowed a car in exchange for crack cocaine, and knew that the person lending the defendant the car did automobile body work for others and that the car was clearly undergoing body work, sufficient evidence supported the conviction for receiving stolen property under O.C.G.A. § 16-8-7(a); a jury could have found that the defendant knew or should have known that the lender had no authority to loan the car and that the lender had converted the car to the lender's own use by renting the car to defendant in violation of O.C.G.A. § 16-8-4(a), prohibiting theft by conversion, and

O.C.G.A. § 16-8-2, prohibiting theft by taking. McKinney v. State, 276 Ga. App. 75, 622 S.E.2d 427 (2005).

Circumstances to be considered include contradictory statements by the defendant, as well as facts which the jury might find sufficient to excite the suspicions of a man of ordinary prudence. Austin v. State, 89 Ga. App. 866, 81 S.E.2d 508 (1954).

Contradictory statement made by defendant coupled with apparent nonexistence of the person from whom defendant contended to have gotten the car, the place where defendant said defendant received it, and other circumstances, authorized the jury to find that the defendant received the automobile knowing it to have been stolen. Austin v. State, 89 Ga. App. 866, 81 S.E.2d 508 (1954).

Proof that accused did not steal goods not required. — It is not a requirement of present law that the state prove the accused did not steal the goods. Weidendorf v. State, 215 Ga. App. 129, 449 S.E.2d 675 (1994).

Proof that the defendant knew or should have known that a gun the defendant tried to pawn was stolen was an essential element of the crime of receiving stolen property, and a conviction was reversed since the evidence showed no more than the defendant's possession of a stolen gun; no inference of guilty knowledge could have been drawn solely from the fact that the defendant tried to pawn the stolen gun and the evidence showed no additional circumstances from which a jury could rationally have inferred that the defendant knew or should have known that the gun was stolen. Wells v. State, 268 Ga. App. 62, 601 S.E.2d 433 (2004).

Knowledge that goods are stolen may well be deduced from conduct and behavior, the character of the person from whom received, and the kind of goods. Prather v. State, 116 Ga. App. 696, 158 S.E.2d 291 (1967).

Essence of crime of theft by receiving stolen property is that the defendant, with knowledge of the facts and without intent to return it to the owner, bought or obtained property which had been stolen by some person other than the defendant. Clark v. State, 144 Ga. App. 69, 240 S.E.2d 270 (1977); Dyer v. State, 150 Ga. App. 760, 258 S.E.2d 620 (1979), overruled on other grounds, Redding v. State, 192 Ga. App. 325, 384 S.E.2d 910 (1989).

Knowledge that goods have been stolen. — Defendant who is guilty of receiving stolen goods must hold the goods with knowledge that the goods are the property of another. Knowledge that goods have been stolen is felonious knowledge, and is the gist of the offense. Causey v. State, 139 Ga. App. 499, 229 S.E.2d 1 (1976).

Evidence that a defendant was in possession of a handgun that was labeled for law enforcement use did not support the defendant's conviction under O.C.G.A. § 16-8-7(a) for theft by receiving stolen property as the label did not by itself establish the requisite knowledge that the handgun was stolen; the label did not exclude the possibility that the handgun had been given away or sold on the black market prior to the defendant purchasing the handgun. White v. State, 283 Ga. 566, 662 S.E.2d 131 (2008).

Evidence that a defendant possessed a cell phone, a debit card, and women's jewelry, all of which had been stolen a day earlier, while the defendant attempted to climb into a stranger's home, along with evidence that the defendant attempted to flee when caught climbing in the window, was sufficient to support convictions for criminal trespass and felony theft by receiving stolen property in violation of O.C.G.A. §§ 16-7-21(b)(1) and 16-8-7(a). Reese v. State, 313 Ga. App. 746, 722 S.E.2d 441 (2012).

Juvenile's adjudication of delinquency for violating O.C.G.A. § 16-8-7(a), theft by receiving, was supported by evidence of flight, the defendant's proximity to stolen items in the woods, the location of stolen items in the defendant's bedroom the day after the theft, and phone photographs of the juvenile with the stolen items including watches and firearms. In the Interest of T. J. J, 329 Ga. App. 537, 765 S.E.2d 704 (2014).

Knowledge that goods are stolen is an essential element of an offense under O.C.G.A. § 16-8-7. Pruiett v. State, 159 Ga. App. 396, 283 S.E.2d 625 (1981); Abner v. State, 196 Ga. App. 752, 397 S.E.2d 36 (1990).

Elements of Crime (Cont'd)

Knowledge that goods were stolen when the defendant receives the goods is an essential element of the crime of theft by receiving stolen property. Hudgins v. State, 125 Ga. App. 576, 188 S.E.2d 430 (1972); Parrott v. State, 134 Ga. App. 160, 214 S.E.2d 3 (1975); Williamson v. State, 134 Ga. App. 329, 214 S.E.2d 415 (1975); Shorts v. State, 137 Ga. App. 314, 223 S.E.2d 504 (1976); LaRoche v. State, 140 Ga. App. 509, 231 S.E.2d 368 (1976); Saunders v. State, 145 Ga. App. 248, 243 S.E.2d 668 (1978); Davis v. State, 153 Ga. App. 847, 267 S.E.2d 263 (1980); Watts v. State, 157 Ga. App. 214, 276 S.E.2d 884 (1981).

Essential element of theft by receiving stolen property is that a person receives stolen property "which he knows or should know was stolen." Ingram v. State, 160 Ga. App. 300, 287 S.E.2d 304 (1981).

Knowledge requirement for theft by receiving is satisfied if the defendant either "knows or should know" the property was stolen. State v. Bradbury, 167 Ga. App. 390, 306 S.E.2d 346 (1983).

Evidence was sufficient to authorize the jury's verdict that the defendant possessed a stolen motor vehicle under circumstances when the defendant knew or, in the exercise of ordinary prudence, should have known the vehicle was stolen since: (1) prior inconsistent statements of a witness were admissible as substantive evidence that the defendant possessed the stolen car within 72 hours after the loss was reported and that the car at that time had a shattered windshield and was missing all four hubcaps; (2) in addition to the strange appearance of the vehicle, the defendant abandoned the car after being spotted by the police, apparently in such haste that the defendant left behind the defendant's wallet containing the defendant's identification; and (3) someone had attempted to conceal the nature of the car as stolen by substituting an Alabama license plate for the owner's North Carolina tag, and the next day, the defendant was driving a different vehicle, also with a stolen Alabama tag. Graham v. State, 236 Ga. App. 673, 512 S.E.2d 921 (1999).

Jury was authorized to infer the defendant's guilty knowledge from evidence of the defendant's flight and from the similar transaction evidence adduced; further, since the defendant waived the defendant's privilege to remain silent, the defendant's refusal to answer the prosecutor's questions regarding the defendant's possession of the car could also be considered as evidence of the defendant's guilty knowledge. Reedman v. State, 265 Ga. App. 162, 593 S.E.2d 46 (2003).

Defendant's knowledge that the property the defendant possessed was stolen was sufficiently proved because the friend testified that the defendant said defendant got an automobile in the defendant's possession from "one of the jobs where he had been entering people's homes," and a jury was entitled to believe this testimony and infer that the defendant knew the car was stolen. Johnson v. State, 276 Ga. App. 505, 623 S.E.2d 706 (2005).

Guilty knowledge may be shown by circumstances which would excite suspicion in mind of ordinarily prudent man. Hudgins v. State, 125 Ga. App. 576, 188 S.E.2d 430 (1972); Parrott v. State, 134 Ga. App. 160, 214 S.E.2d 3 (1975); Williamson v. State, 134 Ga. App. 329, 214 S.E.2d 415 (1975); Shorts v. State, 137 Ga. App. 314, 223 S.E.2d 504 (1976); LaRoche v. State, 140 Ga. App. 509, 231 S.E.2d 368 (1976); Saunders v. State, 145 Ga. App. 248, 243 S.E.2d 668 (1978); Barfield v. State, 149 Ga. App. 166, 253 S.E.2d 781 (1979); Brown v. State, 177 Ga. App. 778, 341 S.E.2d 226 (1986).

This guilty knowledge may be inferred from circumstances which would excite suspicion in the mind of an ordinarily prudent man. Beadles v. State, 151 Ga. App. 710, 261 S.E.2d 447 (1979); Watts v. State, 157 Ga. App. 214, 276 S.E.2d 884 (1981); Pruiett v. State, 159 Ga. App. 396, 283 S.E.2d 625 (1981).

Gist of offense is actual state of defendant's mind when the defendant purchased property. Davis v. State, 119 Ga. App. 740, 168 S.E.2d 784 (1969).

Evidence that the defendant was present when the accomplice took another person's jewelry, which the accomplice placed on the front seat of the vehicle in which the defendant and the accomplice were riding, and that the accomplice then

took the jewelry into a pawn shop several hours later and returned with cash, and without the jewelry, was sufficient to support the defendant's conviction for theft by receiving stolen property under O.C.G.A. § 16-8-7(a). Gray v. State, 257 Ga. App. 393, 571 S.E.2d 435 (2002).

Identification of goods. — State must present evidence which sufficiently identifies the goods found in the defendant's possession as being the same goods which were stolen. Causey v. State, 139 Ga. App. 499, 229 S.E.2d 1 (1976).

When identification of an exhibit as a stolen handgun was based solely upon nonprobative hearsay statements, there was no proof of a larcenous taking, and the defendant's conviction for theft by receiving stolen property was reversed. Johnson v. State, 236 Ga. App. 356, 511 S.E.2d 921 (1999).

"After the fact knowledge" would tend to show guilty retention and will sustain conviction. Johnson v. State, 135 Ga. App. 768, 219 S.E.2d 25 (1975).

Any language in past cases indicating that only evidence of guilty knowledge at the time the goods were received will warrant conviction, is no longer controlling because the present law expressly mentions retention. Johnson v. State, 135 Ga. App. 768, 219 S.E.2d 25 (1975).

Retention of stolen property which a person knows or should know is stolen, without intent to restore it to the owner, will sustain a conviction for receiving stolen property even where guilty knowledge at the time of the acquisition of the stolen property is not shown. Poole v. State, 144 Ga. App. 228, 240 S.E.2d 775 (1977).

After the fact knowledge that goods are stolen and retention of the goods constitutes retaining stolen property and will support a conviction. Bremer v. State, 148 Ga. App. 461, 251 S.E.2d 355 (1978).

Included Crimes

Theft by receiving is not lesser included offense of theft by taking. — These two crimes are so mutually exclusive that the thief and the receiver cannot even be accomplices. Sosbee v. State, 155 Ga. App. 196, 270 S.E.2d 367 (1980).

One cannot be convicted of both robbery of a vehicle and theft by receiving that vehicle. Thomas v. State, 261 Ga. 854, 413 S.E.2d 196 (1992).

Defendant could not be convicted of armed robbery of a car and theft by receiving the same car because the offenses were mutually exclusive and the convictions were based on proof sufficient to authorize conviction on either offense. Camsler v. State, 211 Ga. App. 826, 440 S.E.2d 681 (1994).

Trial court did not err in failing to give a requested jury instruction on a lesser offense of theft by receiving stolen property as theft by receiving stolen property is not a lesser included offense of armed robbery, theft by taking, or hijacking a motor vehicle. Mullins v. State, 267 Ga. App. 393, 599 S.E.2d 340 (2004).

Theft by receiving stolen property, O.C.G.A. § 16-8-7(a), was not a lesser included offense of theft by taking under O.C.G.A. § 16-8-2 because applying the required evidence test each crime required proof that the other did not; the former required a showing that the defendant knew or should have known that the gun the victim wanted to sell was stolen while the latter required that the defendant took the gun from the victim with intent to deprive the victim of the gun. Peoples v. State, 295 Ga. App. 731, 673 S.E.2d 82 (2009).

Theft by receiving not included in burglary. — It is not error for the trial court, in the absence of a written request, to fail to charge on the lesser crime of theft by receiving. Jacobs v. State, 140 Ga. App. 410, 231 S.E.2d 155 (1976).

As a matter of fact or of law, theft by receiving is not a lesser included offense of burglary. State v. Bolton, 144 Ga. App. 797, 242 S.E.2d 378 (1978).

Theft by taking, but not theft by receiving, may be lesser included offense to burglary. Breland v. Smith, 247 Ga. 690, 279 S.E.2d 204 (1981).

Because theft by receiving is not a lesser included offense of burglary, the trial court's reduction of the charge against appellant from burglary to theft by receiving was error as the bill of indictment did not charge the appellant with theft by receiving. Holloman v. State, 168 Ga. App. 683, 310 S.E.2d 734 (1983).

Theft by receiving stolen property contains elements not present in of-

Included Crimes (Cont'd)

fense of burglary; only an intent to commit theft is required, not the completed act. Gearin v. State, 127 Ga. App. 811, 195 S.E.2d 211 (1973).

One cannot be a principal thief of stolen property and at the same time be convicted of theft by receiving the same property. — Defendants' convictions for the crimes of burglary and theft by receiving as to one residence were reversed as one cannot be a principal thief of stolen property and at the same time be convicted of theft by receiving the same property. Clark v. State, 289 Ga. App. 612, 658 S.E.2d 190 (2008).

Theft by receiving includes concept that defendant did not steal. — After the defendant was indicted in Fulton County on charges of armed robbery and hijacking of a motor vehicle, but the defendant had been previously convicted in Clayton County of theft by receiving stolen property by retaining the same car on the same day, the defendant's plea in bar and motion to dismiss the Fulton County indictment was improperly denied as the charges in the Fulton County case were mutually exclusive of the defendant's prior conviction for theft by receiving because the theft by receiving conviction contained an implicit and necessary finding that the defendant did not steal the car, and the charges of armed robbery and hijacking a motor vehicle each required proof that the defendant actually took the car. Bonner v. State, 339 Ga. App. 539, 794 S.E.2d 186 (2016).

Burden of Proof

State's burden of proof. — Although one admits buying and receiving goods shown by undisputed evidence to have been stolen, the burden is still upon the state to prove beyond a reasonable doubt that the transaction occurred with guilty knowledge on the part of the accused. Prather v. State, 116 Ga. App. 696, 158 S.E.2d 291 (1967).

It need not be alleged or proved that defendant received goods directly from principal thief, provided defendant received the goods knowing the goods to have been stolen. Anderson v. State, 113 Ga. App. 670, 149 S.E.2d 398 (1966).

When an indictment charges the defendant with knowingly buying and receiving stolen goods, it is not necessary to prove that the defendant knowingly received the stolen goods from the principal thief, but if it is proved that the defendant received the goods, knowing the goods to be stolen, from any person whatsoever, the defendant would be guilty. Gaspin v. State, 76 Ga. App. 375, 45 S.E.2d 785 (1947); Tucker v. State, 94 Ga. App. 468, 95 S.E.2d 296 (1956).

Burden is not on possessor of stolen goods. — Law does not put the burden upon the possessor of stolen goods of proving that the possessor was not guilty of receiving the goods knowingly. Gaskin v. State, 119 Ga. App. 593, 168 S.E.2d 183 (1969) (for comment, see 22 Mercer L. Rev. 481 (1971)).

When the principal thief is unknown, there is no burden on the state of proving that such thief was not the defendant. Poole v. State, 144 Ga. App. 228, 240 S.E.2d 775 (1977); Duke v. State, 153 Ga. App. 204, 264 S.E.2d 721 (1980).

Vehicle title inaccuracies in indictment. — Trial court properly denied the defendant's motion for acquittal made on the ground that the state failed to prove ownership of the stolen vehicles given certain inaccuracies as to title in the indictment since these variances neither misinformed the accused of the charges against the accused nor left the accused subject to subsequent prosecutions for the same offense. Holbrook v. State, 209 Ga. App. 301, 433 S.E.2d 616 (1993).

Jury Issues and Instructions

Charge should include whole of section; a deletion or omission of the portion "unless the property is received, disposed of, or retained with intent to restore it to the owner," was error. Boorstine v. State, 126 Ga. App. 90, 190 S.E.2d 83 (1972).

Charge of receiving stolen goods is equal charge to theft by taking and the punishment is the same. McRoy v. State, 131 Ga. App. 307, 205 S.E.2d 445 (1974).

Whether explanation of possession is satisfactory is jury question. — In a theft by receiving stolen goods trial, whether the explanation of the possession offered by the defendant in defendant's statement alone is a satisfactory explanation, is a question for the jury. Beadles v. State, 151 Ga. App. 710, 261 S.E.2d 447 (1979).

Factually inconsistent findings. — When the evidence so authorizes, a jury must be instructed that the jury can convict of either robbery or theft by receiving, but not both. Thomas v. State, 261 Ga. 854, 413 S.E.2d 196 (1992).

Offense not included in armed robbery. — Defendant's oral request for a jury instruction on theft by receiving stolen property was properly denied because it is not a lesser included offense of armed robbery. Hawkins v. State, 242 Ga. App. 603, 528 S.E.2d 853 (2000).

Because theft by receiving stolen property is not a lesser included offense of armed robbery, a defendant charged with two counts of party to the crime of armed robbery was not entitled to a jury instruction on theft by receiving stolen property. Dean v. State, 292 Ga. App. 695, 665 S.E.2d 406 (2008).

Mere passenger. — Although the issue was moot, it was error in refusing to instruct the jury as to mere passenger. Cooper v. State, 281 Ga. App. 882, 637 S.E.2d 480 (2006).

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Defendant unaware vehicle was stolen. — When all the evidence indicated that the defendant was simply along for the ride in a stolen van, and evidence was lacking that the defendant ever possessed or controlled the van or affirmatively acted as a party to the crime under O.C.G.A. § 16-2-20, adjudication of delinquency for theft by receiving stolen property was erroneous. In re C.W., 226 Ga. App. 30, 485 S.E.2d 561 (1997); Harris v. State, 247 Ga. App. 41, 543 S.E.2d 75 (2000).

Juvenile court erred by adjudicating the defendant juvenile delinquent for violating O.C.G.A. § 16-8-7(a) by committing theft by receiving a stolen motorcycle because the evidence did not support the finding that the defendant should have known that the motorcycle was stolen; the defendant's testimony permitted an inference that only after learning of the theft did the defendant realize that the motorcycle was stolen, the defendant rode the motorcycle on the street in front of the victim's house, and there was no evidence that the defendant tried to conceal the motorcycle; absent evidence of the real value of the motorcycle at the time of the theft, the evidence did not support a finding that the price the defendant offered to pay for the motorcycle was grossly disproportionate to the value. In re J. L., 306 Ga. App. 89, 701 S.E.2d 564 (2010).

Defendant aware vehicle was stolen. — State met the state's burden of proof and introduced sufficient evidence to convict the defendant on the charge of theft by receiving stolen property as the state introduced similar transaction evidence to show that the defendant, under similar circumstances about three years earlier, attempted to elude police while driving a car that the defendant knew was stolen, and such evidence was enough to allow a rational trier of fact to find beyond a reasonable doubt that the defendant knew the car the defendant used to try and elude police was stolen. Dorsey v. State, 261 Ga. App. 181, 582 S.E.2d 158 (2003).

Buying at price grossly less than real value should excite suspicion in the mind of an ordinarily reasonable man. Hudgins v. State, 125 Ga. App. 576, 188 S.E.2d 430 (1972); LaRoche v. State, 140 Ga. App. 509, 231 S.E.2d 368 (1976); Moore v. State, 171 Ga. App. 911, 321 S.E.2d 413 (1984).

When it is shown that property was bought at a price grossly less than the property's value, the knowledge required by statute may be inferred and a conviction is authorized. Hudgins v. State, 125 Ga. App. 576, 188 S.E.2d 430 (1972).

Evidence of the purchase of property at a price grossly less than the real value is very often a sufficient circumstance to excite suspicion. Watts v. State, 157 Ga. App. 214, 276 S.E.2d 884 (1981).

Knowledge that goods are stolen is an essential element of the crime of theft by receiving stolen property. This guilty

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knowledge may be inferred from circumstances which would excite suspicion in the mind of an ordinary prudent man. Buying at a price grossly less than the real value is a sufficient circumstance to excite suspicion. Whitehead v. State, 169 Ga. App. 518, 313 S.E.2d 775 (1984); Maxwell v. State, 182 Ga. App. 571, 356 S.E.2d 533 (1987).

Notice of questionable circumstances. — Evidence that approximately 100 pieces of silverware were marked with the name "Ewing" would authorize the jury to find that this marking was an indication that this property did not belong to the defendant's companion, and that it would place defendant on notice as to its questionable origin. Barfield v. State, 149 Ga. App. 166, 253 S.E.2d 781 (1979).

Evidence sufficient for knowledge. — There was evidence from which the jury could reasonably have concluded that the defendant passenger was aware during the two hours that defendant spent in the small vehicle that it was stolen, in that the vehicle was being driven without keys, the steering wheel was damaged and the interior was disorderly, which was inconsistent both with the driver's ownership of the vehicle and with the driver's explanation that the driver borrowed it from a relative. The defendant's suspicious behavior at the convenience store and defendant's attempt to flee also indicated that defendant knew the vehicle was stolen. Hurston v. State, 202 Ga. App. 311, 414 S.E.2d 303 (1991).

Jury could infer knowledge that two rifles were stolen based upon the defendant's contradictory statements as to how the defendant came to possess the rifles and the character of the person from whom the rifles were received. Miller v. State, 275 Ga. 32, 561 S.E.2d 810 (2002).

Evidence provided ample support for jury's verdict that defendant was guilty of theft by receiving stolen property as it showed that defendant knew the vehicle tag on the stolen vehicle was stolen and that defendant did not intend to restore the tag to its rightful owner. Rose v. State, 258 Ga. App. 232, 573 S.E.2d 465 (2002).

Circumstantial evidence supported defendant's convictions for aggravated assault, burglary, armed robbery, cruelty to children, theft by receiving stolen property, and possession of a firearm where: (1) defendant was driving a stolen car that the defendant knew was not the defendant's; (2) the defendant returned to the victims' house, which the defendant had left only a short time before, slowly circling the victims' residence, pointing at the house; (3) the defendant appeared to let codefendants out of the car for a specific purpose, since the defendant saw them enter the victims' home and waited for them, demonstrating that the defendant knew they would return shortly; (4) when codefendants ran back to the car and jumped in, defendant drove off in response to their rapid return; and (5) shortly thereafter, defendant abandoned the stolen car. Parnell v. State, 260 Ga. App. 213, 581 S.E.2d 263 (2003).

There was sufficient evidence to support the defendant's conviction for theft of stolen property in violation of O.C.G.A. § 16-8-7(a), because the defendant was driving one truck when the defendant was arrested for the crimes, and as to the other truck which was parked on property where the defendant was residing, there was sufficient evidence from the condition of the truck, which had an ignition that was tampered with and the name of a company that it was stolen from on the side, together with other evidence, that allowed an inference that defendant knew or should have known that the truck was stolen. Wynn v. State, 271 Ga. App. 10, 609 S.E.2d 97 (2004).

Sufficient evidence supported a conviction for theft by receiving stolen property under O.C.G.A. § 16-8-7(a) because, while there was insufficient evidence that the DVD player found in the trash can belonging to the defendant's uncle was the same one that was stolen from the victim's residence, the state presented sufficient evidence that the racing jacket found in the trash can was the same one that was stolen from the victim's residence since the victim identified the brand, style, and color scheme of the jacket; testimony that the defendant told the uncle that the items in the trash can belonged to the

defendant was sufficient to establish that the defendant had exercised control over the jacket, and the defendant's statement to the uncle that the defendant did not want the police to think that the defendant had stolen the jacket in the trash can, made at the same time that a police vehicle was parked across the street, demonstrated knowledge that the items were stolen. Duncan v. State, 278 Ga. App. 703, 629 S.E.2d 577 (2006).

There was sufficient evidence that the defendant, who was convicted of theft by receiving, knew that the two riding lawnmowers that the defendant sold were stolen. The defendant sold the lawn mowers at a grossly low price; the defendant simply knocked on an acquaintance's door to sell that buyer the first lawnmower and approached the second buyer, a stranger, through the buyer's employee to sell the other lawnmower; and the defendant lied to the second buyer that the lawnmower belonged to the defendant's allegedly deceased grandparent. Martin v. State, 300 Ga. App. 39, 684 S.E.2d 111 (2009).

Evidence was sufficient to support the defendant's conviction for theft by receiving stolen property, in violation of O.C.G.A. § 16-8-7(a), because the evidence was sufficient to enable a rational jury to find beyond a reasonable doubt that the defendant had the requisite knowledge that the four-wheeler had been stolen. The witness, who acquired the four-wheeler from a dealer by false pretenses, met with the defendant an hour or two later behind a motel and sold the four-wheeler to the defendant, whom the witness did not know, for cash and drugs in a meeting that was arranged by a third-party. Gillis v. State, 315 Ga. App. 803, 728 S.E.2d 324 (2012).

When property retained after obtaining knowledge of unlawful acquisition. — Retention of stolen property which a person knows or should know is stolen without intent to restore the property to the owner will sustain conviction even when guilty knowledge at time of acquisition is not shown. Pruiett v. State, 159 Ga. App. 396, 283 S.E.2d 625 (1981).

Evidence of possession or control. — Police officer's testimony concerning defendant's entry into an automobile and defendant's attempt to start the vehicle was evidence that defendant possessed or was in control of the automobile. Preston v. State, 183 Ga. App. 20, 357 S.E.2d 825, cert. denied, 183 Ga. App. 906, 357 S.E.2d 825 (1987).

Trial court erred by adjudicating juvenile delinquent of theft by receiving stolen property since the only evidence tending to suggest that the juvenile acquired possession or controlled the vehicle was uncorroborated accomplice testimony. In the Interest of D.J., 253 Ga. App. 265, 558 S.E.2d 806 (2002).

Defendant's adjudication as delinquent for committing theft by receiving stolen property, a motor vehicle, was reversed on appeal since there was no evidence that the defendant ever possessed or controlled the car under O.C.G.A. § 16-8-7(a) or affirmatively acted as a party to the crime under O.C.G.A. § 16-2-20. The defendant's mere presence as a passenger in the vehicle and the presence of a gasoline tank in the back seat where the defendant was observed sitting was insufficient to support any finding of guilt. In the Interest of J.Q.W., 288 Ga. App. 444, 654 S.E.2d 424 (2007).

Regarding the defendants' convictions for burglary and theft by receiving stolen property, sufficient evidence authorized the jury's decision to reject one defendant's version of events — that defendants believed that the property involved belonged to an accomplice — because, with regard to one of the burglarized residences, the fact that defendants were unsuccessful in taking anything from the home was irrelevant to the burglary convictions since the crime was completed upon entry into the dwelling. As to the second residence, the fact that the property from that residence was found in the vehicle in which the defendants were in was sufficient to establish that the property had been stolen. Clark v. State, 289 Ga. App. 612, 658 S.E.2d 190 (2008).

Evidence confirmed retention. — When a suspect later identified as the defendant was pursued and apprehended within the immediate vicinity of a stolen rental truck, and the key to the rental truck was found in the defendant's pocket, the evidence was sufficient to authorize a

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trier of fact to find that the defendant retained the truck within the meaning of O.C.G.A. § 16-8-7. Floyd v. State, 207 Ga. App. 275, 427 S.E.2d 605 (1993).

Possession or control of property required. — Stolen guns found in an abandoned and dilapidated trailer on property where the defendant lived with the defendant's parent did not support a conviction for theft by receiving under O.C.G.A. § 16-8-7(a) because the state did not show the defendant's control or possession of the trailer or the guns. Mock v. State, 306 Ga. App. 93, 701 S.E.2d 567 (2010).

Passenger in car may possess vehicle. — In some circumstances, a passenger may possess, control or retain a vehicle for purposes of O.C.G.A. § 16-8-7. Hurston v. State, 202 Ga. App. 311, 414 S.E.2d 303 (1991).

Involuntarily restrained coconspirator. — When appellant was placed in the trunk of a car or appellant's liberty otherwise restricted by being subjected involuntarily to the will of coconspirators, the coconspirators were in control and possession of this stolen automobile sufficient to support appellant's conviction for theft by receiving stolen property under O.C.G.A. § 16-8-7(a). Watkins v. State, 207 Ga. App. 766, 430 S.E.2d 105 (1993), overruled on other grounds, West v. Waters, 272 Ga. 591, 533 S.E.2d 88 (2000).

Proof of possession of recently stolen property will not authorize inference that possessor received it with knowledge that the property was stolen. Shorts v. State, 137 Ga. App. 314, 223 S.E.2d 504 (1976); LaRoche v. State, 140 Ga. App. 509, 231 S.E.2d 368 (1976); Curry v. State, 144 Ga. App. 129, 240 S.E.2d 280 (1977); Watts v. State, 157 Ga. App. 214, 276 S.E.2d 884 (1981).

Fact that the defendant had possession of a stolen car was not alone sufficient to authorize a conviction for the offense of theft by knowingly receiving stolen property. Heard v. State, 126 Ga. App. 62, 189 S.E.2d 895 (1972).

Possession of stolen property alone is not sufficient to show guilty knowledge; however, possession together with other circumstances and evidence may be used to infer knowledge required by O.C.G.A. § 16-8-7. Ingram v. State, 160 Ga. App. 300, 287 S.E.2d 304 (1981).

Unexplained possession of recently stolen goods is not sufficient in itself to authorize conviction for receiving stolen goods. Pate v. State, 158 Ga. App. 395, 280 S.E.2d 414 (1981); Harris v. State, 239 Ga. App. 723, 521 S.E.2d 864 (1999).

In prosecution for receiving stolen property, judge's instruction to jury that recent possession of stolen property without satisfactory explanation is sufficient to establish criminal intent was error despite proper instruction on burden of proving criminal intent, and required reversal. Williams v. State, 159 Ga. App. 865, 285 S.E.2d 597 (1981).

Possession of stolen goods coupled with other circumstances and evidence may be used to infer knowledge, required by statute, that the goods were stolen. Beadles v. State, 151 Ga. App. 710, 261 S.E.2d 447 (1979); Pate v. State, 158 Ga. App. 395, 280 S.E.2d 414 (1981); Pruiett v. State, 159 Ga. App. 396, 283 S.E.2d 625 (1981); Wilson v. State, 211 Ga. App. 791, 440 S.E.2d 534 (1994); Shaheed v. State, 245 Ga. App. 754, 538 S.E.2d 823 (2000).

Unexplained possession of recently stolen property can be used in conjunction with other evidence to infer guilty knowledge, but standing alone the possession will not support the inference or authorize a conviction for the offense of theft by receiving stolen property. Curry v. State, 144 Ga. App. 129, 240 S.E.2d 280 (1977); James v. State, 150 Ga. App. 357, 258 S.E.2d 40 (1979).

Mere proof of possession, even though in the absence of an explanation, is not enough evidence to support a verdict of guilty of the offense of theft by receiving stolen property, but such possession, coupled with facts and circumstances from which knowledge may be inferred that the property so received was stolen, is sufficient to support the verdict. Cheek v. State, 170 Ga. App. 230, 316 S.E.2d 583 (1984).

Unexplained possession of recently stolen property, alone, is not sufficient to support a conviction for receiving stolen

property, but guilt may be inferred from possession in conjunction with other evidence of knowledge. Abner v. State, 196 Ga. App. 752, 397 S.E.2d 36 (1990).

There was sufficient evidence to support defendant's conviction for theft by receiving stolen property in violation of O.C.G.A. § 16-8-7 because the defendant was driving a stolen van only a few hours after the van was stolen, and there was an inference of guilt by the defendant's use of a false name to police. Naillon v. State, 276 Ga. App. 799, 625 S.E.2d 73 (2005).

Proof of possession of goods taken in burglary need not show recent possession. — There is no authority which, as a matter of law, requires that proof of possession of goods taken in burglary must show "recent possession" in order for this evidence to corroborate accomplice's testimony. Ladson v. State, 248 Ga. 470, 285 S.E.2d 508 (1981).

Evidence showing manner in which defendant disposed of stolen vehicle is sufficient to establish guilty knowledge essential to support a conviction for theft by receiving stolen property. Callahan v. State, 148 Ga. App. 555, 251 S.E.2d 790 (1978).

Proof of from whom stolen article was received is not essential element of the crime of receiving stolen property. Abercrombie v. State, 145 Ga. App. 204, 243 S.E.2d 567 (1978).

Defendant's admission. — Element which amply justifies the conclusion of the jury that the defendant knew or should have known that the goods were stolen is the defendant's own admission that at the time the defendant received the item the defendant got the item through a shady deal or by means other than legal. Heilman v. State, 132 Ga. App. 775, 209 S.E.2d 220 (1974).

Juvenile committed act which constituted theft by receiving if an adult. — Rational trier of fact could conclude that the juvenile knowingly came into possession of a stolen purse, and that the juvenile committed an act, which, if the juvenile were an adult, constituted the crime of theft by receiving as the purse was hidden in the juvenile's bedroom of which the juvenile had some degree of control and privacy. In the Interest of R.W., 257 Ga. App. 488, 571 S.E.2d 485 (2002).

There was sufficient evidence supporting an adjudication of juvenile delinquency based upon theft by receiving under O.C.G.A. § 16-8-7(a); because the 14-year-old defendant could not drive, the defendant had no legitimate reason for possessing the key to a stolen car, which was silver, the defendant's sibling stated that the defendant had been bragging about driving a silver car, and the stolen car was found near the defendant's home. In the Interest of C.S., 284 Ga. App. 759, 644 S.E.2d 894 (2007).

Conviction on basis of testimony of accomplices. — One may be legally convicted of a felony, other than treason or perjury, where the only evidence directly connecting the person with the offense charged is the testimony of an accomplice, and where the only corroboration is the testimony of other accomplices. Berry v. State, 124 Ga. App. 31, 183 S.E.2d 48 (1971).

Conspiracy. — Evidence authorized a finding that there was a conspiracy between the accused and a third party to associate themselves in the unlawful enterprise of knowingly buying and selling the stolen goods in question (cigarettes), and that the act of the third party, who knowingly bought them from the thief or thieves, in legal contemplation was the act of both, and hence that in contemplation of law defendant knowingly bought the stolen goods from the thief, or thieves; therefore, the allegation in the indictment that the accused received the goods from the thief did not constitute a fatal variance. Gaspin v. State, 76 Ga. App. 375, 45 S.E.2d 785 (1947).

Evidence sufficient to support conviction of theft by receiving stolen property. See Perry v. State, 180 Ga. App. 273, 349 S.E.2d 25 (1986); Parrott v. State, 188 Ga. App. 564, 373 S.E.2d 828 (1988); English v. State, 202 Ga. App. 751, 415 S.E.2d 659 (1992); Leachman v. State, 226 Ga. App. 98, 485 S.E.2d 587 (1997); Hash v. State, 226 Ga. App. 643, 487 S.E.2d 452 (1997); Wilson v. State, 227 Ga. App. 59, 488 S.E.2d 121 (1997); Dunbar v. State, 228 Ga. App. 104, 491 S.E.2d 166 (1997); Willis v. State, 239 Ga. App. 607,

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521 S.E.2d 662 (1999); Denson v. State, 240 Ga. App. 207, 523 S.E.2d 62 (1999); Ingram v. State, 268 Ga. App. 149, 601 S.E.2d 736 (2004).

Evidence of receiving stolen property by paying less than value. — Evidence which showed sale and delivery of stolen shirts on a Saturday night in the defendant's hotel room, the shirts being brought in at a side door, and payment by the defendant of a price for the shirts which was in great disparity to their real value, was sufficient to sustain conviction of receiving stolen property. Williams v. State, 98 Ga. App. 346, 105 S.E.2d 771 (1958).

Redeeming stolen lottery ticket as evidence of receiving stolen property. — Evidence supported the defendant's conviction of theft by receiving stolen property and the defendant's sentence for a felony, since the defendant attempted to redeem a stolen lottery ticket, and thus was in receipt of the ticket at a time when it still had a redemption value of $5,000. Baker v. State, 234 Ga. App. 846, 507 S.E.2d 475 (1998).

Possession of wedding book as sufficient evidence of receiving stolen property. — Evidence was sufficient to support the defendants' convictions for theft by receiving stolen property as a jury could reasonably believe that a wedding book found in the car being driven by the second defendant, and in which the first defendant was a passenger, was a book stolen from a married couple as one spouse identified the book and the book contained a notation stating that the book was dedicated to the couple. Haney v. State, 261 Ga. App. 136, 581 S.E.2d 626 (2003).

Receiving stolen automobile. — Rational trier of fact could have determined beyond a reasonable doubt that the defendant was guilty of theft by receiving stolen property, i.e., an automobile, since the defendant was observed getting into the vehicle immediately after a robbery, and a hammer exhibiting paint marks similar in color to that of the vehicle's broken steering column was found in the defendant's possession at the time of the defendant's arrest. Fair v. State, 198 Ga. App. 437, 401 S.E.2d 626 (1991).

Since a witness saw the defendant driving a van that had been stolen, the defendant lacked permission to use the van, there was no evidence that the defendant intended to return the van, and the defendant confessed to the defendant's love interest that the van was stolen, there was sufficient evidence to convict the defendant of theft by receiving in violation of O.C.G.A. § 16-8-7(a). Sexton v. State, 268 Ga. App. 736, 603 S.E.2d 66 (2004).

When a codefendant testified that the defendant was with the codefendant when the codefendant stole a truck, and another codefendant testified that it was obvious the truck was stolen since the ignition was damaged, there was sufficient evidence to find that defendant knew, or should have known, that the truck was stolen, and the defendant's conviction of theft by receiving the stolen truck was affirmed; there was also testimony, inter alia, that the defendant drove the truck and that the defendant's hat and guns were in the truck so the jury could have inferred that the defendant was in possession and control of the truck in Georgia. King v. State, 268 Ga. App. 811, 603 S.E.2d 88 (2004).

Evidence was sufficient to support the defendant's theft by receiving stolen property conviction as there was no direct evidence as to who took the stolen car the defendant was driving at the time of the defendant's arrest, the defendant did not admit taking the car from the owner's driveway, and the defendant told the police that the defendant's cousin had purchased the car from the owner; in the absence of evidence proving that the defendant was the thief, the jury could infer that the defendant was guilty of theft by receiving. Petty v. State, 271 Ga. App. 547, 610 S.E.2d 169 (2005).

Evidence was sufficient to support a conviction for theft by receiving stolen property, in violation of O.C.G.A. § 16-8-7(a), since police who responded to a domestic disturbance call noticed a stolen vehicle behind an abandoned duplex, the defendant was found hidden in the duplex with the car keys, and the license plate on the stolen vehicle was registered in the defendant's name. Green v. State, 277 Ga. App. 867, 627 S.E.2d 914 (2006).

Defendant's warrantless arrest for theft under either O.C.G.A. § 16-8-2 or O.C.G.A. § 16-8-7(a) was supported by probable cause as: (1) an officer observed the defendant banging on and breaking into a coin-operated air compressor in the middle of the night; (2) the officer recognized the air compressor as belonging to a gas station; (3) the officer had seen the defendant at the gas station less than 24 hours earlier; and (4) the defendant refused to provide information that would verify the claim that the defendant had lawfully obtained the compressor. Cole v. State, 273 Ga. App. 259, 614 S.E.2d 883 (2005).

Evidence was sufficient to sustain the defendant's conviction of theft by receiving stolen property in violation of O.C.G.A. § 16-8-7(a), and, thus, the trial court did not err in denying the defendant's motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, because the defendant's vehicle was stopped for violating traffic laws, the defendant could not produce a driver's license or proof of insurance, the personal information the defendant gave conflicted with the information on the identification card, the vehicle defendant was driving had no vehicle tag, and the rental application found in the glove compartment along with the defendant's health insurance application showed that the car was rented to a person other than the defendant as the evidence showed that the defendant knew or should have known that the car was stolen. Richardson v. State, 275 Ga. App. 320, 620 S.E.2d 522 (2005).

Evidence was sufficient to support the defendant's conviction for theft by receiving because the defendant admitted to participating in the theft of the mother-in-law's ring and was seen pawning the ring; the defendant also stipulated to the admission of polygraph examination results showing deception in the responses to direct questions about the defendant's involvement in the theft. Shelton v. State, 276 Ga. App. 685, 624 S.E.2d 262 (2005).

Because the defendant acted as lookout and immediately alerted an unidentified driver to the presence of a police officer, resulting in the unidentified driver's escaping, the evidence was sufficient to convict the defendant of aiding or abetting the unidentified driver in the crime of theft by receiving in violation of O.C.G.A. §§ 16-2-20 and 16-8-7(a). Dixon v. State, 277 Ga. App. 656, 627 S.E.2d 406 (2006).

Because sufficient evidence as to the value of the stolen goods possessed by the defendant was presented, and the trial court properly instructed the jury on all the relevant issues, including value and the state's burden of proof, the defendant's convictions were upheld on appeal; moreover, the appeals court rejected the defendant's argument that the antique shop owners that the defendant tried to sell the stolen merchandise to were accomplices, as the owners could not have been indicted for the offense of theft by receiving stolen property and testified that they did not know the items were stolen. Price v. State, 283 Ga. App. 564, 642 S.E.2d 191 (2007).

There was sufficient evidence to support a conviction of theft by receiving stolen property, a car, since the defendant admitted that the defendant's fingerprints would be found in the car, the car was operated with a screwdriver, the car was used in the commission of an armed robbery in which the defendant participated, and the car had been parked in front of the defendant's apartment. Jones v. State, 285 Ga. App. 866, 648 S.E.2d 183 (2007).

Sufficient evidence authorized the defendant's conviction for theft by receiving stolen property because a testifying codefendant stated that the car the defendant drove on the night in question was stolen, had no keys in the ignition, and was operated by the use of a screwdriver; moreover, the defendant admitted to driving the car on that same night. Brown v. State, 289 Ga. App. 421, 657 S.E.2d 322 (2008).

Evidence was sufficient to find a juvenile guilty of theft by receiving a stolen vehicle, O.C.G.A. § 16-8-7(a), as the juvenile was found guilty of the theft of the vehicle because the juvenile knew the vehicle was stolen yet got back in and used the vehicle for the juvenile's benefit. This evidence, combined with evidence that the vehicle was stolen from the juve-

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nile's neighbor, was sufficient to establish that the juvenile knew the vehicle was stolen and that the juvenile had no right to exercise control over the vehicle. In the Interest of L.A., 292 Ga. App. 101, 663 S.E.2d 420 (2008).

While an assailant pointed a handgun to the victim's neck, the defendant and another assailant held and searched the victim and took the victim's cell phone and cash; the armed assailant, who had stolen the handgun, displayed the handgun to the others before the crimes were committed. Under O.C.G.A. § 16-2-20, the evidence was sufficient to convict the defendant as an accomplice of theft by receiving and possession of a firearm during the commission of a crime. Simpson v. State, 293 Ga. App. 760, 668 S.E.2d 451 (2008).

Evidence that auto parts and a shell of a stolen car lacking a vehicle identification number plate were found at the defendant's home, that the defendant was always working on cars, and that it was apparent that a lot of work on cars occurred at the home was sufficient to convict the defendant of theft by receiving a stolen car (O.C.G.A. § 16-8-7(a)) and operating a chop shop (O.C.G.A. § 16-8-82(1)). Xiong v. State, 295 Ga. App. 697, 673 S.E.2d 86 (2009).

Because the testimony of the victims in identifying the various items of property found at the defendant's residence and the circumstances of the disappearance of the items was sufficient to support a verdict of guilty of theft by receiving stolen property; the defendant was properly convicted of violating O.C.G.A. § 16-8-7(a). Allison v. State, 299 Ga. App. 542, 683 S.E.2d 104 (2009).

Although under Georgia law, a defendant could not be convicted solely upon the uncorroborated testimony of an accomplice, former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the evidence corroborated some particulars of the accomplice's testimony implicating the codefendants in the charged crimes since all three of the victims from the three separate gas stations provided descriptions of their assailants that generally matched the codefendants and the accomplice, and all three victims also testified that their assailants brandished a handgun and a shotgun, which were indeed the weapons that were found at the scene where the stolen SUV crashed and where the accomplice was arrested. Accordingly, the evidence corroborating the accomplice's testimony was sufficient to authorize the jury's determination that the codefendants were guilty beyond a reasonable doubt as parties to armed robbery, O.C.G.A. § 16-8-41, hijacking a motor vehicle, O.C.G.A. § 16-5-44.1, aggravated assault, O.C.G.A. § 16-5-21, theft by taking, O.C.G.A. § 16-8-2, theft by receiving, O.C.G.A. § 16-8-7, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106. Daniels v. State, 306 Ga. App. 577, 703 S.E.2d 41 (2010).

Under O.C.G.A. § 16-8-7, a person committed the offense of theft by receiving stolen property when the person received, disposed of, or retained stolen property which the person knew or should have known was stolen, and the state introduced testimony concerning the hijacking of that vehicle to show that the vehicle was stolen. Furthermore, the state was entitled to inform the jury of all the circumstances surrounding the commission of the crime or crimes charged and the appellate court found no error in admitting the evidence as part of the res gestae even though it may have incidentally placed the codefendants' character in evidence. Daniels v. State, 306 Ga. App. 577, 703 S.E.2d 41 (2010).

Evidence at trial was sufficient to support the defendant's convictions for two counts of armed robbery, in violation of O.C.G.A. § 16-8-41(a), and one count of theft by receiving stolen property, in violation of O.C.G.A. § 16-8-7(a), because the evidence showed that the defendant admitted to being present at the scene of the armed robberies, a victim identified the defendant in court as the person who robbed the victim at gunpoint, several items belonging to the victims were found in the defendant's home, the defendant and the defendant's girlfriend owned vehicles similar to those used in the robberies, and each victim testified that the robber worked in cooperation with an accomplice. Baker v. State, 307 Ga. App.

884, 706 S.E.2d 214 (2011), cert. denied, No. S11C0940, 2011 Ga. LEXIS 517 (Ga. 2011).

Defendant's conviction for theft by receiving a stolen automobile was supported by evidence that the defendant had been driving a car without an ignition, which a witness assumed was stolen, and that the defendant and an accomplice went to see someone about a stolen automobile, which the accomplice and the defendant were planning to give back to the owner for a reward. Toro v. State, 319 Ga. App. 39, 735 S.E.2d 80 (2012).

Knowledge that dirt bike stolen. — Defendant's conviction for theft by receiving stolen property was supported by the evidence as the state did not rely solely upon mere possession of a stolen dirt bike to support the state's case, but presented additional evidence from which the jury could infer that the defendant knew or should have known that the bike was stolen, specifically, evidence that the brand new dirt bike had been physically abused in a manner inconsistent with ownership in a 24-hour period and that the dirt bike had been borrowed from an alleged friend with an unknown last name who disappeared after the defendant's arrest. Ridgeway v. State, 310 Ga. App. 6, 712 S.E.2d 84 (2011).

Lack of receipts as evidence for theft by receiving. — Evidence corroborating an accomplice's testimony was sufficient to authorize the jury's determination that the defendant was guilty beyond a reasonable doubt of theft by receiving because in addition to the accomplice's testimony, a deputy with the county sheriff's office observed the accomplice and a codefendant appear to shoplift at a store, after which they got into the defendant's car; the defendant did not stop when police chased the defendant but instead continued to drive evasively while the codefendant threw items out of the passenger window, and there were no receipts showing that the items had been purchased. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Evidence was sufficient to sustain the codefendants' convictions for theft by receiving stolen property and conspiracy to commit theft by receiving stolen property since the testimony was sufficient to show that items of value, owned by someone other than the codefendants, were recovered from a warehouse over which the codefendants had control. A witness's misstatements concerning the specific address of the warehouse did not render the evidence insufficient as to the location from where the stolen property was recovered. Robinson v. State, 312 Ga. App. 736, 719 S.E.2d 601 (2011).

Theft by receiving stolen jewelry. — Evidence was sufficient to support the defendant's conviction for felony theft by receiving stolen property in violation of O.C.G.A. § 16-8-7(a) because the jury was authorized to find that a ruby and diamond ring exceeding $500 in value had been stolen from the victim's house, that the defendant had acquired possession of the ring, and that the defendant knew or should have known the ring was stolen; although the defendant asserted that the ring found in the defendant's possession did not belong to the victim, that was a question for the jury as the trier of fact, and the jury had no obligation to believe the defendant's claim. Hogues v. State, 313 Ga. App. 717, 722 S.E.2d 430 (2012).

Evidence was sufficient to find the defendant guilty of theft by receiving stolen property under O.C.G.A. § 16-8-7, when the defendant made contradictory statements to the investigator concerning whether the defendant had sold a gun to anyone and the defendant's statement that the defendant had acquired the shotgun two years earlier from a co-worker conflicted with the victim's testimony as to when the victim's truck was broken into and when the shotgun was stolen. Those conflicts in evidence created credibility issues regarding the circumstances surrounding the defendant's possession of the shotgun, which the fact finder resolved adversely to the defendant. Bradley v. State, 317 Ga. App. 477, 731 S.E.2d 371 (2012).

Evidence that the defendant possessed items stolen from a second victim and others was sufficient to support the defendant's conviction for theft by receiving the second victim's stolen property. Reeves v. State, 329 Ga. App. 470, 765 S.E.2d 407 (2014).

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Sufficient basis to accept defendant's Alford plea. — State's summary of the facts provided a factual basis for the trial court to accept a defendant's Alford plea to possession of stolen property and the trial court fulfilled the court's obligation to attempt to resolve the conflict between the defendant's claim of innocence and the decision to plead guilty. The trial court found that the defendant's claim not to have known a car was stolen was "incredible," it was a rational decision for the defendant to plead guilty. Cameron v. State, 295 Ga. App. 670, 673 S.E.2d 59 (2009).

Search incident to arrest. — Since police officers had probable cause to arrest the defendant for theft by receiving stolen property, in violation of O.C.G.A. § 16-8-7, based on a determination that the defendant had admitted to having received, stored, and disposed of a stolen four-wheeler, their search incident to the arrest was legal and defendant's subsequent motion to suppress, pursuant to O.C.G.A. § 17-5-30, was properly denied. James v. State, 265 Ga. App. 660, 595 S.E.2d 359 (2004).

Stolen clothes as evidence of theft by receiving. — When four sport coats and a suit that were recently stolen from a local department store were found in the defendant's bedroom closet, this evidence, along with evidence showing that stolen merchandise is often traded for illegal drugs and evidence that the defendant was guilty of trafficking in cocaine was sufficient to authorize the jury's finding that the defendant was guilty of theft by receiving stolen property beyond a reasonable doubt. Owens v. State, 192 Ga. App. 335, 384 S.E.2d 920, cert. denied, 192 Ga. App. 902, 384 S.E.2d 920 (1989).

Theft by receiving stolen property proven. — Evidence that purse in defendant's possession contained stolen credit cards and driver's license with a stranger's name imprinted thereon was sufficient to support conviction of theft by receiving stolen property. Stovall v. State, 167 Ga. App. 69, 306 S.E.2d 14 (1983).

There was insufficient evidence to show that the defendant was guilty of theft by receiving stolen property when stolen property was not found in any portion of the apartment (shared with a codefendant) over which the defendant had control or possession; the fact that stolen property is often traded for drugs and that the defendant was guilty of trafficking in cocaine was insufficient evidence to authorize a finding, beyond a reasonable doubt, that the defendant was in possession or control of the stolen property. Owens v. State, 192 Ga. App. 335, 384 S.E.2d 920, cert. denied, 192 Ga. App. 902, 384 S.E.2d 920 (1989).

When there was no evidence that identified any original thief other than the defendant and the defendant admitted to taking the jewelry and pawning the jewelry, there was insufficient evidence to support a conviction for theft by receiving stolen property. Phillips v. State, 269 Ga. App. 619, 604 S.E.2d 520 (2004).

Defendant's conviction for theft by receiving stolen property was reversed as there was no evidence that the defendant ever possessed or controlled the stolen car, or affirmatively acted as a party to the crime, since the state only presented the police officers' general statements that based on conversations with the suspects, the officers believed the suspects were linked to the vehicle, that the defendant had given the officers a false name, and that the men were wearing wet clothing, which might have indicated that the suspects attempted to hide from the officers; there was no evidence that the steering column was damaged, that the car was driven without keys, that the defendant had stolen property in the defendant's possession, or that the defendant admitted doubts as to the car's ownership. Morgan v. State, 280 Ga. App. 646, 634 S.E.2d 818 (2006).

Evidence did not support conviction for theft by receiving stolen property under O.C.G.A. § 16-8-7(a) since the evidence showed no more than defendant's possession of stolen stereo speakers, which defendant testified were purchased at a flea market before the defendant later pawned the speakers to obtain money for gasoline; the speakers bore no signs that would cause an ordinary prudent person to believe that the speakers had been stolen,

and no inference of guilty knowledge could be drawn solely from the fact that the defendant pawned speakers nearly a month after the speakers were stolen. Smith v. State, 290 Ga. App. 689, 659 S.E.2d 917 (2008).

Evidence was insufficient to sustain the codefendant's conviction for theft by receiving stolen property in violation of O.C.G.A. § 16-8-7(a) because the fact that the codefendant purchased a handgun that was found in the codefendant's apartment and had been reported stolen "on the street" did not prove knowledge that the handgun was stolen; no evidence was presented as to the age of the handgun the codefendant purchased or whether the handgun had been fired, and there was no evidence that, at the time the codefendant bought the handgun, the handgun was worth the amounts a police officer testified the officer had paid for new handguns or that there was such a gross disparity between the value of the handgun and the price the codefendant paid for the handgun as to excite suspicion. Rainly v. State, 307 Ga. App. 467, 705 S.E.2d 246 (2010).

Evidence was insufficient to support the defendant's convictions for theft by receiving stolen property, O.C.G.A. § 16-8-7(a), because there was uncontroverted direct evidence that the defendant was the original thief, and no evidence identified any other person other than the defendant; there were video and still photographs, clearly revealing the defendant's unobstructed face and body from several angles, depicting the defendant as the taker of the property, not the receiver. Fields v. State, 310 Ga. App. 455, 714 S.E.2d 45 (2011).

Because there was no competent evidence to show that a memory card had been stolen, as the third victim failed to testify, only that the memory card had been reported stolen, the defendant's conviction for theft by receiving stolen property as to that victim could not stand. Reeves v. State, 329 Ga. App. 470, 765 S.E.2d 407 (2014).

Evidence insufficient. — Circumstantial evidence of a larcenous taking was insufficient to sustain defendant's conviction for theft by receiving beyond a reasonable doubt because the officer's testimony that radio dispatch identified the pistol as stolen was non-probative hearsay and the fact that the weapon was labeled for law enforcement use only and loaded with police-issue ammunition did not exclude the possibility that the weapon may have been given away or sold "on the black market" in violation of the warning. Lopez v. State, 259 Ga. App. 720, 578 S.E.2d 304 (2003).

Defendant was entitled to reversal of the conviction for theft by receiving because there was no evidence from which a rational trier of fact could have concluded that the defendant knew or should have known that the gun used by the defendant was stolen. Thornton v. State, 292 Ga. 796, 741 S.E.2d 641 (2013).

Evidence was insufficient to support the defendant's conviction on one of the counts of theft by receiving stolen property because the state presented no evidence to show that it would have been readily apparent to the defendant that the car the defendant was riding in had been stolen, that the defendant had taken items from the car that belonged to the owner, or that the defendant admitted doubts as to the car's ownership; and the state presented no evidence that the defendant exerted possession or control over the car or otherwise participated in the theft of the car. Tigner v. State, 332 Ga. App. 808, 775 S.E.2d 180 (2015).

Evidence was insufficient to convict the defendant of theft by receiving stolen property, specifically the handgun used to kill the second victim, because the state did not prove beyond a reasonable doubt that the defendant knew, or should have known, the gun was stolen when the defendant received and retained the gun because, although the owner of the handgun testified the gun was stolen from the owner in North Carolina by a friend, that evidence shed no light on the defendant's knowledge of the provenance of the handgun, which the defendant claimed to have found behind a club. Daughtie v. State, 297 Ga. 261, 773 S.E.2d 263 (2015).

Defendant's conviction had to be reversed because the state could not prove that the tangible goods received by the defendant were the same goods that were taken from the owner because the goods

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the defendant received from the defendant's mistress were purchased with funds stolen from the mistress's employer and, thus, could not satisfy the "receiving stolen property" element. Lindsay v. State, 336 Ga. App. 330, 785 S.E.2d 6 (2016).

Evidence insufficient to support possession. — Fact that a pistol was a stolen weapon and that the accused sat in the automobile seat under which the pistol was found is not alone sufficient to show that the accused had possession, and is insufficient to authorize a conviction for the offense of theft by knowingly receiving stolen property. Williamson v. State, 134 Ga. App. 329, 214 S.E.2d 415 (1975).

Conviction was reversed when the evidence showed that the defendant had some recent contact with the stolen car, but did not show that the defendant ever possessed or controlled the car or affirmatively acted as a party to the crime; mere proximity was insufficient to establish possession or control. Buchanan v. State, 254 Ga. App. 249, 562 S.E.2d 216 (2002).

There was insufficient evidence to convict the defendants, both of whom had been passengers in a vehicle the defendants knew had been stolen, of theft by receiving stolen property in violation of O.C.G.A. § 16-8-7(a); there was no evidence that the defendants did anything other than allow themselves to be transported in the vehicle or that the defendants intentionally aided or abetted the commission of a crime under O.C.G.A. § 16-2-20(b). Cooper v. State, 281 Ga. App. 882, 637 S.E.2d 480 (2006).

Defendant's adjudication as delinquent for committing theft by receiving stolen property, a motor vehicle, was reversed on appeal since there was no evidence that the defendant ever possessed or controlled the car under O.C.G.A. § 16-8-7(a) or affirmatively acted as a party to the crime under O.C.G.A. § 16-2-20. The defendant's mere presence as a passenger in the vehicle and the presence of a gasoline tank in the back seat where the defendant was observed sitting was insufficient to support any finding of guilt. In the Interest of J.Q.W., 288 Ga. App. 444, 654 S.E.2d 424 (2007).

Insufficient evidence defendant knew gun was stolen. — Defendant was entitled to reversal of the defendant's conviction for theft by receiving because there was only evidence that the defendant found a gun that was reported stolen, not that the defendant knew the gun was stolen. Stacey v. State, 292 Ga. 838, 741 S.E.2d 881 (2013).

Prior federal felony conviction shown to be felony under Georgia law. — For purposes of Georgia's recidivist statute, the defendant's federal conviction for conspiracy to transport stolen goods, in which the defendant admitted that the defendant stole more than $5,000 worth of silver, and that the defendant transported that stolen property across state lines, was a conviction that would have constituted a felony under Georgia law based on the state offense of theft by receiving as the defendant received stolen property with a value that exceeded $500. Nordahl v. State, 344 Ga. App. 686, No. A17A1360, 2018 Ga. App. LEXIS 127 (2018).

Sentencing

Participation in pretrial intervention program. — Prosecution of the defendants for theft by taking and criminal trespass in Calhoun County, O.C.G.A. §§ 16-7-21(b) and 16-8-2, was not prohibited by double jeopardy based on their prior entry into a pretrial intervention program under O.C.G.A. § 15-18-80(b) following charges of theft by receiving stolen property, O.C.G.A. § 16-8-7(a), in Irwin County because there was no prosecution in Irwin County within the meaning of O.C.G.A. §§ 16-1-3(14) and 16-1-8(a)(1)-(2). Palmer v. State, 341 Ga. App. 433, 801 S.E.2d 300 (2017).

Sentence based on value of received property. — Appellate court affirmed conviction of theft by receiving stolen property of some value but directed that appellant's sentence be vacated and that appellant be resentenced for a misdemeanor, where evidence was insufficient to establish that value of stolen property exceeded $200.00. Searcy v. State, 163 Ga. App. 528, 295 S.E.2d 227 (1982).

While value is not an element of the crime of theft by receiving stolen goods, it

is relevant for the purpose of distinguishing between a misdemeanor and a felony for sentencing under O.C.G.A. § 16-8-12. Ayers v. State, 164 Ga. App. 195, 296 S.E.2d 772 (1982).

Although relevant to the question of value, the cost of the property to the owner is not the ultimate determinate of whether the offense of receiving stolen property is punishable as a felony or a misdemeanor. Baker v. State, 234 Ga. App. 846, 507 S.E.2d 475 (1998).

Value of property that is the subject of a theft by receiving stolen property is the fair cash market value either at the time and place of the theft or at any time during the receipt or concealment of the property. Baker v. State, 234 Ga. App. 846, 507 S.E.2d 475 (1998).

Testimony by the owner concerning the purchase price, absent any other evidence of value, was insufficient evidence to establish that the value of the property exceeded $500. Denson v. State, 240 Ga. App. 207, 523 S.E.2d 62 (1999).

In a prosecution for theft by receiving stolen property under O.C.G.A. § 16-8-7(a), there was insufficient evidence to support felony sentencing under O.C.G.A. § 16-8-12(a) because the evidence was only sufficient to authorize a conviction based on a stolen racing jacket, and there was no evidence showing that the value of the racing jacket exceeded $500. Duncan v. State, 278 Ga. App. 703, 629 S.E.2d 577 (2006).

Sentence based on theft by taking credit cards and theft by receiving the same credit cards is void. The crimes are mutually exclusive and defendant cannot be sentenced on both crimes. Syms v. State, 244 Ga. App. 21, 534 S.E.2d 502 (2000).

Evidence was sufficient to support defendant's conviction for theft by receiving stolen property where defendant kept a trailer that defendant did not own and used it for two months without contacting the police or the owner, even though the owner could have been identified, and a stolen license tag on the trailer, the removal of some of the owner's markings, and the reversal of the mud flaps to conceal the owner's identity were circumstantial evidence from which the jury could conclude that defendant knew or should have known that the property was stolen. Ingram v. State, 268 Ga. App. 149, 601 S.E.2d 736 (2004).

Merged counts for sentencing. — Because: (1) different facts were used to prove an aggravated assault and an armed robbery, specifically, that the armed robbery was complete after the defendant laid a handgun on the counter in the convenience store, demanded that the victim open the register, and a codefendant took money from the cash register; and (2) the separate offense of aggravated assault occurred when the defendant struck the victim in the head with the gun, the offenses did not merge as a matter of fact. Thus, the separate sentences imposed for each offense were upheld, and no double jeopardy violation occurred. Garibay v. State, 290 Ga. App. 385, 659 S.E.2d 775 (2008).

Resentence proper. — Trial court did not err in resentencing the defendant to a probated sentence of ten years for a theft by receiving conviction, upon filing a motion under O.C.G.A. § 16-8-12, with such sentence to commence ten years after the beginning of a term of imprisonment for an armed robbery conviction as: (1) the revised sentence did not impermissibly increase the original sentence imposed; (2) the revised probated sentence effected no change in the probation term to be served following the confinement for armed robbery, as both the original and revised sentences provided for five years of probation, consecutive to the defendant's confinement; and (3) the defendant failed to show fulfillment of the maximum legal term for the theft by receiving conviction, or that any of the probation requirements had been satisfied. Fair v. State, 281 Ga. App. 518, 636 S.E.2d 712 (2006), cert. denied, No. S07C0125, 2007 Ga. LEXIS 494 (Ga. 2007).

OPINIONS OF THE ATTORNEY GENERAL

Stolen property acquired by a pawn shop remains the property of the original owner. 1996 Op. Att'y Gen. No. 96-24.

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Receiving and Transporting Stolen Property, § 1 et seq.

C.J.S. — 76 C.J.S., Receiving or Transferring Stolen Goods, § 1 et seq.

ALR. — Assisting in transportation or disposal of property known to have been stolen as rendering one guilty of larceny, 29 A.L.R. 1031.

Possession of recently stolen goods by one charged with receiving them as evidence on question of guilty knowledge, 68 A.L.R. 187.

Right of purchaser of stolen bonds, 85 A.L.R. 357; 102 A.L.R. 28.

Admissibility, in prosecution for receiving stolen property, of evidence of transactions other than, but similar to, that upon which the prosecution is based, for purpose of showing guilty knowledge or intent, 105 A.L.R. 1288.

May participant in larceny or theft be convicted of offenses of receiving or concealing the stolen property, 136 A.L.R. 1087.

Knowledge imputed to reasonable man as test of knowledge of defendant in prosecution for larceny or receiving stolen property, 147 A.L.R. 1058.

Charge of larceny or receiving stolen goods predicated upon taking or appropriation of waste paper or other articles deposited in street with intention to donate to patriotic or other cause, 156 A.L.R. 631.

Thief as accomplice of one charged with receiving stolen property, or vice versa, within rule requiring corroboration or cautionary instruction, 53 A.L.R.2d 817.

Receiving property stolen in another state or country as receiving stolen property, 67 A.L.R.2d 752.

Attempts to receive stolen property, 85 A.L.R.2d 259.

Sufficiency of description of stolen property in indictment or information for receiving it, 99 A.L.R.2d 813.

What amounts to "exclusive" possession of stolen goods to support inference of burglary or other felonious taking, 51 A.L.R.3d 727.

Receipt of public documents taken by another without authorization as receipt of stolen property, 57 A.L.R.3d 1211.

Receiver of stolen goods as accomplice of thief for purposes of corroboration, 74 A.L.R.3d 560.

Modern status: instruction allowing presumption or inference of guilt from possession of recently stolen property as violation of defendant's privilege against self-incrimination, 88 A.L.R.3d 1178.

What constitutes "constructive" possession of stolen property to establish requisite element of possession supporting offense of receiving stolen property, 30 A.L.R.4th 488.

Conviction of receiving stolen property, or related offenses, where stolen property previously placed under police control, 72 A.L.R.4th 838.

Possession of stolen property as continuing offense, 24 A.L.R.5th 132.

Participation in larceny or theft as precluding conviction for receiving or concealing the stolen property, 29 A.L.R.5th 59.

What constitutes tax-deductible theft loss under 26 USCS § 165, 98 A.L.R. Fed. 229.

16-8-8. Theft by receiving property stolen in another state.

A person commits the offense of theft by receiving property stolen in another state when he receives, disposes of, or retains stolen property which he knows or should know was stolen in another state, unless the property is received, disposed of, or retained with intent to restore it to

the owner. (Ga. L. 1918, p. 272, § 1; Code 1933, § 26-2623; Code 1933, § 26-1816, enacted by Ga. L. 1972, p. 841, § 2.)

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982).

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Venue. — One who has bought or received stolen property has exercised control over that property sufficient to warrant venue when the property was bought or received. Stephens v. State, 164 Ga. App. 398, 297 S.E.2d 90 (1982).

Evidence sufficient to support conviction. — When the state produced evidence that the defendant stated to the police that the defendant knew a car had been stolen in another state by the defendant's brother, that the car was used by the defendant and other robbers in a robbery, that an item from the robbery was found a few feet from the car, and that the defendant's fingerprints were found on the car, this was more than enough for the jury to find the defendant guilty beyond a reasonable doubt. Kimble v. State, 236 Ga. App. 391, 512 S.E.2d 306 (1999).

Cited in Fair v. State, 140 Ga. App. 281, 231 S.E.2d 1 (1976); Cherry v. State, 198 Ga. App. 415, 401 S.E.2d 607 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Receiving and Transporting Stolen Property, §§ 8, 9, 10.

C.J.S. — 76 C.J.S., Receiving or Transferring Stolen Goods, § 5.

ALR. — Knowledge imputed to reasonable man as test of knowledge of defendant in prosecution for larceny or receiving stolen property, 147 A.L.R. 1058.

What amounts to "exclusive" possession of stolen goods to support inference of burglary or other felonious taking, 51 A.L.R.3d 727.

Conviction of receiving stolen property, or related offenses, where stolen property previously placed under police control, 72 A.L.R.4th 838.

What constitutes tax-deductible theft loss under 26 USCS § 165, 98 A.L.R. Fed. 229.

16-8-9. Theft by bringing stolen property into state.

A person commits the offense of theft by bringing stolen property into this state when he brings into this state any property which he knows or should know has been stolen in another state. (Ga. L. 1918, p. 272, § 2; Code 1933, § 26-2622; Code 1933, § 26-1815, enacted by Ga. L. 1972, p. 841, § 1.)

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982).

JUDICIAL DECISIONS

Verdicts mutually exclusive. — In finding the defendant guilty of bringing stolen property into the State of Georgia and theft by conversion of the same property, the jury necessarily reached two positive findings of fact that could not logi-

cally and mutually exist and, thus, the verdicts were mutually exclusive. Jones v. State, 302 Ga. 730, 808 S.E.2d 655 (2017).

Evidence supported defendant's conviction, when the defendant acknowledged that defendant knew that the vehicle the defendant brought into Georgia was stolen, even though the defendant may not have been physically behind the steering wheel at the moment the vehicle crossed the state line. Olsen v. State, 191 Ga. App. 763, 382 S.E.2d 715 (1989).

Evidence was sufficient to find the defendant guilty of theft by bringing stolen property into the state; witness testimony placed the defendant in possession of the car in another state minutes after the theft and in possession of the car in the state hours after the theft. Smith v. State, 256 Ga. App. 22, 567 S.E.2d 359 (2002).

Evidence supported a defendant's conviction of bringing stolen property to Georgia, eluding an officer, and possessing marijuana as a party, if not as a conspirator, since: (1) the defendant discussed with the defendant's love interest what would happen if they were apprehended by the police; (2) the love interest gave the defendant a handgun after the love interest stole a new gun and the defendant packed two guns with the defendant's personal items and the ski masks; (3) the defendant suspected that the truck was stolen, refused to ask about the truck's origin, saw the stolen gun on the seat of the truck, observed two gas drive-offs, ate stolen food, smoked shared marijuana repeatedly, and sat next to the glove compartment where the marijuana lay; and (4) the defendant was silent during the police pursuits, saw the defendant's love interest retrieve a stolen handgun just prior to an assault of a police officer, did not hinder the love interest or warn the police, lied to the police to cover up the matter, and referred to the entire affair as having "fun for a minute." Michael v. State, 281 Ga. App. 289, 635 S.E.2d 790 (2006), overruled on other grounds by Gibbs v. State, 304 Ga. App. 723, 798 S.E.2d 308 (2017).

Cited in Cunningham v. State, 222 Ga. App. 740, 475 S.E.2d 924 (1996); Selley v. State, 237 Ga. App. 47, 514 S.E.2d 706 (1999); Barron v. State, 291 Ga. App. 494, 662 S.E.2d 285 (2008); Davis v. State, 322 Ga. App. 826, 747 S.E.2d 19 (2013); In the Interest of D. C., 324 Ga. App. 95, 748 S.E.2d 514 (2013).

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Receiving and Transporting Stolen Property, §§ 8, 9, 10.

C.J.S. — 76 C.J.S., Receiving or Transferring Stolen Goods, § 5.

ALR. — What constitutes tax-deductible theft loss under 26 USCS § 165, 98 A.L.R. Fed. 229.

16-8-10. Affirmative defenses to prosecution for violation of Code Sections 16-8-2 through 16-8-9.

It is an affirmative defense to a prosecution for violation of Code Sections 16-8-2 through 16-8-9 that the person:

(1) Was unaware that the property or service was that of another;

(2) Acted under an honest claim of right to the property or service involved;

(3) Acted under a right to acquire or dispose of the property as he or she did; provided, however, that the use of a power of attorney as provided in Chapter 6B of Title 10 shall not, in and of itself, absolve a person from criminal responsibility; or

(4) Took property or service exposed for sale intending to purchase and pay for it promptly or reasonably believing that the owner, if present, would have consented. (Code 1933, § 26-1810, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2017, p. 435, § 3-2/HB 221.)

The 2017 amendment, effective July 1, 2017, substituted "16-8-9" for "16-8-7" in the introductory paragraph; substituted the present provisions of paragraph (2) for the former provisions, which read: "Acted under an honest claim of right to the property or service involved or under a right to acquire or dispose of it as he did; or"; added present paragraph (3); and redesignated former paragraph (3) as present paragraph (4).

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Claim of right. — When the defendant, charged with theft by receiving stolen goods, did not deny the purchase, but contended the defendant purchased while believing the defendant had a right to purchase, failure to charge the substance of former Code 1933, § 26-1810 (see now O.C.G.A. § 16-8-10) was reversible error. Foskey v. State, 125 Ga. App. 672, 188 S.E.2d 825 (1972).

When the defense of claim of right is the sole defense available to a charge of theft, but the defendant fails to request a jury charge, failure to make a charge on this defense constitutes reversible error. McRoy v. State, 131 Ga. App. 307, 205 S.E.2d 445 (1974).

When defendants omitted to request jury instructions on a claim of right defense, the omission was not harmful or erroneous since the entire gist of the state's case was precisely that the defendants converted funds without any claim of right. Collins v. State, 170 Ga. App. 753, 318 S.E.2d 492, aff'd, 253 Ga. 367, 322 S.E.2d 61 (1984).

Trial court did not err in failing to charge the jury that an affirmative defense to a prosecution for theft by a public officer arose if the defendant, a sheriff, acted under an honest claim of right to the property or service involved pursuant to O.C.G.A. § 16-8-10(2) because the defendant could not have had an honest claim of right to the county's property. Dorsey v. State, 279 Ga. 534, 615 S.E.2d 512 (2005).

Defendant was properly convicted of felony theft by taking in violation of O.C.G.A. § 16-8-2 because there was evidence that the defendant intended not to transmit, to a law firm, payments the defendant received for indigent defense work; the defendant's failure to deny the debt and promises to pay, coupled with evidence of billing, timekeeping, and collection practices, provided evidence from which a jury could infer that the defendant was not acting under a claim of right pursuant to O.C.G.A. § 16-8-10(2) and that the defendant had the intent required to commit theft by taking. Clarke v. State, 317 Ga. App. 471, 731 S.E.2d 100 (2012).

Claim of right is a defense to the crime of theft, not armed robbery. Crowder v. State, 241 Ga. App. 818, 527 S.E.2d 901 (2000).

Trial court did not err by failing to charge the jury on the defendant's sole defense of "claim of right" because defendant was not charged under O.C.G.A. §§ 16-8-2 through 16-8-7, but was charged with the offense of robbery "by use of sudden snatching." Westmoreland v. State, 245 Ga. App. 482, 538 S.E.2d 119 (2000).

Defense unavailable for robbery by intimidation. — Because the affirmative defense of "claim of right" under O.C.G.A. § 16-8-10(2) was not, as a matter of law, available to a defendant in a prosecution for robbery by intimidation under O.C.G.A. § 16-8-40(a)(2), the trial court did not err in refusing to charge the jury on that principle. Richards v. State, 276 Ga. App. 384, 623 S.E.2d 222 (2005).

Repossession of goods as claim of right. — Defendant's conviction for theft by taking was reversed, where the trial court's findings indicated that defendant's

intent was to repossess a motorcycle under an honest claim of right after purchasers had defaulted on their payments. Edens v. State, 197 Ga. App. 146, 397 S.E.2d 612 (1990).

Written request required for charge on political motivation. — When the defendants raised defense of political motivation in addition to defense of "claim of right" the defendants were required to submit a timely written request for such a defense of "claim of right" if the defendants wished to have the defense submitted to the jury. Collins v. State, 170 Ga. App. 753, 318 S.E.2d 492, aff'd, 253 Ga. 367, 322 S.E.2d 61 (1984).

Denial not affirmative defense. — It was not error to fail to charge concerning former Code 1933, § 26-1810 (see now O.C.G.A. § 16-8-10) as an affirmative defense to a theft prosecution when a defendant's testimony that the defendant found the property nearby and was attempting to discover its rightful owner did not set forth any claim of right of the property, but was merely a denial that the defendant had any intent to deprive the owner of the property. Mathis v. State, 147 Ga. App. 148, 248 S.E.2d 212 (1978).

Trial court properly did not instruct the jury, sua sponte under O.C.G.A. § 5-5-24(c), on a claim of right defense under O.C.G.A. § 16-8-10 to theft by deception charges under O.C.G.A. § 16-8-3 as a sole defense as the defendant did not object to the instructions given, and a claim of right defense was not warranted as the sole defense as the defendant testified about the reasons the defendant was prevented from completing the jobs, and that the defendant had composed a list with the defendant's pastor of how much work was done on each job, and how much the defendant owed the people. Stratacos v. State, 312 Ga. App. 783, 720 S.E.2d 256 (2011).

Cited in Brindle v. State, 134 Ga. App. 257, 214 S.E.2d 182 (1975); Breland v. State, 135 Ga. App. 478, 218 S.E.2d 153 (1975); Cox v. State, 137 Ga. App. 794, 224 S.E.2d 845 (1976); Clontz v. State, 140 Ga. App. 440, 231 S.E.2d 454 (1976); Williams v. State, 142 Ga. App. 764, 236 S.E.2d 893 (1977); Bremer v. State, 148 Ga. App. 461, 251 S.E.2d 355 (1978); Conner v. State, 160 Ga. App. 202, 286 S.E.2d 441 (1981); White v. State, 163 Ga. App. 518, 295 S.E.2d 333 (1982); Grant v. State, 182 Ga. App. 669, 356 S.E.2d 730 (1987); Cincinnati Ins. Co. v. Tire Master of Thomaston, Inc., 183 Ga. App. 64, 357 S.E.2d 812 (1987); Williams v. State, 187 Ga. App. 859, 371 S.E.2d 673 (1988); Wideman v. State, 222 Ga. App. 733, 476 S.E.2d 49 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Embezzlement, § 47. 50 Am. Jur. 2d, Larceny, § 63.

C.J.S. — 76 C.J.S., Receiving or Transferring Stolen Goods, §§ 11, 12, 17.

ALR. — Larceny or embezzlement by appropriating money or proceeds of paper mistakenly delivered in excess of the amount due or intended, 14 A.L.R. 894.

Retaking of money lost at gambling as robbery or larceny, 77 A.L.R.3d 1363.

Embezzlement, larceny, false pretenses, or allied criminal fraud by a partner, 82 A.L.R.3d 822.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 A.L.R.3d 1309.

What is "property of another" within statute proscribing larceny, theft, or embezzlement of property of another, 57 A.L.R. 6th 445.

16-8-11. Venue for purposes of Code Sections 16-8-2 through 16-8-9 and 16-8-13 through 16-8-15.

In a prosecution under Code Sections 16-8-2 through 16-8-9 and 16-8-13 through 16-8-15, the crime shall be considered as having been committed in any county in which the accused exercised control over

the property which was the subject of the theft. In addition, in any prosecution under Code Section 16-8-4 in which there is a written rental agreement for personal property, the crime shall also be considered to have been committed in the county in which the accused signed the rental agreement. (Code 1933, § 26-1811, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1972, p. 841, § 3; Ga. L. 1994, p. 650, § 2.)

Cross references. — Venue generally, Ga. Const. 1983, Art. VI, Sec. II, Para. VI and § 17-2-2.

Law reviews. — For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986).

For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 126 (1994).

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Editor's notes. — In light of the similarity of the provisions, decisions under former Penal Code 1910, § 152 and former Code 1933, § 26-2602, as it read prior to revision of title by Ga. L. 1968, p. 1249, are included in the annotations for this Code section.

Constitutionality of Code section. — Former Code 1933, § 26-1811 (see now O.C.G.A. § 16-8-11) did not violate Ga. Const. 1976, Art. VI, Sec. XIV, Para. VI (see now Ga. Const. 1983, Art. VI, Sec. II, Para. VI). Crosby v. State, 232 Ga. 599, 207 S.E.2d 515 (1974).

Purpose of O.C.G.A. § 16-8-11 is to provide for establishment of venue in situations where there is either some doubt as to which county was the scene of the crime or where the crime in fact occurred in more than one county. Its purpose is the same as O.C.G.A. § 17-2-2. Bundren v. State, 247 Ga. 180, 274 S.E.2d 455 (1981).

Code Section 16-8-11 declarative of common law. — Statute fixing the venue for the trial of a thief in any county into which the thief may carry the property is but declaratory of the common law. Sanders v. State, 67 Ga. App. 706, 21 S.E.2d 276 (1942) (decided under former Code 1933, § 26-2602).

Buying or receiving stolen property. — One who has bought or received stolen property has exercised control over that property sufficient to warrant venue where the property was bought or received. Stephens v. State, 164 Ga. App. 398, 297 S.E.2d 90 (1982).

Venue in theft by taking case. — In an action for theft by taking, venue was properly shown as the trial court was authorized to find that deposit of the subject check had been made by the defendant or someone acting on the defendant's behalf; specifically, the check was deposited into a business account for the defendant's wife and the defendant identified the defendant's new company to the homeowner and the general contractor at a meeting. Erick v. State, 322 Ga. App. 71, 744 S.E.2d 69 (2013).

In a theft by taking case involving the theft of donations to an animal shelter, the evidence was sufficient to prove that venue was proper in Rabun County, Georgia, as the defendant exercised control over the money in that county because the state elicited direct testimony that the animal shelter was located in that county, that the defendant's residence was located in that county, that one bank used in the theft was located in that county, that one branch of another bank was located in that county, and that the defendant's "fundraising" efforts were conducted in that county, on either the defendant's home or work computer. Kilby v. State, 335 Ga. App. 238, 780 S.E.2d 411 (2015), cert. denied, No. S16C0653, No. S16C0653, 2016 Ga. LEXIS 437 (Ga. 2016).

Larceny is considered as committed in each county into which thief passes. — Thief may be tried in any one of the counties into which the thief may so pass. The crime is regarded as completely committed in all its parts in each county;

as much so in the last county as in the first. Sanders v. State, 67 Ga. App. 706, 21 S.E.2d 276 (1942) (decided under former Code 1933, § 26-2602).

When automobile is stolen and carried into another county. — Indictment is sufficient if the indictment alleges that the asportation occurred in the latter county, without any reference to any other county. Sanders v. State, 67 Ga. App. 706, 21 S.E.2d 276 (1942) (decided under former Code 1933, § 26-2602).

Venue of embezzlement was properly laid in county where defendant obtained possession of notes and presumptively formed the criminal intent. Denmark v. State, 44 Ga. App. 157, 161 S.E. 286 (1931) (decided under former Penal Code 1910, § 152).

If one embezzles funds from a branch office in Atlanta of a corporation which has its main office in New York City, it could not be reasonably contended that the accused would have to be tried in New York. Denmark v. State, 44 Ga. App. 157, 161 S.E. 286 (1931) (decided under former Penal Code 1910, § 152).

In theft by conversion cases, when allegedly converted property is money, two options are available to state regarding venue: first, the state can proceed in the county where the accused received the money; second, the state can produce evidence tracing funds disbursed in one county (where case is being prosecuted) back to an account or other source in the origin county, showing further that the funds were not disbursed in accordance with the contract provisions governing use of funds. Stowe v. State, 163 Ga. App. 535, 295 S.E.2d 209 (1982).

In prosecution for theft by conversion of a portion of an account, funds properly spent were not "subject of the theft," but only those funds alleged to have been spent unlawfully; thus, for venue purposes, burden was upon state to produce evidence that appellant exercised control over allegedly converted funds in county where case was prosecuted. Stowe v. State, 163 Ga. App. 535, 295 S.E.2d 209 (1982).

Venue proper in county where checks taken, not deposited. — Venue in prosecution for theft by taking involving defendants' taking checks in one county and depositing them in their bank account in another county was proper in the county where the checks were taken. Hawkins v. State, 167 Ga. App. 143, 305 S.E.2d 797 (1983).

In a prosecution for theft by deception, venue was proper where the evidence showed that defendant's agent obtained a check for defendant in the forum county at the defendant's direction and subjected it to defendant's control. Arnold v. State, 210 Ga. App. 843, 437 S.E.2d 844 (1993).

Venue was proper in the county where defendant exercised control over a stolen vehicle but drove the vehicle to another county. Kennon v. State, 232 Ga. App. 494, 502 S.E.2d 330 (1998).

Venue for defendant's theft by receiving trial was proper in Forsyth County as the deputy stopped the defendant driving a stolen car outside of a car dealership in Forsyth County; thus, the defendant exercised control over the stolen car in Forsyth County. Petty v. State, 271 Ga. App. 547, 610 S.E.2d 169 (2005).

Venue was appropriate under O.C.G.A. § 16-8-11 in DeKalb County for a defendant's prosecution for theft by deception as the defendant deposited a stolen check and withdrew funds from the victim's account via an ATM at a bank branch there. Parks v. State, 294 Ga. App. 646, 669 S.E.2d 684 (2008).

Evidence was sufficient to establish venue in Hall County for a theft by deception charge because a witness testified that at the defendant's request, the witness placed a check in the mailbox at a rental house, and that occurred the same day defendant cashed the check; the police officer who responded to the witness's call testified that the house was located in Hall County. Forrester v. State, 315 Ga. App. 1, 726 S.E.2d 476 (2012).

Venue in Georgia was proper, despite the car being leased by the defendant in Tennessee and the conversion taking place well before arrival in Georgia, because the defendant was seen exercising control over the car in Georgia in Gordon County; thus, venue was appropriate in that county. Jones v. State, 337 Ga. App. 687, 787 S.E.2d 330 (2016).

Venue in theft case was in the county where defendant exercised

control over the items at issue. — Evidence showed that the defendant borrowed a co-worker's vehicle containing a handgun, drove away, and never returned either the vehicle or the gun, and that these incidents occurred in White County, Georgia. This evidence was sufficient to prove venue in White County under O.C.G.A. § 16-8-11, as the evidence showed that, while in White County, defendant exercised control over the vehicle and the gun, and also allowed the jury to infer intent to steal the vehicle and firearm in White County. Couch v. State, 256 Ga. App. 822, 570 S.E.2d 57 (2002).

Venue was proper under O.C.G.A. § 16-8-11 for a count of theft by taking under O.C.G.A. § 16-8-2 regarding the stealing of furniture from the decedent's residence in Chatham County by the defendant, who was the executrix, as theft by taking occurred in any county in which a defendant exercised control over the subject property. Christian v. State, 288 Ga. App. 546, 654 S.E.2d 452 (2007).

Defendant's conviction for theft by deception, in violation of O.C.G.A. § 16-8-3, was reversed because no evidence was presented that the defendant had exercised control over the wire transfer funds in Morgan County, Georgia, where the trial was had on the charge. Davis v. State, 322 Ga. App. 826, 747 S.E.2d 19 (2013).

Sufficient evidence supported the defendant's conviction for theft by taking since the evidence showed that the defendant never used the funds borrowed for relocating the Florida plant, as promised, and the loan was secured with equipment that the defendant did not own; however, the prosecution failed to prove venue was proper in Dodge County, Georgia, since although the contracts were executed in Dodge County, there was no evidence that the defendant exercised any control over the $350,000 in Dodge County. Davis v. State, 326 Ga. App. 279, 754 S.E.2d 815 (2014).

Establishment of venue. — Venue in the county in which defendant building contractor's agent received a check from the defendant's customer was sufficiently established by defendant's admission that defendant received payments from no customer and had designated the agent as the person to receive the check. Queen v. State, 210 Ga. App. 588, 436 S.E.2d 714 (1993).

State failed to establish venue when the indictment was for theft by taking from a trust which at all times was located in another state, not in the county where the trust beneficiary lived. DeVine v. State, 229 Ga. App. 346, 494 S.E.2d 87 (1997).

State failed to prove venue for armed robbery and hijacking a motor vehicle since the facts showed that the victim was forced at gunpoint into the victim's car in a parking lot in one county and then ordered the victim to drive into a second county (the place of trial) where the victim was taken from the car and shot; both offenses were complete in the first county, and neither O.C.G.A. § 16-8-11 nor O.C.G.A. § 17-2-2(d) were applicable to confer venue in the second county. Bradley v. State, 272 Ga. 740, 533 S.E.2d 727 (2000).

Conviction for theft by taking was reversed where the state failed to properly establish venue. There was no evidence that defendant received the money in Fayette County, and the state did not show that defendant spent any of the money in Fayette County. Naylor v. State, 257 Ga. App. 899, 572 S.E.2d 410 (2002).

Evidence showed that the defendant resided in a forum county during the time the defendant was persuading the victim to give the defendant money to invest in federal government securities and that the defendant even showed the victim documents that the defendant authored that contained a forum county address and phone number; accordingly, venue was proper in the forum county in the defendant's case in which the defendant did not invest the victim's money as defendant said the defendant would do, but instead transferred the money into entities controlled by the defendant. Gould v. State, 273 Ga. App. 155, 614 S.E.2d 252 (2005).

Despite the defendant's claim that venue was not proper in Jackson County because the defendant exerted no meaningful control over funds until the defendant withdrew the funds in Banks County, the money was subject to the defendant's

control after the money entered the defendant's account in Jackson County, and thus venue was proper in Jackson County, O.C.G.A. § 16-8-11. Williams v. State, 297 Ga. App. 150, 676 S.E.2d 805 (2009).

State clearly demonstrated that venue was proper in Dawson County, Georgia for the defendant's trial for misdemeanor theft by receiving, O.C.G.A. § 16-8-7, where the defendant began driving away in a vehicle containing stolen goods. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Evidence was sufficient to establish venue beyond a reasonable doubt and to sustain the defendant's conviction for theft by taking because the state established that the defendant wrote checks at a company's county office, the amount of the check cashed exceeded the amount entered into the computer register, and the total amount of the difference was more than $500; the company president testified that the company was located in the county where the defendant's trial was held and that the defendant worked at the company office and then began working from home. Gautreaux v. State, 314 Ga. App. 103, 722 S.E.2d 915 (2012).

Venue was sufficiently established in Cobb County, Georgia, pursuant to O.C.G.A. § 16-8-11 in the defendant's trial for theft by taking in violation of O.C.G.A. § 16-8-2 because a Secret Service agent testified that during the investigation, the agent discovered that checks disbursed from the victims' loans were sent to the defendant at the defendant's mailbox located in Cobb County. Bearden v. State, 316 Ga. App. 721, 728 S.E.2d 874 (2012).

Cited in Cagle v. State, 132 Ga. App. 227, 207 S.E.2d 703 (1974); Henderson v. State, 134 Ga. App. 898, 216 S.E.2d 696 (1975); Barfield v. State, 149 Ga. App. 166, 253 S.E.2d 781 (1979); Moore v. State, 153 Ga. App. 49, 264 S.E.2d 538 (1980); Salter v. State, 163 Ga. App. 655, 294 S.E.2d 612 (1982); Miller v. State, 174 Ga. App. 703, 331 S.E.2d 616 (1985); Jordan v. State, 242 Ga. App. 547, 528 S.E.2d 858 (2000); Travis v. State, 243 Ga. App. 77, 532 S.E.2d 430 (2000); Pruitt v. State, 245 Ga. App. 801, 538 S.E.2d 874 (2000); Bradley v. State, 272 Ga. 740, 533 S.E.2d 727 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 464, 469.

ALR. — Where is embezzlement committed for purposes of territorial jurisdiction or venue, 80 A.L.R.3d 514.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

16-8-12. Penalties for theft in violation of Code Sections 16-8-2 through 16-8-9.

(a) A person convicted of a violation of Code Sections 16-8-2 through 16-8-9 shall be punished as for a misdemeanor except:

(1)(A) If the property which was the subject of the theft exceeded $24,999.99 in value, by imprisonment for not less than two nor more than 20 years;

(B) If the property which was the subject of the theft was at least $5,000.00 in value but was less than $25,000.00 in value, by imprisonment for not less than one nor more than ten years and, in the discretion of the trial judge, as for a misdemeanor;

(C) If the property which was the subject of the theft was at least $1,500.01 in value but was less than $5,000.00 in value, by

imprisonment for not less than one nor more than five years and, in the discretion of the trial judge, as for a misdemeanor; and

(D) If the defendant has two prior convictions for a violation of Code Sections 16-8-2 through 16-8-9, upon a third conviction or subsequent conviction, such defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years and, in the discretion of the trial judge, as for a misdemeanor;

(2) If the property was any amount of anhydrous ammonia, as defined in Code Section 16-11-111, by imprisonment for not less than one nor more than ten years, a fine not to exceed the amount provided by Code Section 17-10-8, or both;

(3) If the property was taken by a fiduciary in breach of a fiduciary obligation or by an officer or employee of a government or a financial institution in breach of his or her duties as such officer or employee, by imprisonment for not less than one nor more than 15 years, a fine not to exceed the amount provided by Code Section 17-10-8, or both;

(4) If the crime committed was a violation of Code Section 16-8-2 and if the property which was the subject of the theft was a memorial to the dead or any ornamentation, flower, tree, or shrub placed on, adjacent to, or within any enclosure of a memorial to the dead, by imprisonment for not less than one nor more than three years. Nothing in this paragraph shall be construed as to cause action taken by a cemetery, cemetery owner, lessee, trustee, church, religious or fraternal organization, corporation, civic organization, or club legitimately attempting to clean, maintain, care for, upgrade, or beautify a grave, gravesite, tomb, monument, gravestone, or other structure or thing placed or designed for a memorial of the dead to be a criminal act;

(5)(A) The provisions of paragraph (1) of this subsection notwithstanding, if the theft or unlawful activity was committed in violation of subsection (b) of Code Section 10-1-393.5 or in violation of subsection (b) of Code Section 10-1-393.6 or while engaged in telemarketing conduct in violation of Chapter 5B of Title 10, by imprisonment for not less than one nor more than ten years or, in the discretion of the trial judge, as for a misdemeanor; provided, however, that any person who is convicted of a second or subsequent offense under this paragraph shall be punished by imprisonment for not less than one year nor more than 20 years.

(B) Subsequent offenses committed under this paragraph, including those which may have been committed after prior felony convictions unrelated to this paragraph, shall be punished as provided in Code Section 17-10-7;

(6)(A) As used in this paragraph, the term:

(i) "Destructive device" means a destructive device as such term is defined by Code Section 16-7-80.

(ii) "Explosive" means an explosive as such term is defined by Code Section 16-7-80.

(iii) "Firearm" means any rifle, shotgun, pistol, or similar device which propels a projectile or projectiles through the energy of an explosive.

(B) If the property which was the subject of the theft offense was a destructive device, explosive, or firearm, by imprisonment for not less than one year nor more than ten years; provided, however, that upon a second or subsequent conviction, by imprisonment for not less than five nor more than ten years;

(7) If the property which was the subject of the theft is a grave marker, monument, or memorial to one or more deceased persons who served in the military service of this state, the United States of America or any of the states thereof, or the Confederate States of America or any of the states thereof, or a monument, plaque, marker, or memorial which is dedicated to, honors, or recounts the military service of any past or present military personnel of this state, the United States of America or any of the states thereof, or the Confederate States of America or any of the states thereof, and if such grave marker, monument, memorial, plaque, or marker is privately owned or located on privately owned land, by imprisonment for not less than one nor more than three years if the value of the property which was the subject of the theft is $1,000.00 or less, and by imprisonment for not less than three years and not more than five years if the value of the property which was the subject of the theft is more than $1,000.00;

(8) Reserved; or

(9) Notwithstanding the provisions of paragraph (1) of this subsection, if the property of the theft was regulated metal property, as such term is defined in Code Section 10-1-350, and the sum of the aggregate amount of such property, in its original and undamaged condition, plus any reasonable costs which are or would be incurred in the repair or the attempt to recover any property damaged in the theft or removal of such regulated metal property, exceeds $500.00, by imprisonment for not less than one nor more than five years, a fine of not more than $5,000.00, or both.

(b) Except as otherwise provided in paragraph (5) of subsection (a) of this Code section, any person who commits the offense of theft by deception when the property which was the subject of the theft

exceeded $500.00 in value and the offense was committed against a person who is 65 years of age or older shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than ten years.

(c) Where a violation of Code Sections 16-8-2 through 16-8-9 involves the theft of a growing or otherwise unharvested commercial agricultural product which is being grown or produced as a crop, such offense shall be punished by a fine of not less than $1,000.00 and not more than the maximum fine otherwise authorized by law. This minimum fine shall not in any such case be subject to suspension, stay, or probation. This minimum fine shall not be required in any case in which a sentence of confinement is imposed and such sentence of confinement is not suspended, stayed, or probated; but this subsection shall not prohibit imposition of any otherwise authorized fine in such a case. (Code 1933, § 26-1812, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1972, p. 841, § 4; Ga. L. 1978, p. 1457, § 1; Ga. L. 1981, p. 1552, § 1; Ga. L. 1981, p. 1576, § 1; Ga. L. 1982, p. 1371, § 2; Ga. L. 1984, p. 900, § 3; Ga. L. 1986, p. 1228, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1994, p. 359, § 1; Ga. L. 1996, p. 231, § 4; Ga. L. 1996, p. 416, § 4; Ga. L. 1997, p. 1507, § 4; Ga. L. 1998, p. 643, § 5; Ga. L. 2000, p. 1085, § 3; Ga. L. 2001, p. 1153, § 2; Ga. L. 2003, p. 177, § 1; Ga. L. 2004, p. 1072, § 2; Ga. L. 2006, p. 329, § 1/HB 1275; Ga. L. 2007, p. 650, § 4/SB 203; Ga. L. 2009, p. 731, § 4/SB 82; Ga. L. 2012, p. 112, § 1-2/HB 872; Ga. L. 2012, p. 899, § 3-2/HB 1176; Ga. L. 2014, p. 195, § 2/HB 749; Ga. L. 2018, p. 550, § 4-1/SB 407.)

The 2018 amendment, effective July 1, 2018, in subparagraph (a)(6)(B), inserted "year" and added the proviso at the end.

Cross references. — Unlawful telemarketing transactions, § 10-1-393.6. Reports of stolen motor vehicles, § 40-3-5.

Editor's notes. — Ga. L. 1997, p. 1507, § 5, not codified by the General Assembly, provides that the 1997 amendment to this Code section is applicable to offenses committed on or after July 1, 1997.

Ga. L. 1998, p. 643, § 6, not codified by the General Assembly, provides that the 1998 amendment to this Code section is applicable to acts and offenses committed on or after July 1, 1998.

Ga. L. 2000, p. 1085, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Georgia Protection of Elder Persons Act of 2000'."

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Ga. L. 2014, p. 195, § 3/HB 749, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2014, and shall apply to all offenses committed on or after such date."

Law reviews. — For article on recidivism and convictions based on nolo

contendere pleas, see 13 Ga. L. Rev. 723 (1979). For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 29 (1997). For review of 1998 legislation relating to commerce and trade, see 15 Ga. St. U.L. Rev. 9 (1998). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

For note on 2000 amendment of O.C.G.A. § 16-8-12, see 17 Ga. St. U.L. Rev. 93 (2000).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 26-1813 are included in the annotations for this Code section.

O.C.G.A. § 16-8-12(a)(2) permits felony punishment for theft by taking in breach of a fiduciary obligation. Hannon v. State, 232 Ga. App. 352, 501 S.E.2d 865 (1998).

O.C.G.A. § 16-8-12(a)(5)(A) permits felony punishment for theft of tractor. — Pursuant to O.C.G.A. § 40-1-1(33), a self-propelled tractor was a motor vehicle as contemplated by state law. Browning v. State, 207 Ga. App. 547, 428 S.E.2d 441 (1993).

Theft of riding lawnmower punishable under O.C.G.A. § 16-8-2 not O.C.G.A. § 16-8-12. — Theft of a riding lawnmower was a violation of O.C.G.A. § 16-8-2, the theft by taking statute; a riding lawnmower was not a "motor vehicle" as that term was used in O.C.G.A. § 16-8-12(a)(5)(A). Harris v. State, 286 Ga. 245, 686 S.E.2d 777 (2009).

Riding lawnmower was not a "motor vehicle" as that term was used in the statute punishing theft of a motor vehicle, O.C.G.A. § 16-8-12(a)(5)(A); therefore, the defendant's conviction was reversed. A motor vehicle was defined by the court for purposes of § 16-8-12(a)(5)(A) as a self-propelled vehicle with wheels that was designed to be used, or was ordinarily used, to transport people or property on roads. Harris v. State, 286 Ga. 245, 686 S.E.2d 777 (2009).

O.C.G.A. § 16-8-12(a)(5)(A) permits felony punishment for theft of motor vehicle, regardless of value, and requires evidence of value exceeding $100 only if a motor vehicle part or component was the subject of the theft. Preston v. State, 183 Ga. App. 20, 357 S.E.2d 825, cert. denied, 183 Ga. App. 906, 357 S.E.2d 825 (1987); Jackson v. State, 267 Ga. 130, 475 S.E.2d 637 (1996); Sapp v. State, 222 Ga. App. 415, 474 S.E.2d 233 (1996); Jordan v. State, 224 Ga. App. 181, 480 S.E.2d 228 (1996).

State court had jurisdiction over prosecution of the defendant charged with theft by deception involving nine checks, each written for less than $280. Cartwright v. State, 229 Ga. App. 385, 494 S.E.2d 99 (1997).

Statute of limitations properly tolled. — Because the statute of limitations as to two counts of theft by receiving was tolled during the period in which the person committing the crimes was unknown, and knowledge was not imputed to the state during this time, the prosecution of those counts was not time-barred. English v. State, 288 Ga. App. 436, 654 S.E.2d 150 (2007).

Misdemeanor offenses. — Indictment charging two counts of theft by taking, each involving less than $500, charged offenses with maximum punishments of less than 12 months, i.e., misdemeanor offenses within the jurisdiction of the state court. Royster v. State, 226 Ga. App. 737, 487 S.E.2d 491 (1997).

Merger. — Evidence supported the trial court's judgment that defendant com-

mitted felony theft by deception when defendant lied about obtaining a bank loan so the defendant could purchase three pieces of equipment, took the equipment from the owner to have it inspected, and kept the equipment without paying for it. However, the trial court erred when it convicted defendant of three counts of felony theft by deception because, although each piece of equipment was worth more than $500, the same evidence was used to prove all three counts and the counts merged, as a matter of fact, into one offense. Pettiford v. State, 265 Ga. App. 874, 595 S.E.2d 673 (2004).

Due to the entry of a guilty plea over 20 years before the filing of a motion to correct alleged illegal sentences, the defendant's merger claim was waived and since the sentences imposed were not void, the trial court lacked subject matter jurisdiction over the motion for correction. Sanders v. State, 282 Ga. App. 834, 640 S.E.2d 353 (2006).

Felony by statutory definition. — While former Code 1933, § 26-1812 (see now O.C.G.A. § 16-8-12(a)(1)) granted the trial judge discretion to impose misdemeanor punishment, this provision did not reduce the offense to a misdemeanor, because theft of property of a value in excess of $100.00 (now $500.00) was a felony by statutory definition. Andrews v. State, 130 Ga. App. 2, 202 S.E.2d 246 (1973).

When the defendant was accused of keeping rather than depositing salon funds at the end of the day on six occasions, and the value of the checks and cash combined totaled over $500 missing from each deposit, the evidence supported six separate counts of felony theft by taking under O.C.G.A. § 16-8-12(a)(1). Matthews v. State, 257 Ga. App. 886, 572 S.E.2d 391 (2002).

Where property taken by government employee. — Since a defendant may be convicted as a party to the crime of conversion, without first "having lawfully obtained the funds" under former Code 1933, § 26-1808 (see now O.C.G.A. § 16-8-4), it necessarily follows that a defendant may also be punished without having been a government employee "if the property was taken by an officer or employee of a government institution," under former Code 1933, § 26-1812(b) (see now O.C.G.A. § 16-8-12(a)(2)). Garrett v. State, 243 Ga. 322, 253 S.E.2d 741 (1979).

Illustrative cases. — Defendant's actions while serving as a county sheriff, using sheriff's department employees and equipment for defendant's personal benefit, were so far outside the realm of acceptable police behavior that any rational trier of fact could have found proof beyond a reasonable doubt of theft by taking in violation of the duties as a public officer. Dorsey v. State, 279 Ga. 534, 615 S.E.2d 512 (2005).

Evidence was sufficient to convict the defendant of criminal trespass and theft by taking because the defendant was found at a recycling facility trying to sell pieces of the victim's aluminum awning, which the defendant had previously been told was not trash, but belonged to a laundry establishment. Jackson v. State, 301 Ga. App. 863, 690 S.E.2d 195 (2010).

Evidence was sufficient to support the defendant's conviction for felony theft by receiving stolen property in violation of O.C.G.A. § 16-8-7(a) because the jury was authorized to find that a ruby and diamond ring exceeding $ 500 in value had been stolen from the victim's house, that the defendant had acquired possession of the ring, and that the defendant knew or should have known the ring was stolen; although the defendant asserted that the ring found in the defendant's possession did not belong to the victim, that was a question for the jury as the trier of fact, and the jury had no obligation to believe the defendant's claim. Hogues v. State, 313 Ga. App. 717, 722 S.E.2d 430 (2012).

Indictment conjunctively alleging two violations sufficient. — Indictment which conjunctively alleged violations of former Code 1933, § 26-1802 (see now O.C.G.A. § 16-8-2) (theft by taking) and former Code 1933, § 26-1812 (see now O.C.G.A. § 16-8-12) sufficiently advised defendant of both charges. Wages v. State, 165 Ga. App. 587, 302 S.E.2d 112 (1983).

Excessive sentence for misdemeanor. — It was reversible error for the trial court to impose probated confinement for a period of five years on two

General Consideration (Cont'd)

counts of misdemeanor theft, when the maximum period of confinement which could be imposed was for a term of one year, as both sentences ran consecutively, and one of the conditions of the probation was that, in the event probation was revoked, the trial court could order the execution of the sentence originally imposed. Tenney v. State, 194 Ga. App. 820, 392 S.E.2d 294 (1990).

Misdemeanor punishment not authorized when pistol subject of offense. — Trial court did not err by failing to charge the jury that the jury could recommend misdemeanor punishment upon conviction of the defendant for the felony offense of theft by receiving stolen property since a pistol was the subject of the charge. Rowe v. State, 266 Ga. 136, 464 S.E.2d 811 (1996).

When sentencing for felony is unauthorized. — When there is no competent evidence showing the value of the subject property to be in excess of $100.00 (now $500.00), sentencing for a felony is unauthorized. Dunbar v. State, 146 Ga. App. 136, 245 S.E.2d 486 (1978).

Appellate court affirmed conviction of theft by receiving stolen property of some value but directed that the appellant's sentence be vacated and that the appellant be resentenced for a misdemeanor since the evidence was insufficient to establish that value of stolen property exceeded $200.00 (now $500.00). Searcy v. State, 163 Ga. App. 528, 295 S.E.2d 227 (1982).

Scrivener's error held moot. — Because a scrivener's error regarding the sentence entered upon the defendant's plea to five counts of theft by taking had already been corrected by the trial court, the sentence imposed was upheld, and any claim of error was rendered moot. Manley v. State, 287 Ga. App. 358, 651 S.E.2d 453 (2007), cert. denied, 2008 Ga. LEXIS 94 (Ga. 2008).

Restitution order proper. — Evidence was sufficient to support the trial court's determination of the amount of restitution awarded based on the rental agreements requiring the defendant to either make monthly payments on the televisions or return the television; the agreements provided for a total $2,797.90 in monthly payments, the defendant made only $573.60 in payments, and never returned the televisions. Williams v. State, 328 Ga. App. 898, 763 S.E.2d 280 (2014).

Jury instructions. — Trial court did not err in failing to instruct the jury that property taken by a public officer in breach of the defendant's duties was punishable as a felony as a jury concerns itself with guilt or innocence, not punishment. Dorsey v. State, 279 Ga. 534, 615 S.E.2d 512 (2005).

Resentence proper. — Trial court did not err in resentencing the defendant to a probated sentence of ten years for a theft by receiving conviction, upon filing a motion under O.C.G.A. § 16-8-12, with such sentence to commence ten years after the beginning of a term of imprisonment for an armed robbery conviction as: (1) the revised sentence did not impermissibly increase the original sentence imposed; (2) the revised probated sentence effected no change in the probation term to be served following the confinement for armed robbery as both the original and revised sentences provided for five years of probation, consecutive to the defendant's confinement; and (3) the defendant failed to show fulfillment of the maximum legal term for the theft by receiving conviction, or that any of the probation requirements had been satisfied. Fair v. State, 281 Ga. App. 518, 636 S.E.2d 712 (2006), cert. denied, No. S07C0125, 2007 Ga. LEXIS 494 (Ga. 2007).

Although the state argued that a juvenile had been adjudicated on five separate petitions setting out five separate felonies, because the record revealed that adjudication had occurred on only two prior occasions for acts which, if done by an adult, would have been felonies, the juvenile's sentence under O.C.G.A. § 15-11-63(a)(2)(B)(vii) was vacated, and the case was remanded for resentencing. In the Interest of P.R., 282 Ga. App. 480, 638 S.E.2d 898 (2006).

Sentence appropriate. — Because: (1) the defendant was properly sentenced for felony theft by taking as the defendant admitted to the accusation which valued

the items taken at greater than $100; and (2) the offenses of theft by taking and entering an automobile with intent to commit theft did not merge for purposes of sentencing as each offense required the proof of different facts, the sentence imposed by the trial court was upheld. Neslein v. State, 288 Ga. App. 234, 653 S.E.2d 825 (2007).

Defendant's sentence for theft by deception for taking $2,611.29 from an elderly victim in a roofing scheme was within the statutory limits and, thus, the defendant's sentence of 10 years, with five years probated, was not so disproportionate as to shock the conscience. Jones v. State, 325 Ga. App. 845, 755 S.E.2d 238 (2014).

Cited in Stull v. State, 230 Ga. 99, 196 S.E.2d 7 (1973); Johnson v. State, 130 Ga. App. 134, 202 S.E.2d 525 (1973); Abbott v. State, 130 Ga. App. 891, 205 S.E.2d 14 (1974); Marchman v. State, 132 Ga. App. 677, 209 S.E.2d 88 (1974); McCrary v. Ricketts, 232 Ga. 890, 209 S.E.2d 148 (1974); Burkett v. State, 133 Ga. App. 728, 212 S.E.2d 870 (1975); Parrott v. State, 134 Ga. App. 160, 214 S.E.2d 3 (1975); King v. State, 134 Ga. App. 636, 215 S.E.2d 532 (1975); Henderson v. State, 134 Ga. App. 898, 216 S.E.2d 696 (1975); Sanders v. State, 135 Ga. App. 436, 218 S.E.2d 140 (1975); Dent v. State, 136 Ga. App. 366, 221 S.E.2d 228 (1975); Mahar v. State, 137 Ga. App. 116, 223 S.E.2d 204 (1975); Jones v. State, 137 Ga. App. 612, 224 S.E.2d 473 (1976); Mena v. State, 138 Ga. App. 722, 227 S.E.2d 411 (1976); Hickox v. State, 138 Ga. App. 882, 227 S.E.2d 829 (1976); Garrett v. State, 141 Ga. App. 584, 234 S.E.2d 161 (1977); Crowley v. State, 141 Ga. App. 867, 234 S.E.2d 700 (1977); Johnson v. State, 143 Ga. App. 160, 237 S.E.2d 605 (1977); Eubanks v. State, 144 Ga. App. 152, 241 S.E.2d 6 (1977); Yarber v. State, 144 Ga. App. 781, 242 S.E.2d 372 (1978); Peterkin v. State, 147 Ga. App. 437, 249 S.E.2d 152 (1978); Garrett v. State, 147 Ga. App. 666, 250 S.E.2d 1 (1978); Nowicki v. State, 148 Ga. App. 255, 251 S.E.2d 840 (1978); Garrett v. State, 243 Ga. 322, 253 S.E.2d 741 (1979); Parnell v. State, 151 Ga. App. 756, 261 S.E.2d 481 (1979); Jones v. State, 155 Ga. App. 382, 271 S.E.2d 30 (1980); Carnes v. Crawford, 246 Ga. 677, 272 S.E.2d 690 (1980); Jones v. State, 159 Ga. App. 845, 285 S.E.2d 584 (1981); Baker v. State, 160 Ga. App. 211, 286 S.E.2d 458 (1981); Jones v. State, 161 Ga. App. 218, 288 S.E.2d 293 (1982); Kraus v. State, 161 Ga. App. 739, 289 S.E.2d 555 (1982); Searcy v. State, 162 Ga. App. 695, 291 S.E.2d 557 (1982); Traylor v. State, 163 Ga. App. 473, 294 S.E.2d 707 (1982); Moyer v. State, 164 Ga. App. 629, 298 S.E.2d 308 (1982); McCormick v. Gearinger, 253 Ga. 531, 322 S.E.2d 716 (1984); McIlhenny v. State, 172 Ga. App. 419, 323 S.E.2d 280 (1984); Howard v. State, 173 Ga. App. 346, 326 S.E.2d 546 (1985); Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987); Jones v. Gaither, 640 F. Supp. 741 (N.D. Ga. 1986); Phinazee v. State, 182 Ga. App. 45, 354 S.E.2d 671 (1987); Ranson v. State, 198 Ga. App. 659, 402 S.E.2d 740 (1991); State v. Stamey, 211 Ga. App. 837, 440 S.E.2d 725 (1994); Simmons v. State, 222 Ga. App. 447, 474 S.E.2d 253 (1996); Holland v. State, 232 Ga. App. 284, 501 S.E.2d 829 (1998); Espinoza v. State, 243 Ga. App. 665, 534 S.E.2d 127 (2000); Conley v. State, 281 Ga. App. 841, 637 S.E.2d 438 (2006); State v. Henderson, 281 Ga. 623, 641 S.E.2d 515 (2007); Tiller v. State, 286 Ga. App. 230, 648 S.E.2d 738 (2007); Simmons v. State, 287 Ga. App. 68, 651 S.E.2d 359 (2007); Brandeburg v. State, 292 Ga. App. 191, 663 S.E.2d 844 (2008); State v. Campbell, 295 Ga. App. 856, 673 S.E.2d 336 (2009); Vadde v. State, 296 Ga. App. 405, 674 S.E.2d 323 (2009); Kilby v. State, 335 Ga. App. 238, 780 S.E.2d 411 (2015); State v. Crowder, 338 Ga. App. 642, 791 S.E.2d 423 (2016).

Prior Convictions

Alleging prior convictions in indictment. — When, because of prior convictions, the state seeks to increase the punishment of one who is convicted for theft of an automobile, it is a requisite that the indictment allege the prior convictions upon which the state relies. Studdard v. State, 225 Ga. 410, 169 S.E.2d 327, answer conformed to, 120 Ga. App. 225, 170 S.E.2d 46 (1969).

Alleged recidivism of accused may not be disclosed to jury during the guilt/innocence phase of trial. Callahan v.

Prior Convictions (Cont'd)

State, 148 Ga. App. 555, 251 S.E.2d 790 (1978) (decided under former Code 1933, § 26-1813).

Time for defendant to challenge validity of convictions on which recidivism charge is made is when the state attempts to prove the convictions at the sentencing. Callahan v. State, 148 Ga. App. 555, 251 S.E.2d 790 (1978) (decided under former Code 1933, § 26-1813).

Value

Applicable statutory dollar amount. — When theft was committed and a conviction had prior to the effective date of the 1982 amendment substituting "$500.00" for "$200.00" in O.C.G.A. § 16-8-12(a)(1), the $500.00 figure had no application in defendants' appeal as to the sufficiency of value proved. Pippin v. State, 166 Ga. App. 658, 305 S.E.2d 408 (1983).

Because the state failed to prove that the value of the property stolen, specifically, a washer and dryer, exceeded $500, as the owner of the property never offered any testimony regarding the cost or value of those items, and said nothing about their age and condition, the defendant's felony conviction associated with that charge was vacated and ordered reduced to a misdemeanor. English v. State, 288 Ga. App. 436, 654 S.E.2d 150 (2007).

Because the applicable law relevant to a crime is the law as the law existed at the time the crime occurred, where the theft of $350 was a felony with a four-year statute of limitations when the theft was committed, it remains such a felony with that statute of limitations despite subsequent reduction of the offense to a misdemeanor with a two-year statute of limitations. State v. Williams, 172 Ga. App. 708, 324 S.E.2d 557 (1984).

Evidence was sufficient to support the defendant's conviction for theft by receiving stolen property as the state introduced sufficient evidence to permit the jury to find that the bathtub in the back of the defendant's truck had been stolen from the house, that the defendant knew or should have known that the bathtub was stolen, and that the defendant had acquired possession of the bathtub; however, since the state did not prove that the actual fair market value of the bathtub exceeded $500.00, the trial court erred in imposing a felony sentence as only a misdemeanor sentence was authorized. DeLong v. State, 270 Ga. App. 173, 606 S.E.2d 107 (2004).

Evidence was sufficient for the jury to find that the items the appellant stole exceeded $500 in value when the evidence showed that the appellant had taken two gaming stations valued at $150 each, DVDs collectively valued at $175, as well as earrings and other items from the victim. Pulley v. State, 291 Ga. 330, 729 S.E.2d 338 (2012).

Value is relevant only to question of whether theft by taking is felony or misdemeanor. — Only if there is a factual issue as to whether the value is more than $100.00 (now $500.00) does the jury need to establish value to assist the trial court in determining an appropriate sentence. Jones v. State, 147 Ga. App. 779, 250 S.E.2d 500 (1978).

Defendant prosecuted for misdemeanor when no proof value of stolen goods exceeded minimum. — State must prove that the value of stolen goods purchased or received by a defendant exceeded the minimum level necessary to constitute a felony, and failure to meet this burden of proof entails that the defendant will be prosecuted, if at all, only on a misdemeanor offense. Lane v. State, 173 Ga. App. 804, 328 S.E.2d 231 (1985).

Value of the property can be a relevant issue in any theft case in the same manner as a substantive element; thus, the trial court did not err in charging the jury that, in order to convict the defendant of theft by taking, the jury must first find the value of the stolen property exceeded $500, as alleged in the indictment. Hammett v. State, 246 Ga. App. 287, 539 S.E.2d 193 (2000).

Classification of punishment determined by value of property taken. — Though there was sufficient evidence to support a finding that a juvenile committed an act of theft by taking, because the state failed to offer evidence as to the stolen property's value, the juvenile court erred in finding that the juvenile commit-

ted an act of felony theft by taking. Thus, the case required a remand for an adjudication of delinquency and a disposition thereof to be entered against the juvenile for committing an act which would have supported a conviction for the offense of misdemeanor theft by taking since the value of the stolen property only was relevant as to the conviction's classification as a felony versus a misdemeanor. In the Interest of J. S., 296 Ga. App. 144, 673 S.E.2d 645 (2009).

Defendant's conviction for theft by conversion was supported by sufficient evidence because the conviction did not depend on the value of the stolen property, which was relevant only for purposes of distinguishing between a misdemeanor and a felony, therefore, the owner's testimony that the televisions had some value authorized the jury to find the defendant guilty, beyond a reasonable doubt, of misdemeanor theft by conversion. Williams v. State, 328 Ga. App. 898, 763 S.E.2d 280 (2014).

Punishment only is determined by value. — There are not two thefts by taking crimes, one being a misdemeanor and the other being a felony. There is only one such crime, and upon conviction for it, the punishment only is determined by the value of the property taken. Mack v. Ricketts, 236 Ga. 86, 222 S.E.2d 337 (1976).

Defendant's felony sentence for theft by taking under O.C.G.A. §§ 16-8-2 and 16-8-12(a) had to be vacated because, although the state proved that the defendant took certain software belonging to the defendant's employer, which the defendant was not permitted to copy, the state failed to prove the value of the software so the defendant could only receive a misdemeanor sentence; the value of the software was not an element of the crime but only determined whether the defendant was punished for a felony or a misdemeanor. DuCom v. State, 288 Ga. App. 555, 654 S.E.2d 670 (2007), cert. denied, No. S08C0598, 2008 Ga. LEXIS 383 (Ga. 2008).

Although an indictment for theft by taking under O.C.G.A. § 16-8-2 did not allege the value of stolen car parts defendant was caught removing from a business, the value was not an element of the offense. Because a jury found the parts were worth more than $100, the crime was punishable as a felony under O.C.G.A. § 16-8-12(a)(5)(A). Roman v. State, 300 Ga. App. 526, 685 S.E.2d 775 (2009), cert. denied, No. S10C0386, 2010 Ga. LEXIS 306 (Ga. 2010).

Value was not an element of the crime of theft by receiving stolen goods proscribed by former Code 1933, § 26-1812 (see now O.C.G.A. § 16-8-7), but value was relevant for the purpose of distinguishing between a misdemeanor and a felony for sentencing. Ayers v. State, 164 Ga. App. 195, 296 S.E.2d 772 (1982).

Value was not element of crime of theft by taking as proscribed by former Code 1933, § 26-1812 (see now O.C.G.A. § 16-8-2); the value of stolen items was relevant only for purposes of distinguishing between a misdemeanor and a felony. Stancell v. State, 146 Ga. App. 773, 247 S.E.2d 587 (1978); Hight v. State, 221 Ga. App. 574, 472 S.E.2d 113 (1996).

Whether theft by deception is misdemeanor or felony is material only to punishment. — Whether the offense of theft by deception constitutes a misdemeanor or a felony is not material to the defense, and is only material after conviction for the purpose of sentencing under the provisions of former Code 1933, § 26-1812 (see now O.C.G.A. § 16-8-12). Guy v. State, 138 Ga. App. 11, 225 S.E.2d 492 (1976).

Value's impact on statute of limitations. — Defendant was properly denied a motion for a directed verdict of acquittal based on the expiration of the statute of limitations under O.C.G.A. § 17-3-1 as the charge of theft by deception was a felony rather than a misdemeanor under O.C.G.A. § 16-8-12 based on the evidence that more than $500 was taken and, thus, a four-year statute of limitations applied; the defendant should have made a special plea in bar prior to the trial. Parks v. State, 294 Ga. App. 646, 669 S.E.2d 684 (2008).

Purchase price alone is not sufficient criterion of value. Pate v. State, 158 Ga. App. 395, 280 S.E.2d 414 (1981); Pippin v. State, 166 Ga. App. 658, 305 S.E.2d 408 (1983).

Value (Cont'd)

Although relevant to the question of value, the cost of the property to the owner is not the ultimate determinate of whether the offense of receiving stolen property is punishable as a felony or a misdemeanor. Baker v. State, 234 Ga. App. 846, 507 S.E.2d 475 (1998).

Testimony by the owner concerning the purchase price, absent any other evidence of value, was insufficient evidence to establish that the value of the property exceeded $500. Denson v. State, 240 Ga. App. 207, 523 S.E.2d 62 (1999).

Mere statement that thing has certain value without stating reasons for conclusion lacks probative value. Pate v. State, 158 Ga. App. 395, 280 S.E.2d 414 (1981).

Valuation of property. — Owner of property may not testify as to the owner's opinion of the value of the property taken without giving the owner's reasons therefor, and an opinion as to value based solely on cost price is inadmissible in evidence as it has no probative value. Dotson v. State, 144 Ga. App. 113, 240 S.E.2d 238 (1977).

Owner of property may not testify as to the owner's opinion of the value of property in a single or gross amount without giving the owner's reasons therefor, or else showing an opportunity for forming a correct opinion. But cost price, if coupled with other evidence, may be admitted as an element upon which an opinion may be formed as to the item's value. Dunbar v. State, 146 Ga. App. 136, 245 S.E.2d 486 (1978).

To prove the value of the property allegedly stolen, the state may offer the testimony of an employee of the corporate owner of the property where the witness clearly establishes that the witness has knowledge, experience, and familiarity with the value of the property or similar property, and thus establishes the witness's reasons for the value, having an opportunity for forming such an opinion. Pippin v. State, 166 Ga. App. 658, 305 S.E.2d 408 (1983).

When the defendant was convicted of stealing Christmas presents from the victims' house, the items stolen could be considered "everyday objects," and the jurors' awareness of the value of such objects was sufficient to allow the jurors to consider evidence of the purchase price of the items and to make reasonable deductions based on the jurors' own knowledge of value, and this evidence supported the felony sentence the trial court imposed under O.C.G.A. § 16-8-12(a)(1). Campbell v. State, 275 Ga. App. 8, 619 S.E.2d 720 (2005).

Evidence was sufficient to support the sentence for felony theft by taking as the state established that the value of the rented property taken, namely a skid steer, an augur attachment, a fork attachment, and the trailer used to haul the equipment was over $500 based on the testimony of the fence company employee as to the value of the equipment being over $500 and the testimony of the person defendants tried to sell the items to, who testified based on experience in dealing with that type of equipment, that the price defendants tried to sell the property at ($1800) was much too low. As a result, that testimony, together with the equipment operator's and the sales manager's testimony, was sufficient to show that the property stolen was worth more than $500. Barron v. State, 291 Ga. App. 494, 662 S.E.2d 285 (2008).

Trial court did not err in concluding that the victim's testimony was sufficient to allow a felony theft charge to go to the jury because the victim testified as to the market value for each of the items stolen from the victim, and the total value exceeded $500; the victim established that the victim had an opportunity to form a correct opinion because the victim based the opinion as to the market value of the stolen tools on the age of the tools and the victim's experience using and purchasing the tools. Sheppard v. State, 300 Ga. App. 631, 686 S.E.2d 295 (2009).

Testimony of a store's loss prevention officer as to the price of the phone that was taken was sufficient to support the defendant's felony conviction. Mendez v. State, 327 Ga. App. 497, 759 S.E.2d 574 (2014).

Although the defendant was properly convicted of theft by taking, the evidence was insufficient to prove that the theft was of a felony amount since the witness testified to an amount totally under $100.

Harris v. State, 328 Ga. App. 852, 763 S.E.2d 133 (2014).

Proof of value of stolen property. — When the defendant failed to dispute the amount of restitution ordered as a condition of probation for theft by taking, that the state failed to prove the amount at trial was of no consequence because the state was only required to prove that the defendant stole in excess of $200.00 (now $500.00) under O.C.G.A. § 16-8-12(a)(1). Johnston v. State, 165 Ga. App. 792, 302 S.E.2d 708 (1983).

Defendant was convicted of felony theft by taking under O.C.G.A. §§ 16-8-2 and 16-8-12(a)(1) for taking more than $500 from potential buyers of ecstasy pills and then fleeing with the money without delivering the promised pills since there was sufficient evidence that defendant took more than $500 despite the defendant's claim that the money was counterfeit after one of the buyers testified that the buyer contributed $1,000 of real money to the total that was given to the defendant. Camero v. State, 257 Ga. App. 109, 570 S.E.2d 405 (2002).

Defendant was properly sentenced as a recidivist, under O.C.G.A. § 17-10-7(c), because it was shown that the defendant pled guilty in Alabama to theft of an automobile, and, under Georgia law, theft of a motor vehicle was a felony, regardless of the value of the vehicle under O.C.G.A. § 16-8-12(a)(5)(A). Johnson v. State, 268 Ga. App. 1, 601 S.E.2d 392 (2004).

In a prosecution for theft by receiving stolen property under O.C.G.A. § 16-8-7(a), there was insufficient evidence to support felony sentencing under O.C.G.A. § 16-8-12(a) because the evidence was only sufficient to authorize a conviction based on a stolen racing jacket, and there was no evidence showing that the value of the racing jacket exceeded $500. Duncan v. State, 278 Ga. App. 703, 629 S.E.2d 577 (2006).

It was error to convict a defendant, a bookstore employee, of felony theft by taking when there was no evidence regarding the quantity of the books and videos taken on the date in question and it therefore could not be determined that the value of the merchandise stolen exceeded $500; as the defendant admitted taking some items and there was evidence that the merchandise had some value, the conviction was to be reduced to a misdemeanor. Gorham v. State, 287 Ga. App. 404, 651 S.E.2d 520 (2007), overruled on other grounds, McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008).

Defendant was properly sentenced for felony theft of aluminum tire rims under O.C.G.A. § 16-8-12(a)(1) because the prosecution established that the value of the rims exceeded $500 since lay testimony of the victim provided that used rims were valued at between $150 and $175 each so that the total value of the eight to nine rims taken exceeded $1,000. Perdue v. State, 300 Ga. App. 588, 685 S.E.2d 489 (2009).

Trial court did not err in imposing a felony sentence pursuant to O.C.G.A. § 16-8-12(a)(1) after the defendant was convicted of theft by taking in violation of O.C.G.A. § 16-8-2 for stealing lumber and other materials from a builder's job site because the evidence was sufficient for the trial court to determine that the fair cash market value of the property at the time and place of the theft exceeded $500 when according to the builder, the cost of the materials was $450, and the cost of the labor to construct the jigs was approximately $200, bringing the total value of the stolen property to $650; the builder clearly established knowledge, experience, and familiarity with the value of the property and, thus, established reasons for the value, having an opportunity for forming such an opinion. Partin v. State, 302 Ga. App. 589, 692 S.E.2d 32 (2010).

Evidence was sufficient to support the defendant's conviction for felony theft by taking in violation of O.C.G.A. § 16-8-12(a)(1) because the jury was authorized to find that the value of the goods the defendant stole from the defendant's girlfriend was more than $500; the girlfriend's testimony as to the age and condition of the stolen items, coupled with the cost price of the items, was admissible as a basis for her opinion that the value of the stolen items was more than $500. Wilson v. State, 304 Ga. App. 743, 698 S.E.2d 6 (2010).

Evidence from a plant employee that golf club heads stolen by an employee cost

Value (Cont'd)

$203 each wholesale and that their value was $203 each was sufficient for the trial court to determine that the value of the items stolen at the time and place of the theft exceeded $500 for purposes of sentencing under O.C.G.A. § 16-8-12(a)(1). Baker v. State, 311 Ga. App. 532, 716 S.E.2d 580 (2011).

State failed to establish that the value of stolen jewelry exceeded $500 as required for felony theft by taking. There was evidence that the rings were part of an entire lot of jewelry — including necklaces, bracelets, rings, and pendants — that the victim had previously purchased from the pawn shop for $10,000. The only evidence related to the specific items taken by the defendant showed that the defendant pawned nine rings for $275. Schneider v. State, 312 Ga. App. 504, 718 S.E.2d 833 (2011).

Evidence from a theft victim as to the value of a stolen cell phone and items of jewelry that the victim or the victim's spouse had purchased was sufficient to establish that the stolen items' value exceeded $ 500 and was sufficient to support a felony sentence. Reese v. State, 313 Ga. App. 746, 722 S.E.2d 441 (2012).

Motor vehicles. — O.C.G.A. § 16-8-12(a)(5)(A) allowed the trial court to sentence the defendant to not less than one nor more than 20 years' imprisonment for theft of a motor vehicle, and the court properly sentenced the defendant to 10 years' imprisonment even though the state did not offer evidence to prove the value of the vehicle the defendant took. Martin v. State, 266 Ga. App. 190, 596 S.E.2d 705 (2004).

Sufficient evidence existed to support the defendant's convictions for theft by deceitful means, in violation of O.C.G.A. § 16-8-3, because the defendant held the defendant out as an attorney and took title and possession of an elderly person's vehicle in payment for the legal services rendered; the state was not obligated to prove the value of the vehicle for purposes of imposition of a felony sentence under O.C.G.A. § 16-8-12(a)(5)(A), as the motor vehicle was valued at more than $100.00. Marks v. State, 280 Ga. 70, 623 S.E.2d 504 (2005).

Evidence of value of the stolen motor vehicle parts as exceeding $100, allowing a sentence for felony theft under O.C.G.A. § 16-8-12(a)(5)(A), was supported by testimony from the owner, who had been in the parts business since 1973, and who identified the engines as vintage 1960s Volkswagen engines that would cost $2500 or more to replace. Brown v. State, 337 Ga. App. 36, 785 S.E.2d 674 (2016).

Video cassette recorders may now be considered "everyday objects" which the jury may determine the value of. Moore v. State, 171 Ga. App. 911, 321 S.E.2d 413 (1984).

Evidence supported jury determination of value. — There was sufficient evidence for the jury to determine that the combined value of the goods in defendant's possession (a VCR and a pistol) was in excess of $500.00. Ford v. State, 183 Ga. App. 566, 359 S.E.2d 435 (1987).

Felony sentence inappropriate when inadequate proof of value. — Felony sentence imposed by the trial court was vacated, and the case was remanded because, although the State of Georgia proved beyond a reasonable doubt that the defendant committed the offense of theft by taking under O.C.G.A. § 16-8-2, the state's evidence was insufficient under O.C.G.A. § 16-8-12 to establish that the current fair market value of the stolen items exceeded $500. Porter v. State, 308 Ga. App. 121, 706 S.E.2d 620 (2011).

Amounts stolen could be aggregated into one count. — Defendant's conviction for felony theft by taking over $500.00 was supported by the evidence as defendant was accused of stealing over $500.00 in the aggregate over a 35-month period; the state could aggregate the amount of money stolen over a period of time into one count in an accusation. Parham v. State, 275 Ga. App. 528, 621 S.E.2d 532 (2005).

RESEARCH REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d, Habitual Criminals and Subsequent Offenders, § 1 et seq.

ALR. — Fixed or controlled price as affecting value of goods for purpose of determining degree of larceny, 157 A.L.R. 1303.

Single or separate larceny predicated upon stealing property from different owners at the same time, 37 A.L.R.3d 1407.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

Consideration of sales tax in determining value of stolen property or amount of theft, 63 A.L.R.5th 417.

16-8-13. Theft of trade secrets.

(a) As used in this Code section, the term:

(1) "Article" means any object, material, device, substance, or copy thereof, including any writing, record, recording, drawing, sample, specimen, prototype, model, photograph, microorganism, blueprint, or map.

(2) "Copy" means any facsimile, replica, photograph, or other reproduction of an article and any note, drawing, or sketch made of or from an article.

(3) "Representing" means describing, depicting, containing, constituting, reflecting, or recording.

(4) "Trade secret" means information, without regard to form, including, but not limited to, technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public and which information:

(A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(b) Any person who, with the intent to deprive or withhold from the owner thereof the exclusive use of a trade secret, or with an intent to appropriate a trade secret to his or her own use or to the use of another, does any of the following:

(1) Takes, uses, or discloses such trade secret to an unauthorized person;

(2) Acquires knowledge of such trade secret by deceitful means or artful practice; or

(3) Without authority, makes or causes to be made a copy of an article representing such trade secret

commits the offense of theft of a trade secret and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years and by a fine of not more than $50,000.00, provided that, if the value of such trade secret, and any article representing such trade secret that is taken, is not more than $100.00 such person shall be punished as for a misdemeanor.

(c) In a prosecution for any violation of this Code section, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

(d) For the purposes of this Code section, a continuing theft by any person constitutes a single claim against that person, but this Code section shall be applied separately to the claim against each person who receives a trade secret from another person who committed the theft.

(e) This Code section shall not affect:

(1) Contractual duties or remedies, whether or not based on theft of a trade secret; or

(2) The provisions of Code Sections 10-1-761 through 10-1-767, pertaining to civil offenses and remedies involving the misappropriation of a trade secret, or other civil or criminal laws that presently apply or in the future may apply to any transaction or course of conduct that violates this Code section. (Ga. L. 1965, p. 647, §§ 1, 2; Ga. L. 1966, p. 425, §§ 1, 2, 5; Code 1933, § 26-1809, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1995, p. 1051, § 1.)

Cross references. — Trade secrets, § 10-1-760 et seq.

Law reviews. — For note, "Trade Secrets and Confidential Information Under Georgia Law," see 19 Ga. L. Rev. 623 (1984). For note, "Legal Remedies for Computer Abuse," see 21 Ga. St. B.J. 100 (1985).

JUDICIAL DECISIONS

Sufficient evidence to support conviction. — There was legally sufficient evidence to support the defendant's conviction for theft of a trade secret under O.C.G.A. § 16-8-13 because the defendant, without authority, copied the master client list for the property management division of the defendant's employer and used the list to transfer or otherwise appropriate the employer's clients to the

defendant's own new business. DuCom v. State, 288 Ga. App. 555, 654 S.E.2d 670 (2007), cert. denied, No. S08C0598, 2008 Ga. LEXIS 383 (Ga. 2008).

Cited in Duracell, Inc. v. SW Consultants, Inc., 126 F.R.D. 571 (N.D. Ga. 1989); Davis v. State, 322 Ga. App. 826, 747 S.E.2d 19 (2013).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Larceny, §§ 59, 67, 68.

Am. Jur. Proof of Facts. — Abandonment of Trade Secret, 41 POF2d 517.

Abandonment of Trade Secret, 100 POF3d 195.

C.J.S. — 52B C.J.S., Larceny, § 28.

ALR. — Individual criminal responsibility of officer or employee for larceny or embezzlement, through corporate act, of property of third person, 33 A.L.R. 787.

Implied obligation of employee not to use trade secrets or confidential information for his own benefit or that of third persons after leaving the employment, 165 A.L.R. 1453.

Nature of property or rights other than tangible chattels which may be subject of conversion, 44 A.L.R.2d 927.

What constitutes "loss from theft" within provisions of Internal Revenue Code concerning deduction of losses arising from theft, 62 A.L.R.2d 572.

Right of employee who has wrongfully appropriated trade secrets, in accounting for profits, to set off losses, 67 A.L.R.2d 825; 11 A.L.R.4th 12.

Implied obligation not to use trade secrets or similar confidential information disclosed during unsuccessful negotiations for sale, license, or the like, 9 A.L.R.3d 665.

Former employee's duty, in absence of express contract, not to solicit former employer's customers or otherwise use his knowledge of customer lists acquired in earlier employment, 28 A.L.R.3d 7.

Criminal liability for misappropriation of trade secret, 84 A.L.R.3d 967.

Disclosure of trade secret as abandonment of secrecy, 92 A.L.R.3d 138.

Proper measure and elements of damages for misappropriation of trade secret, 11 A.L.R.4th 12.

Disclosure or use of computer application software as misappropriation of trade secret, 30 A.L.R.4th 1250.

What is computer "trade secret" under state law, 53 A.L.R.4th 1046.

What is "trade secret" so as to render actionable under state law its use or disclosure by former employee, 59 A.L.R.4th 641.

What constitutes tax-deductible theft loss under 26 USCS § 165, 98 A.L.R. Fed. 229.

16-8-14. Theft by shoplifting.

(a) A person commits the offense of theft by shoplifting when such person alone or in concert with another person, with the intent of appropriating merchandise to his or her own use without paying for the same or to deprive the owner of possession thereof or of the value thereof, in whole or in part, does any of the following:

(1) Conceals or takes possession of the goods or merchandise of any store or retail establishment;

(2) Alters the price tag or other price marking on goods or merchandise of any store or retail establishment;

(3) Transfers the goods or merchandise of any store or retail establishment from one container to another;

(4) Interchanges the label or price tag from one item of merchandise with a label or price tag for another item of merchandise; or

(5) Wrongfully causes the amount paid to be less than the merchant's stated price for the merchandise.

(b)(1) A person convicted of the offense of theft by shoplifting, as provided in subsection (a) of this Code section, when the property which was the subject of the theft is $500.00 or less in value shall be punished as for a misdemeanor; provided, however, that:

(A) Upon conviction of a second offense for shoplifting, where the first offense is either a felony or a misdemeanor, as defined by this Code section, in addition to or in lieu of any imprisonment which might be imposed, the defendant shall be fined not less than $500.00, and the fine shall not be suspended or probated;

(B) Upon conviction of a third offense for shoplifting, when the first two offenses are either felonies or misdemeanors, or a combination of a felony and a misdemeanor, as defined by this Code section, in addition to or in lieu of any fine which might be imposed, the defendant shall be punished by imprisonment for not less than 30 days or confinement in a "special alternative incarceration-probation boot camp," probation detention center, or other community correctional facility of the Department of Corrections for a period of 120 days or shall be sentenced to monitored house arrest for a period of 120 days and, in addition to such types of confinement, may be required to undergo psychological evaluation and treatment to be paid for by the defendant; and such sentence of imprisonment or confinement shall not be suspended, probated, deferred, or withheld; and

(C) Upon conviction of a fourth or subsequent offense for shoplifting, where the prior convictions are either felonies or misdemeanors, or any combination of felonies and misdemeanors, as defined by this Code section, the defendant commits a felony and shall be punished by imprisonment for not less than one nor more than ten years; and the first year of such sentence shall not be suspended, probated, deferred, or withheld.

(2) A person convicted of the offense of theft by shoplifting, as provided in subsection (a) of this Code section, when the property which was the subject of the theft exceeds $500.00 in value commits a felony and shall be punished by imprisonment for not less than one nor more than ten years.

(3) A person convicted of the offense of theft by shoplifting, as provided in subsection (a) of this Code section, when the property which was the subject of the theft is taken from three separate stores or retail establishments within one county during a period of seven days or less and when the aggregate value of the property which was the subject of each theft exceeds $500.00 in value, commits a felony

and shall be punished by imprisonment for not less than one nor more than ten years.

(4) A person convicted of the offense of theft by shoplifting, as provided in subsection (a) of this Code section, when the property which was the subject of the theft is taken during a period of 180 days and when the aggregate value of the property which was the subject of each theft exceeds $500.00 in value, commits a felony and shall be punished by imprisonment for not less than one nor more than ten years.

(c) In all cases involving theft by shoplifting, the term "value" means the actual retail price of the property at the time and place of the offense. The unaltered price tag or other marking on property, or duly identified photographs thereof, shall be prima-facie evidence of value and ownership of the property.

(d) Subsection (b) of this Code section shall in no way affect the authority of a sentencing judge to provide for a sentence to be served on weekends or during the nonworking hours of the defendant as provided in Code Section 17-10-3, relative to punishment for misdemeanors. (Ga. L. 1957, p. 115, §§ 1, 3; Code 1933, § 26-1802.1, enacted by Ga. L. 1978, p. 2257, § 2; Ga. L. 1983, p. 457, § 1; Ga. L. 1997, p. 1394, § 1; Ga. L. 1998, p. 578, § 1; Ga. L. 2000, p. 870, § 1; Ga. L. 2012, p. 899, § 3-3/HB 1176; Ga. L. 2016, p. 443, § 13-1/SB 367; Ga. L. 2017, p. 774, § 16/HB 323.)

The 2016 amendment, effective July 1, 2016, in subparagraph (b)(1)(B), substituted "when the first" for "where the first" near the beginning, deleted ", diversion center," following "detention center" in the middle, and deleted "either" following "in addition to" near the end.

The 2017 amendment, effective May 9, 2017, part of an Act to revise, modernize, and correct the Code, revised punctuation in subparagraph (b)(1)(B).

Cross references. — Unlawful use of emergency exit door, § 16-11-40. Recovery for detention or arrest of person suspected of shoplifting, § 51-7-60. Antishoplifting device, § 51-7-61.

Editor's notes. — Ga. L. 1998, p. 578, § 2, not codified by the General Assembly, provides that the 1998 amendment applies with respect to offenses committed on or after July 1, 1998. Offenses committed prior to July 1, 1998, shall continue to be governed by and punishable as provided in the law as it existed prior to Ga. L. 1998, p. 578.

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on recidivism and convictions based on nolo contendere pleas, see 13 Ga. L. Rev. 723 (1970). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001). For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012). For article, "Eleventh Circuit Survey: January 1, 2013 - December 31, 2013:

Article: Immigration," see 65 Emory L. J. 1039 (2014). For annual survey of immigration law, see 67 Mercer L. Rev. 947 (2016). For article on the 2016 amendment of this Code section, see 33 Ga. St. U.L. Rev. 139 (2016).

For note on 2000 amendment of this Code section, see 17 Ga. St. U.L. Rev. 110 (2000).

JUDICIAL DECISIONS

Constitutionality of Code section. — Ga. L. 1957, p. 115 (see now O.C.G.A. § 16-8-14) clearly spells out what acts constitute shoplifting and is amply definite and certain, and is not unconstitutional for vagueness. Watts v. State, 224 Ga. 596, 163 S.E.2d 695 (1968).

Relationship with federal immigration law. — Conviction under the Georgia statute for shoplifting with intent to appropriate merchandise to one's own use without paying for the merchandise, under O.C.G.A. § 16-8-14, does not constitute a theft offense within the meaning of 8 U.S.C. § 1101(a)(43)(G). The Georgia statute punishes both conduct that qualifies as a theft offense and conduct that does not; therefore, the Georgia statute is divisible. Ramos v. United States AG, 709 F.3d 1066 (11th Cir. 2013).

Removal of merchandise from immediate place of display is not act of shoplifting cognizable under the criminal laws of this state. Martin v. State, 168 Ga. App. 623, 309 S.E.2d 899 (1983).

It is not required that a taking must occur in a specified area of a store or retail establishment. Hayes v. State, 168 Ga. App. 710, 309 S.E.2d 843 (1983).

Element of intent. — Although the defendant possessed goods only within the store, there was evidence that the defendant possessed the goods with the intent of appropriating the goods to defendant's own use without paying for the goods. Mathis v. State, 194 Ga. App. 498, 391 S.E.2d 130 (1990).

Although criminal intent is a material element of shoplifting, a store employee is not required to determine the shopper's subjective intent before seeking an arrest and prosecution under the shoplifting statute. K-Mart Corp. v. Coker, 261 Ga. 745, 410 S.E.2d 425 (1991).

There was probable cause to prosecute a store customer for the offense of shoplifting, where the customer removed a lipstick from its package, abandoned the empty package with the price tag, walked through the store for at least 20 minutes with the lipstick in hand, failed to return the lipstick to a nearby service desk as the customer left, and instead discarded the tube in a handbag on a rack where no employee would be likely to discover the lipstick and return it to its original package. K-Mart Corp. v. Coker, 261 Ga. 745, 410 S.E.2d 425 (1991).

State proved the element of intent to appropriate the merchandise for defendant's own use after the defendant was seen stuffing two packages of meat into the waist of defendant's trousers and pulling the defendant's shirt down over the packages, but returned the meat to the display case after the store security guard and store manager started watching the defendant's actions and following the defendant. Racquemore v. State, 204 Ga. App. 88, 418 S.E.2d 448 (1992).

Although one may commit theft by shoplifting when one takes possession of store merchandise with any of three intents, i.e. (1) to appropriate the property to (one's) own use without paying for the property, (2) to deprive the owner of the possession of the property, or (3) to deprive the owner of the value of the property, these three intents may overlap and are not always mutually exclusive. Gilliam v. State, 237 Ga. App. 476, 517 S.E.2d 348 (1999).

Date sufficiently alleged. — Even assuming that the date was a material averment in the theft by shoplifting count, because the period of time was sufficiently alleged in the indictment by saying that the crimes occurred on or about a date, the indictment sufficiently alleged the period of time. Wallace v. State, 341 Ga. App. 576, 802 S.E.2d 34 (2017).

Value of stolen item is relevant only for distinguishing between misdemeanor

and felony. Drinkard v. State, 155 Ga. App. 638, 271 S.E.2d 889 (1980).

Trial court did not err in not instructing the jury that the value of the items that the defendant shoplifted had to exceed $300 as the value of the items taken was only relevant to distinguish between felony and misdemeanor shoplifting; no such distinction needed to be made in the defendant's case since a store manager testified without contradiction that the retail value of the two watches stolen was between $350 and $390. Reeves v. State, 261 Ga. App. 466, 582 S.E.2d 590 (2003).

Retail value or price is standard to be used in establishing value in theft by taking from retail establishment. Bryan v. State, 148 Ga. App. 428, 251 S.E.2d 338 (1978).

Sufficiency of proof of value. — When the manager of the store from which merchandise was stolen identified photographs of the stolen merchandise at trial and disclosed the actual retail price of each of the items which had been recovered from the appellant, there was sufficient proof of value to avoid a directed verdict of acquittal. Kowalczk v. State, 195 Ga. App. 714, 394 S.E.2d 594 (1990); Moncus v. State, 229 Ga. App. 803, 495 S.E.2d 118 (1998).

When a store security agent testified that the shirts recovered from the defendant still had price tags on the shirts and that the retail prices were $92.00 and $59.50, such evidence was sufficient to prove that the value of the items exceeded $100.00. Parham v. State, 218 Ga. App. 42, 460 S.E.2d 78 (1995).

Trial court properly denied the defendant's motion for a new trial despite the defendant's claim that there was insufficient evidence to prove the identity and value of the items which defendant shoplifted as there was sufficient evidence to prove the identity and value of the items given that: (1) a store manager saw the defendant place items from the manager's store into the trunk of the defendant's car and identified the defendant in a showup identification less than 30 minutes later, after the defendant was stopped for shoplifting at a second store; (2) the manager from the first store identified a number of items that were found in the defendant's trunk as coming from the first store based on the store code markings on the items; and (3) the packages contained pricing labels. Horne v. State, 260 Ga. App. 640, 580 S.E.2d 644 (2003).

Any error in allowing the jury to consider the wholesale value of the phone stolen from the store was harmless because that amount exceeded $300. Gilliland v. State, 325 Ga. App. 854, 755 S.E.2d 249 (2014).

Alteration of price tag. — Charge that defendant altered a price tag was not a variance with proof that defendant cut the uniform product codes (UPCs) off of boxes containing different products, taped the UPC showing a lower price on the box containing the higher priced product, and discarded the remaining UPC. Panek v. State, 226 Ga. App. 14, 485 S.E.2d 580 (1997).

Evidence was sufficient to convict the defendant of theft under O.C.G.A. § 16-8-14(a) after the defendant aided and abetted the defendant's spouse in the commission of the crime by placing items on a shopping cart for the spouse to replace the bar code symbols on the items while the defendant maintained a lookout. Toliver v. State, 257 Ga. App. 769, 572 S.E.2d 97 (2002).

Indictment for required felony punishment. — If the state seeks felony punishment pursuant to O.C.G.A. § 16-8-14, the accused is entitled to an indictment. Parker v. State, 170 Ga. App. 295, 316 S.E.2d 855 (1984), overruled on other grounds, Darty v. State, 188 Ga. App. 447, 373 S.E.2d 389 (1988).

Fourth offender sentence was proper when, even though the three convictions listed in the indictment actually set forth only two previous convictions for purposes of imposing a recidivist sentence, the defendant had notice prior to trial that the state intended to rely upon an additional conviction. There is no requirement to list the previous conviction provided the state's intent to present such evidence is made known to the defendant prior to trial. Darty v. State, 188 Ga. App. 447, 373 S.E.2d 389 (1988), disapproving Parker v. State, 170 Ga. App. 295, 316 S.E.2d 855 (1984).

Consolidation of prior indictments. — Two prior indictments consolidated for

trial and resolved on the same day by guilty pleas are not deemed to constitute only one conviction for purposes of O.C.G.A. § 16-8-4. Robertson v. State, 234 Ga. App. 189, 505 S.E.2d 849 (1998).

When separate items of theft are charged in the indictment, the state is not compelled to prove the theft of every one of such items or to prove an aggregate amount of value for items the subject of a theft. Green v. State, 177 Ga. App. 179, 338 S.E.2d 761 (1985).

Indictment not defective for not stating value of property taken. — In shoplifting case, trial court's denial of defendant's general demurrer and motion to quash on ground that accusation was legally defective for failure to state the value of the items taken was proper since there was evidence that the property was of some value and the specific value is only relevant for distinguishing between misdemeanor and felony. Drinkard v. State, 155 Ga. App. 638, 271 S.E.2d 889 (1980).

Indictment must state prior convictions but prior convictions inadmissible. — Although an indictment charging defendant with theft by shoplifting properly included information about defendant's prior convictions for shoplifting because defendant had to be informed that defendant's prior convictions made the charge a felony, the trial court erred by informing the jury that defendant had prior convictions for shoplifting during the phase of trial where the jury was asked to determine defendant's guilt or innocence, and the error was not harmless. White v. State, 265 Ga. App. 302, 596 S.E.2d 9 (2003).

Variance between allegation and proof. — When the state charged that the defendant altered the price by changing the price, pursuant to O.C.G.A. § 16-8-14(a)(2), but that the evidence showed instead that the defendant interchanged price tags pursuant to O.C.G.A. § 16-8-14(a)(4), the conviction must be set aside for a fatal variance between the allegation and the proof. Nesmith v. State, 183 Ga. App. 529, 359 S.E.2d 421 (1987).

Fatal variance did not exist between the indictment and the evidence based on the indictment stating a cellphone was shoplifted whereas it was actually a tablet because the indictment adequately informed the defendant of the charge, and to the extent the indictment varied from the case, it was immaterial and did not affect the defendant's ability to defend. Leonard v. State, 326 Ga. App. 209, 756 S.E.2d 293 (2014).

Proof of value of stolen property. — Evidence was sufficient to support a felony conviction after witnesses testified to the retail value of items shoplifted by the defendant and the total of those values exceeded the amount necessary to support a felony conviction. Scott v. State, 234 Ga. App. 378, 506 S.E.2d 880 (1998).

Defendant was properly convicted of felony theft by shoplifting because a jury was permitted to consider a security agent's testimony regarding the value of the items stolen since the agent had personal knowledge of the prices of the subject merchandise from a cash register readout. Bell v. State, 262 Ga. App. 788, 586 S.E.2d 455 (2003).

If property of value, conviction can be sustained. — In a prosecution for theft, if there is any evidence that the property stolen was of some value, a conviction can be sustained. Drinkard v. State, 155 Ga. App. 638, 271 S.E.2d 889 (1980).

When the evidence was that the defendant was seen stealing sandals, that the defendant acted "fidgety," that the defendant tried to conceal in the defendant's pants both a shirt and a pair of shorts for which the defendant had no receipt, and that the defendant attempted to leave the store without paying for any of these items, the jury was authorized to conclude that the defendant stole items valued over $100 and that the defendant was guilty beyond a reasonable doubt of the offense of theft by shoplifting. Brown v. State, 236 Ga. App. 478, 512 S.E.2d 369 (1999).

Jury determines value if at issue. — It is only if there is a factual issue as to whether the value is greater than $100.00 that the jury must determine value in order to assist the court in determining the appropriate sentence. Green v. State, 177 Ga. App. 179, 338 S.E.2d 761 (1985).

Jury determination of recidivism. — Since recidivism is an issue only in the sentencing phase of a trial, defendant had

no right to a jury determination of this issue. Gary v. State, 186 Ga. App. 231, 366 S.E.2d 833 (1988).

Effect of prior convictions. — The 1997 statutory amendment to O.C.G.A. § 16-8-14(b)(1)(C) will be applied retroactively and, therefore, prior felony shoplifting convictions occurring either before or after the effective date of the amendment (April 29, 1997) will support an increase in punishment. Lynn v. State, 236 Ga. App. 600, 512 S.E.2d 695 (1999).

Because the state: (1) conceded that the trial court erred by using two felony and three misdemeanor shoplifting convictions; (2) failed to meet the state's burden of proving that the defendant was represented by counsel before pleading guilty to those crimes; and (3) failed to show that the defendant was represented by counsel or waived such a right, on three previous misdemeanor shoplifting convictions, the trial court should not have used the convictions to enhance the defendant's shoplifting conviction into a felony; moreover, the defendant overcame presumption of regularity of the trial court's decision as two of the underlying felonies were the same ones which were ruled inadmissible. Simmons v. State, 278 Ga. App. 372, 629 S.E.2d 86 (2006).

In an action in which the defendant was convicted of shoplifting as a felon in accordance with O.C.G.A. § 16-8-14(b)(1)(C), there was no requirement that the prior convictions upon which the conviction and sentence were based be proved beyond a reasonable doubt, as there was an exception under Apprendi for such prior convictions based upon the general principle that prior convictions were generally already proved beyond a reasonable doubt; further, there was no due process violation under U.S. Const., amend. 14 because the defendant received notice of the state's intent to use the prior convictions for sentencing and the defendant had an opportunity to challenge the convictions pursuant to former O.C.G.A. § 17-10-2(a). Redd v. State, 281 Ga. App. 272, 635 S.E.2d 870 (2006).

Because there was no language within O.C.G.A. § 16-8-14(b)(1)(c), which specifically governed fourth-time shoplifting offenders or that blocked the application of the general recidivist provisions set forth in O.C.G.A. § 17-10-7(c), the trial court's imposition of a recidivist's sentence under § 17-10-7(c), as opposed to the specific provision for shoplifting contained in O.C.G.A. § 16-8-14(b)(1)(C), was upheld. Patrick v. State, 284 Ga. App. 472, 644 S.E.2d 309 (2007).

Trial court properly sentenced the defendant as a recidivist under O.C.G.A. § 17-10-7 following a shoplifting conviction because the record of the plea proceeding in a prior case wherein the defendant pled guilty belied the claim that the defendant was not adequately advised of the right to a jury trial; thus, the trial court did not err in considering, for purposes of sentencing, that prior conviction. Foster v. State, 319 Ga. App. 815, 738 S.E.2d 651 (2013).

In applying the statute for imposition of recidivist sentencing, based on the defendant's four prior felony drug convictions, the trial court had no discretion with regard to the term of the sentence and was required to sentence the defendant to 10 years, which was the maximum sentence for theft by shoplifting. Allen v. State, 325 Ga. App. 752, 754 S.E.2d 795 (2014).

Applicability of prior convictions. — O.C.G.A. § 16-8-14, regarding sentencing for multiple shoplifting offenses, did not apply to defendant as none of defendant's prior felony convictions involved shoplifting. Walker v. State, 268 Ga. App. 669, 602 S.E.2d 351 (2004).

Recidivist sentence improper. — Trial court erred in sentencing the defendant as a recidivist to 10 years imprisonment under O.C.G.A. § 17-10-7 for theft by shoplifting in violation of O.C.G.A. § 16-8-14 because the defendant demonstrated that the trial court did not exercise the court's discretion to consider probating or suspending a portion of the sentence after the defendant served one year pursuant to § 16-8-14(b)(1)(C). Holland v. State, 310 Ga. App. 623, 714 S.E.2d 126 (2011).

Jury instructions on mere presence. — Defendant was not entitled to a jury instruction on mere presence because mere presence was not recognized as a separate and discrete defense to a criminal charge; and the evidence showed that

the defendant was not merely present but was the sole participant in the crime of theft by shoplifting. Allen v. State, 325 Ga. App. 752, 754 S.E.2d 795 (2014).

Shoplifting as lesser included offense of robbery by sudden snatching. — In a prosecution for robbery by sudden snatching, defendant's requested charge on shoplifting was not a complete and accurate statement of the law and, even though due to a typographical error was properly refused by the trial court; nevertheless, circumstances in the case reasonably raised the inference that defendant committed theft by shoplifting and authorized a proper request to charge on that offense. King v. State, 214 Ga. App. 311, 447 S.E.2d 645 (1994).

Criminal attempt not included offense. — Trial court did not err in refusing to instruct on criminal attempt as a lesser included offense of theft by shoplifting where the evidence showed that defendant concealed shirts in defendant's pants while in the store and the only issue for the jury was whether defendant had the requisite intent to shoplift; if the jury had not found such intent, it would have been required to acquit defendant. Parham v. State, 218 Ga. App. 42, 460 S.E.2d 78 (1995).

Jury charge for lesser included offense. — Although the evidence was sufficient to support a verdict of felony theft by shoplifting under O.C.G.A. § 16-8-14(a)(1), there was evidence from which the jury could have found the defendant guilty of misdemeanor theft by shoplifting under O.C.G.A. § 16-8-14(b)(2); therefore, the trial court should have given a jury charge on the lesser-included offense. Kemp v. State, 271 Ga. App. 654, 610 S.E.2d 623 (2005).

Severance of charges. — Severance of charges of theft by shoplifting and giving a false name was not required since the false name charge arose from the circumstances of defendant's arrest for shoplifting. Agony v. State, 226 Ga. App. 330, 486 S.E.2d 625 (1997).

Evidence sufficient to support conviction. See Kelly v. State, 189 Ga. App. 67, 375 S.E.2d 81, cert. denied, 189 Ga. App. 912, 375 S.E.2d 53 (1988); Davis v. State, 192 Ga. App. 47, 383 S.E.2d 615 (1989); Foster v. State, 192 Ga. App. 720, 386 S.E.2d 383 (1989); Allen v. State, 197 Ga. App. 3, 397 S.E.2d 472 (1990); Maddox v. State, 210 Ga. App. 526, 436 S.E.2d 730 (1993); Whitt v. State, 215 Ga. App. 704, 452 S.E.2d 125 (1994); Parham v. State, 218 Ga. App. 42, 460 S.E.2d 78 (1995); Burden v. State, 226 Ga. App. 103, 485 S.E.2d 228 (1997); Agony v. State, 226 Ga. App. 330, 486 S.E.2d 625 (1997); Brown v. State, 228 Ga. App. 281, 491 S.E.2d 488 (1997); Tanner v. State, 230 Ga. App. 77, 495 S.E.2d 315 (1998); Veasey v. State, 244 Ga. App. 102, 534 S.E.2d 129 (2000); Stewart v. State, 243 Ga. App. 860, 534 S.E.2d 544 (2000).

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of two counts of shoplifting. Singleton v. State, 231 Ga. App. 694, 500 S.E.2d 411 (1998).

Defendant was not entitled to a directed verdict on the shoplifting charge against defendant and the evidence supported a conviction on that charge as the evidence showed that the shirt that defendant allegedly took without paying for it was the same shirt that fell out of defendant's purse as defendant ran from the store after being confronted by a police officer working off-duty as a store security guard, that the officer saw defendant take it outside the store without paying for it, that the shirt still had the store tag on it even outside the store, and that defendant fled when the officer approached defendant. Frayall v. State, 259 Ga. App. 286, 576 S.E.2d 654 (2003).

Defendant's conviction of felony theft by shoplifting, O.C.G.A. § 16-8-14(a)(1) and (b)(2), was supported by sufficient evidence, as eyewitness testimony, a videotape showing defendant in the act of stealing cigarettes with a value of over $650, and defendant's attempt to flee from police when confronted were sufficient to support the conviction. Thomas v. State, 260 Ga. App. 718, 580 S.E.2d 665 (2003).

Store employee's testimony that the employee saw defendant walk out of the store with merchandise without paying for it, along with similar transaction evidence that defendant had engaged in two previous shoplifting incidents, was sufficient to show that defendant was guilty beyond a

reasonable doubt of committing the crime of shoplifting. Bradford v. State, 261 Ga. App. 621, 583 S.E.2d 484 (2003).

Evidence that defendant stole 10 digital versatile discs (DVDs) from a video store was sufficient to sustain defendant's conviction for theft by shoplifting as two eyewitnesses identified defendant as the perpetrator. Sneed v. State, 267 Ga. App. 640, 600 S.E.2d 720 (2004).

Testimony of a store's loss prevention employee as to the ownership and value of coats stolen by the defendant, and testimony by the employee that the employee saw the defendant take the coats, place the coats in a bag, and flee from the store was sufficient to support a theft by shoplifting conviction. Lanier v. State, 269 Ga. App. 284, 603 S.E.2d 772 (2004).

Because a co-manager of a grocery store saw the defendant, who was pushing a shopping cart, take a package of ham hocks and some tomatoes and place those items in the defendant's purse, and when the defendant approached the checkout counter, the co-manager confronted the defendant and the defendant retreated into the store and discarded the two items on a display, the evidence was sufficient to support a shoplifting conviction; the question of whether the defendant's placement of the goods in the purse showed an intent to commit theft by shoplifting was one for the jury and the conviction was affirmed. Taylor v. State, 270 Ga. App. 637, 607 S.E.2d 163 (2004), overruled on other grounds, Miller v. State, 285 Ga. 285, 676 S.E.2d 173 (2009).

Evidence was sufficient to support the defendant's conviction for shoplifting under O.C.G.A. § 16-8-14, and the state was not required under former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6) to present evidence excluding every other reasonable hypothesis except the defendant's guilt since the state's case was based, not on circumstantial evidence, but on the direct testimony of an eyewitness to the shoplifting. Fitzpatrick v. State, 271 Ga. App. 804, 611 S.E.2d 95 (2005).

There was sufficient evidence to support the jury's verdict finding the defendant guilty of aiding and abetting in felony shoplifting, in violation of O.C.G.A. §§ 16-2-20(b)(3) and 16-8-14(a)(1), because employees in a store were alerted to a shoplifting in progress, and the employees followed the alleged shoplifter out to a car, which the defendant got into and drove away; the defendant was positively identified by an employee who was on the driver's side of the car, the owner of that car had loaned the car to the defendant and the defendant never returned the car, and the defendant simply contended that the car had been stolen and that the defendant did not report the theft because the defendant intended to get the car back. Patterson v. State, 272 Ga. App. 675, 613 S.E.2d 200 (2005).

As the evidence showed that the defendant was in the lobby of a store when the alarm was triggered, that the defendant ran, that the defendant was apprehended, that a bag from the store was recovered, and that the bag contained a number of items from the store but no receipt, this was sufficient to authorize the defendant's conviction for shoplifting. Smith v. State, 275 Ga. App. 60, 619 S.E.2d 694 (2005).

Evidence supported the defendant's conviction for shoplifting because the defendant was observed concealing boxes of cold medication in a jacket. Rochefort v. State, 279 Ga. 738, 620 S.E.2d 803 (2005).

Defendant's act of concealing liquor bottles in the defendant's pants, with no intent to pay for the bottles, despite the fact that the defendant put the bottles back on the shelf before leaving the store, was sufficient to support a conviction. Simmons v. State, 278 Ga. App. 372, 629 S.E.2d 86 (2006).

Evidence was sufficient to support the defendant's convictions on three counts of shoplifting after eyewitness testimony that the defendant had concealed cologne bottles under the defendant's shirt at a drugstore and had walked out of a grocery store carrying items that had not been paid for supported two of the counts; also, testimony that video games had been taken from a video store without being purchased, and that the defendant had the games on the defendant's person about 20 minutes after leaving the video store and at the time of the defendant's apprehension for shoplifting at the drug store was sufficient circumstantial evidence to exclude every reasonable hypoth-

esis of the defendant's innocence under former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6). Crosby v. State, 287 Ga. App. 109, 650 S.E.2d 775 (2007).

Direct evidence from a loss prevention employee that the employee observed the defendant remove an item from a store shelf, place the item in the defendant's pocket, and then leave a store without presenting the item to a cashier provided sufficient evidence to support the defendant's shoplifting conviction beyond a reasonable doubt. Walton v. State, 291 Ga. App. 736, 662 S.E.2d 820 (2008).

Defendant's shoplifting conviction under O.C.G.A. § 16-8-14(a)(1) was supported by evidence that the defendant and the defendant's accomplice took a cart with merchandise into a restricted area, lied about their purpose of being in the area, surveyed various emergency exits from the store, abandoned the merchandise when an emergency exit jammed, and lacked any means for paying for the merchandise. Alford v. State, 292 Ga. App. 514, 664 S.E.2d 870 (2008).

Evidence supported the defendant's conviction for felony theft by shoplifting. A supervisor in a store stopped the defendant as the defendant tried to push a cart full of goods through a door reserved for incoming customers; the defendant could not produce a receipt; and the supervisor brought the cart to the service desk, after which the defendant left the store and was arrested. Robinson v. State, 293 Ga. App. 238, 666 S.E.2d 615 (2008).

Sufficient evidence existed to find the defendant guilty of shoplifting in violation of O.C.G.A. § 16-8-14 because the defendant knowingly agreed to act, and did act, as a getaway driver to facilitate the defendant's child's commission of theft by shoplifting; specifically, when the defendant and the child entered a store, the defendant stopped directly in front of the store owner and asked the owner questions in an attempt to distract the owner while the child hid products on the child's person. Wester v. State, 294 Ga. App. 263, 668 S.E.2d 862 (2008).

Because the defendant paid for some items in the defendant's shopping bags but not others, and put fake barcode labels on some items so that the items would ring up for less than the items actually were priced, the evidence that the value of the unpaid items totaled over $300 was sufficient to find the defendant guilty of theft by shoplifting, a violation of O.C.G.A. § 16-8-14. Raszeja v. State, 298 Ga. App. 713, 680 S.E.2d 690 (2009).

Evidence was sufficient to support the defendant's conviction for theft by shoplifting because the undisputed direct evidence was that the defendant selected five pieces of children's clothing while shopping in a store, defendant was observed as defendant secreted two such items inside the front of defendant's pants, and on being confronted by a store employee as the defendant left the store, the defendant ran, discarding the clothing the defendant had hidden in the defendant's pants in the store's parking lot. Jackson v. State, 303 Ga. App. 149, 692 S.E.2d 758 (2010).

Evidence was sufficient to prove beyond a reasonable doubt that a juvenile committed theft by shoplifting in violation of O.C.G.A. § 16-8-14(a)(1) because: (1) a security guard at a department store was watching customers via the store's closed circuit television system when the guard saw the juvenile select a hat from the merchandise and put the hat down the juvenile's pants; (2) within less than a minute, the guard arrived on the sales floor and watched the juvenile leave the store; (3) the guard followed the juvenile out the door and apprehended the juvenile: and (4) although the juvenile did not have the hat on the juvenile's person, the juvenile told the guard that the juvenile had taken the hat out of the juvenile's pants and put the hat back. In the Interest of J. C., 308 Ga. App. 336, 708 S.E.2d 1 (2011).

Trial court did not err in denying the codefendant's motion for directed verdict as to the codefendant's conviction for felony theft by shoplifting because in addition to an accomplice's testimony, and the testimony from a store employee that the retrieved items were valued at more than $400, the codefendant's furtive behavior observed by a deputy in the store and the act of tossing clothing from the passenger window of a car were all evidence from which a jury could reasonably infer the codefendant's guilt. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Trial court did not err in denying the codefendant's motion for directed verdict as to the codefendant's conviction for misdemeanor theft by shoplifting because no corroboration of accomplice testimony was necessary to support a misdemeanor conviction. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Evidence that the defendant made a false statement that the merchandise had been paid for and attempted to obtain a refund or merchandise voucher was sufficient to support the defendant's conviction for theft by shoplifting; the jury was authorized to disbelieve testimony that the defendant was unaware that the gift card reflected a value greater than that of the rackets actually purchased. Grady v. State, 319 Ga. App. 894, 743 S.E.2d 22 (2013).

Evidence was sufficient to defeat the defendant's motion for a directed verdict on the felony shoplifting charge as the state introduced circumstantial evidence that the defendant took possession of the phone by removing it from the display and placed it in defendant's pocket before leaving the store and the phone was missing from the store until it was apparently left there by another person around the time the defendant was scheduled to meet with police. Gilliland v. State, 325 Ga. App. 854, 755 S.E.2d 249 (2014).

Evidence was sufficient to sustain the defendant's conviction for theft by shoplifting because a person was observed on the store video monitoring system putting several items in a bag; the person then walked out of the store without paying for the items; when told to stop the person, identified as the defendant, fled toward a wood line; and, when apprehended, the defendant was in possession of a store bag containing several items from the store with price tags attached and no receipt. Allen v. State, 325 Ga. App. 752, 754 S.E.2d 795 (2014).

Sufficient evidence supported the defendant's convictions for aggravated assault with a knife and theft by shoplifting based on the testimony of the loss prevention officer, who witnessed the defendant take the watch, and the testimony of both the loss prevention officer and the store manager, who indicated that the defendant had a knife. Broom v. State, 331 Ga. App. 564, 769 S.E.2d 400 (2015), cert. denied, No. S15C1173, 2015 Ga. LEXIS 520 (Ga. 2015).

Evidence that the defendant was seen hiding items in a mulch bag and only paying for the mulch, the defendant admitted to an asset protection specialist that the defendant did not pay for the items, and the total price of the goods found was $436.80, was sufficient to support the defendant's conviction for felony theft by shoplifting. Lockridge v. State, 335 Ga. App. 611, 782 S.E.2d 674 (2016).

Determination of fourth-offense felony. — O.C.G.A. § 16-8-14 does not preclude consideration of a foreign shoplifting conviction — whether misdemeanor or felony — when determining whether a current Georgia shoplifting charge is a fourth-offense felony. State v. Sterling, 244 Ga. App. 328, 535 S.E.2d 329 (2000).

Trial court erred in failing to exercise the sentencing discretion provided under O.C.G.A. § 16-8-14 for the shoplifting conviction because it erroneously concluded it was required to impose the maximum sentence of 10 years with no eligibility for parole because nothing in the specific sentencing scheme in O.C.G.A. § 16-8-14(b)(1)(C) permitted application of conflicting provisions in the general recidivist sentencing scheme in O.C.G.A. § 17-10-7(a), instead the specific scheme controlled. Williams v. State, 261 Ga. App. 176, 582 S.E.2d 141 (2003).

No bad faith in discovery. — Theft by shoplifting conviction was upheld on appeal, despite the defendant's claim that the state violated the reciprocal discovery requirements of the Georgia Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., as the defendant conceded at trial that the state did not act in bad faith, and failed to request a continuance, but instead, communicated a readiness for trial to both the court and the prosecutor. Brown v. State, 281 Ga. App. 557, 636 S.E.2d 717 (2006).

Evidence insufficient to support conviction. — Evidence was insufficient to support the defendant juvenile's adjudication of delinquency for shoplifting because the defendant did not take any overt action that could have evinced an intent to

appropriate the item, such as concealing the item, attempting to conceal the item, carrying the item around the store, representing that the defendant had already paid for the item, or attempting to leave the store with the item. In the Interest of E. B., 343 Ga. App. 823, 806 S.E.2d 272 (2017).

Sentence not excessive. — Ten-year sentence for a fourth conviction of shoplifting was not excessive. Gary v. State, 234 Ga. App. 506, 507 S.E.2d 242 (1998).

Specific recidivist sentence. — Defendant was wrongfully sentenced as a recidivist under the state's general recidivist statute, O.C.G.A. § 17-10-7(c), rather than the specific recidivist statute applicable to shoplifting offenses, O.C.G.A. § 16-8-14(b)(1)(C), because the record showed that the defendant had three prior felony shoplifting convictions and one prior misdemeanor shoplifting conviction at the time of trial, but there was no evidence of felony convictions for other crimes. Wester v. State, 294 Ga. App. 263, 668 S.E.2d 862 (2008).

Conviction upheld on appeal. — Defendant's shoplifting convictions were upheld on appeal because the defendant waived review of a claim that evidence of a prior shoplifting transaction was insufficiently similar to the offenses charged by failing to raise the same claim at trial, and an objection to the evidence during a Ga. Unif. Super. Ct. R. 31.3(B) hearing was insufficient to adequately preserve the exact claim for appellate review. Cornell v. State, 289 Ga. App. 52, 656 S.E.2d 191 (2007).

Cited in Secrist v. State, 145 Ga. App. 391, 243 S.E.2d 599 (1978); Burnett v. State, 152 Ga. App. 738, 264 S.E.2d 33 (1979); Grizzle v. State, 155 Ga. App. 91, 270 S.E.2d 311 (1980); Stillwell v. State, 161 Ga. App. 230, 288 S.E.2d 295 (1982); Sustakovitch v. State, 249 Ga. 273, 290 S.E.2d 77 (1982); Lane v. State, 170 Ga. App. 42, 316 S.E.2d 31 (1984); Jenkins v. State, 172 Ga. App. 715, 324 S.E.2d 491 (1984); City of Marietta v. Kelly, 175 Ga. App. 416, 334 S.E.2d 6 (1985); Stargell v. State, 183 Ga. App. 434, 359 S.E.2d 205 (1987); Warsham v. State, 200 Ga. App. 322, 408 S.E.2d 122 (1991); Winn-Dixie Stores, Inc. v. Nichols, 205 Ga. App. 308, 422 S.E.2d 209 (1992); Brown v. Super Disc. Mkts., Inc., 223 Ga. App. 174, 477 S.E.2d 839 (1996); Fuller v. State, 230 Ga. App. 219, 496 S.E.2d 303 (1998); Williams v. State, 244 Ga. App. 26, 535 S.E.2d 8 (2000); Wright v. State, 255 Ga. App. 119, 564 S.E.2d 522 (2002); In the Interest of Q.J.A., 255 Ga. App. 160, 564 S.E.2d 770 (2002); Hirjee v. State, 263 Ga. App. 185, 587 S.E.2d 144 (2003); Burch v. State, 289 Ga. App. 388, 657 S.E.2d 294 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprintable offense. — O.C.G.A. § 36-32-9, which addresses the jurisdiction of cases in which a person is charged with a first or second offense of theft by shoplifting when the property taken was valued at $100.00 or less, does not require any modification in the designation of theft by shoplifting as an offense for which persons charged with a violation are to be fingerprinted. 1987 Op. Att'y Gen. No. 87-21.

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Larceny, §§ 63, 123, 124.

C.J.S. — 52B C.J.S., Larceny, §§ 16, 17.

ALR. — What constitutes "loss from theft" within provisions of Internal Revenue Code concerning deduction of losses arising from theft, 62 A.L.R.2d 572.

Changing of price tags by patron in self-service store as criminal offense, 60 A.L.R.3d 1293.

Modern status: instruction allowing presumption or inference of guilt from possession of recently stolen property as violation of defendant's privilege against self-incrimination, 88 A.L.R.3d 1178.

Validity, construction, and effect of statutes establishing shoplifting or its equiv-

alent as separate criminal offense, 64 A.L.R.4th 1088.

What constitutes tax-deductible theft loss under 26 USCS § 165, 98 A.L.R. Fed. 229.

16-8-14.1. Refund fraud.

(a)(1) It shall be unlawful for a person to give a false or fictitious name or address or to give the name or address of another person without that person's approval or permission for the purpose of obtaining a refund from a store or retail establishment for merchandise.

(2) It shall be unlawful for a person to obtain a refund in the form of cash, check, credit on a credit or debit card, a merchant gift card, or credit in any other form from a store or retail establishment using a driver's license not issued to such person, a driver's license containing false information, an identification card containing false information, an altered identification card, or an identification card not issued to such person.

(b) A person who violates subsection (a) of this Code section shall be guilty of refund fraud and, upon conviction, except as provided in subsection (c) of this Code section, shall:

(1) When the property which was the subject of the fraud is $500.00 or less in value, be punished as for a misdemeanor;

(2) When the property which was the subject of the fraud exceeds $500.00 in value, be guilty of a felony and shall be punished by imprisonment for not less than one nor more than ten years;

(3) When the property which was the subject of the fraud is taken from three separate stores or retail establishments within one county during a period of seven days or less and when the aggregate value of the property which was the subject of each fraud exceeds $500.00 in value, be guilty of a felony and shall be punished by imprisonment for not less than one nor more than ten years; and

(4) When the property which was the subject of the fraud is taken during a period of 180 days and when the aggregate value of the property which was the subject of each fraud exceeds $500.00 in value, be guilty of a felony and shall be punished by imprisonment for not less than one nor more than ten years.

(c)(1) Upon conviction of a second offense for a violation of any provision of this Code section, in addition to or in lieu of any imprisonment which might be imposed, the defendant shall be fined not less than $500.00, and the fine shall not be suspended or probated.

(2) Upon conviction of a third offense for a violation of any provision of this Code section, the defendant shall be guilty of a felony

and, in addition to or in lieu of any fine which might be imposed, the defendant shall be punished by imprisonment for not less than 30 days or confinement in a "special alternative incarceration-probation boot camp," probation detention center, or other community correctional facility of the Department of Corrections for a period of 120 days or shall be sentenced to monitored house arrest for a period of 120 days and, in addition to such types of confinement, may be required to undergo psychological evaluation and treatment to be paid for by the defendant; and such sentence of imprisonment or confinement shall not be suspended, probated, deferred, or withheld.

(3) Upon conviction of a fourth or subsequent offense for a violation of any provision of this Code section, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than ten years; and the first year of such sentence shall not be suspended, probated, deferred, or withheld.

(d) In all cases involving refund fraud, the term "value" means the actual retail price of the property at the time and place of the offense. The unaltered price tag or other marking on property, or duly identified photographs thereof, shall be prima-facie evidence of value and ownership of the property.

(e) Subsection (b) of this Code section shall not affect the authority of a judge to provide for a sentence to be served on weekends or during the nonworking hours of the defendant as provided in Code Section 17-10-3, relative to punishment for misdemeanors. (Code 1981, § 16-8-14.1, enacted by Ga. L. 2014, p. 404, § 1-1/SB 382; Ga. L. 2015, p. 5, § 16/HB 90; Ga. L. 2016, p. 443, § 13-2/SB 367; Ga. L. 2017, p. 774, § 16/HB 323.)

The 2016 amendment, effective July 1, 2016, in paragraph (c)(2), deleted ", diversion center," following "detention center" in the middle, and deleted "either" following "in addition to" near the end.

The 2017 amendment, effective May 9, 2017, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraph (c)(2).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2014, the semicolon at the end of paragraph (c)(3) was changed to a period.

Editor's notes. — Ga. L. 2014, p. 404, § 3-1/SB 382, not codified by the General Assembly, provides, in part, that this Code section shall apply to all conduct occurring on or after July 1, 2014.

Law reviews. — For annual survey of criminal law, see 67 Mercer L. Rev. 31 (2015). For article on the 2016 amendment of this Code section, see 33 Ga. St. U.L. Rev. 139 (2016).

OPINIONS OF THE ATTORNEY GENERAL

Updating of crimes and offenses for which Georgia Crime Information Center is authorized to collect and file fingerprints. — Pursuant to authority granted to the Attorney General in O.C.G.A. § 35-3-33(a)(1)(A)(v), any misdemeanor offenses arising under O.C.G.A. §§ 16-8-14.1(a), 16-8-22, 16-11-90(b),

16-11-130.2, and 33-24-53, are designated as ones for which those charged are to be fingerprinted. 2014 Op. Att'y Gen. No. 2014-2.

16-8-15. Conversion of payments for real property improvements.

(a) Any architect, landscape architect, engineer, contractor, subcontractor, or other person who with intent to defraud shall use the proceeds of any payment made to him on account of improving certain real property for any other purpose than to pay for labor or service performed on or materials furnished by his order for this specific improvement while any amount for which he may be or become liable for such labor, services, or materials remains unpaid commits a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than five years or upon the recommendation of the jury or in the discretion of the trial judge, punished for a misdemeanor, provided that, in addition to the above sanctions, where a corporation's agent acts within the scope of his office or employment and on behalf of the corporation and with intent to defraud uses such proceeds for purposes other than for property improvements or where a corporation's board of directors or managerial official, the latter acting within the scope of his employment and on behalf of the corporation recklessly tolerates or, with intent to defraud, authorizes, requests, or commands the use of such proceeds for purposes other than for property improvements, the corporation commits a felony and, upon conviction thereof, shall be punished by a fine of not less than $1,000.00 nor more than $5,000.00.

(b) A failure to pay for material or labor furnished for such property improvements shall be prima-facie evidence of intent to defraud. (Ga. L. 1941, p. 480, § 1; Code 1933, § 26-1808.1, enacted by Ga. L. 1976, p. 1456, § 1; Ga. L. 1982, p. 3, § 16.)

Law reviews. — For article surveying developments in Georgia constitutional law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 51 (1981). For annual survey of construction law, see 57 Mercer L. Rev. 79 (2005).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former Code 1933, § 26-2812 are included in the annotations for this Code section.

Constitutionality of presumption. — Whether presumption of O.C.G.A. § 16-8-15 that failure to pay for material or labor is prima facie evidence of intent to defraud is constitutionally invalid depends upon whether jury in particular case, after instructions, interpreted presumption as burden-shifting or conclusive rather than permissive only. State v. Hudson, 247 Ga. 36, 273 S.E.2d 616 (1981).

Purpose of former Code 1933, § 26-2812 was to make penal the conversion of funds delivered for the purpose of applying to labor and material cost with a provision that there would be a conversion when such funds were otherwise used while there remained any unpaid labor or

material cost. (decided under former Code 1933, § 26-2812). Davis v. State, 122 Ga. App. 311, 176 S.E.2d 660 (1970).

Former Code 1933, § 26-2812 created a form of larceny after trust. Davis v. State, 122 Ga. App. 311, 176 S.E.2d 660 (1970) (decided under former Code 1933, § 26-2812).

General principles with regard to larceny after trust are regarded as applicable and pertinent to and controlling in cases involving former Code 1933, § 26-2812. Davis v. State, 122 Ga. App. 311, 176 S.E.2d 660 (1970) (decided under former Code 1933, § 26-2812).

O.C.G.A. § 16-8-15 refers to lawfully obtained funds or property. — O.C.G.A. § 16-8-15 refers to theft by conversion of payments for property improvements, which refers to lawfully obtaining funds or other property of another rather than falsely obtaining same. Hancock v. State, 158 Ga. App. 829, 282 S.E.2d 401 (1981).

Any trust responsibility arising from O.C.G.A. § 16-8-15 at time and by virtue of misconduct. Murphy & Robinson Inv. Co. v. Cross, 666 F.2d 873 (5th Cir. 1982).

Constructive trust not imposed. — Georgia law does not impose a constructive trust in favor of a subcontractor on funds paid by an owner to a contractor when the subcontractor has not filed a lien, but when the owner has paid the contractor in full during the time the subcontractor could have filed a lien. Wachovia Bank v. American Bldg. Consultants, Inc., 138 Bankr. 1015 (Bankr. N.D. Ga. 1992).

O.C.G.A. § 16-8-15 is a criminal statute and considered alone, it is insufficient to create a constructive trust. Pettigrew v. Southern Aluminum Finishing Co. (In re Amarlite Architectural Prods., Inc.), 178 Bankr. 904 (Bankr. N.D. Ga. 1995).

O.C.G.A. § 16-8-15 does not alone provide authority for the creation of a constructive trust and it could not provide the basis for a civil action by a subcontractor against a contractor for conversion of funds. Doyle Dickerson Co. v. Durden, 218 Ga. App. 426, 461 S.E.2d 902 (1995).

Civil liability for damages. — Plaintiff failed to plead a claim to recover damages for conversion under O.C.G.A. § 51-10-6 based on a violation of two criminal statutes — theft by conversion of payments for property improvements and theft by taking — as the plaintiff did not allege any of the necessary elements to establish the violations and did not allege that the defendant was charged with or found guilty of a violation of those statutes. Vanbenschoten v. Turner (In re Turner), No. 16-04004-EJC, 2017 Bankr. LEXIS 918 (Bankr. S.D. Ga. Mar. 31, 2017).

Although O.C.G.A. § 51-10-6 expressly provided for a civil recovery for thefts, under Georgia case law, that statute could not be used to establish a civil remedy for the specific crime of theft by conversion. Nor had O.C.G.A. § 51-1-6 been used to create a civil remedy for violations of the theft by conversion statute. Thomas Concrete of Ga., Inc. v. Osbourne (In re Osbourne), No. 10-06621, 2017 Bankr. LEXIS 2414 (Bankr. N.D. Ga. Aug. 24, 2017).

Must have claim against alleged converted funds. — Appellate court erred, in part, by denying a bank's motion for summary judgment as to a counterclaim for conversion against a general contractor because the appellate court did not consider whether the general contractor had any right to assert a counterclaim against the bank for conversion of funds due to the subcontractors. Vinings Bank v. Brasfield & Gorrie, LLC, 297 Ga. 468, 774 S.E.2d 701 (2015).

Prosecution did not violate bankruptcy discharge injunction. — Continuation of criminal prosecution was not solely to collect a debt in violation of a discharge order in a Chapter 7 debtor's case as the debtor provided no evidence to support a finding that the prosecution was brought in bad faith, and the alleged crime, theft by conversion in violation of Georgia law, was more than a failure to pay a debt. Further, it was the state that decided to continue the prosecution by conducting the state's own investigation, obtaining a warrant, and submitting evidence to the grand jury. Buckley v. Patel (In re Buckley), No. 14-5330, 2015 Bankr. LEXIS 660 (Bankr. N.D. Ga. Feb. 13, 2015).

Nondischargeability for willful conversion of payments on real property not established. — Consent judgment entered against the debtor with respect to funds for a construction project did not establish nondischargeability for willful conversion of payments for real property improvements because the consent judgment did not establish a constructive trust in favor of the creditor for the debtor's willful conversion under state laws as there was no evidence the debtor was guilty of a violation of a criminal statute and there was no civil action to remedy the harm from the particular criminal law violation. Pioneer Constr., Inc. v. May (In re May), 518 B.R. 99 (Bankr. S.D. Ga. 2014).

Entrustment not established. — Defendant's conviction was reversed where the evidence did not establish that defendant was entrusted with funds for the specific purpose (house construction) set forth in the indictment so as to enable a rational trier of fact to find defendant guilty beyond a reasonable doubt. Teston v. State, 194 Ga. App. 324, 390 S.E.2d 437 (1990).

Specific intent. — O.C.G.A. § 16-8-15 requires not only the general intent required in all criminal statutes, but also a specific intent to defraud. Thompson v. State, 233 Ga. App. 792, 505 S.E.2d 535 (1998).

Defendant's refusal to pay for material furnished for property improvements due to defendant's belief that contractor owed defendant money did not establish a specific intent to defraud; defendant could therefore not be convicted under O.C.G.A. § 16-8-15. Thompson v. State, 233 Ga. App. 792, 505 S.E.2d 535 (1998).

Venue. — In theft by conversion cases, where allegedly converted property is money, two options are available to state regarding venue: first, state can proceed in county where accused received the money; second, state can produce evidence tracing funds disbursed in one county (where case is being prosecuted) back to account or other source in origin county, showing further that the funds were not disbursed in accordance with contract provisions governing use of funds. Stowe v. State, 163 Ga. App. 535, 295 S.E.2d 209 (1982).

In prosecution for theft by conversion of a portion of an account, funds properly spent were not "subject of the theft," but only those funds alleged to have been spent unlawfully; thus, for venue purposes, burden was upon state to produce evidence that appellant exercised control over allegedly converted funds in county where case was prosecuted. Stowe v. State, 163 Ga. App. 535, 295 S.E.2d 209 (1982).

Venue in the county in which defendant building contractor's agent received a check from the defendant's customer was sufficiently established by defendant's admission that defendant received payments from no customer and had designated the agent as the person to receive the check. Queen v. State, 210 Ga. App. 588, 436 S.E.2d 714 (1993).

Theft by taking conviction in lieu of conversion of construction payments. — Trial court did not err in not applying the principle of lenity to find defendant guilty of charges of conversion of payments for real property improvements, which carried a lighter sentence than the conviction defendant received on charges of theft by taking, since the facts did not support a conviction for conversion of payments for real property improvements since the state did not present any evidence on the required element that any bill for labor or materials remained unpaid. McMahon v. State, 258 Ga. App. 512, 574 S.E.2d 548 (2002).

Cited in Lingold v. State, 162 Ga. App. 486, 292 S.E.2d 193 (1982); Farmer v. Dillard, 171 Ga. App. 321, 319 S.E.2d 515 (1984); Hudson v. State, 198 Ga. App. 360, 401 S.E.2d 571 (1991); Chen v. Tai, 232 Ga. App. 595, 502 S.E.2d 531 (1998); Davis v. State, 322 Ga. App. 826, 747 S.E.2d 19 (2013).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Embezzlement, §§ 4, 11, 28.

C.J.S. — 29A C.J.S., Embezzlement, §§ 26, 32, 33. C.J.S., False Pretenses, § 33.

ALR. — Distinction between larceny and embezzlement, 146 A.L.R. 532.

Nature of property or rights other than tangible chattels which may be subject of conversion, 44 A.L.R.2d 927.

What constitutes "loss from theft" within provisions of Internal Revenue Code concerning deduction of losses arising from theft, 62 A.L.R.2d 572.

Validity and construction of statute providing criminal penalties for failure of contractor who has received payment from owner to pay laborers or materialmen, 78 A.L.R.3d 563.

Embezzlement, larceny, false pretenses, or allied criminal fraud by a partner, 82 A.L.R.3d 822.

What constitutes tax-deductible theft loss under 26 USCS § 165, 98 A.L.R. Fed. 229.

16-8-16. Theft by extortion.

(a) A person commits the offense of theft by extortion when he unlawfully obtains property of or from another person by threatening to:

(1) Inflict bodily injury on anyone or commit any other criminal offense;

(2) Accuse anyone of a criminal offense;

(3) Disseminate any information tending to subject any person to hatred, contempt, or ridicule or to impair his credit or business repute;

(4) Take or withhold action as a public official or cause an official to take or withhold action;

(5) Bring about or continue a strike, boycott, or other collective unofficial action if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or

(6) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense.

(b) In a prosecution under this Code section, the crime shall be considered as having been committed in the county in which the threat was made or received or in the county in which the property was unlawfully obtained.

(c) It is an affirmative defense to prosecution based on paragraph (2), (3), (4), or (6) of subsection (a) of this Code section that the property obtained by threat of accusation, exposure, legal action, or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstance to which such

accusation, exposure, legal action, or other official action relates or as compensation for property or lawful services.

(d) A person convicted of the offense of theft by extortion shall be punished by imprisonment for not less than one nor more than ten years. (Code 1933, § 26-1804, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1992, p. 6, § 16.)

Cross references. — Venue generally, Ga. Const. 1983, Art. VI, Sec. II, Para. VI and § 17-2-2.

JUDICIAL DECISIONS

Tort action in favor of victim not created. — Although O.C.G.A. § 16-8-16 establishes the public policy of the state, nothing within its provisions purports to create a private cause of action in tort in favor of an alleged victim. Rolleston v. Huie, 198 Ga. App. 49, 400 S.E.2d 349 (1990), cert. denied, 198 Ga. App. 898, 400 S.E.2d 349 (1991).

Demurrer properly granted. — Trial court properly granted the defendants' general demurrer as to the conspiracy to commit extortion count because the alleged extortion was based on a mere threat to file a lawsuit and there was no allegation that the threatened litigation was somehow unlawful; thus, the defendants could have admitted to all of the allegations and still have been innocent of that crime. State v. Cohen, 302 Ga. 616, 807 S.E.2d 861 (2017).

Lesser included offense. — Theft by extortion is not a lesser included offense of armed robbery, as a matter of law; however, it may merge with armed robbery as a matter of fact. Lewis v. State, 261 Ga. App. 273, 582 S.E.2d 222 (2003).

Evidence sufficient for conviction. — Evidence was sufficient for a rational jury to convict the defendant of theft by extortion because evidence was presented that the defendant and the defendant's accomplices took speakers from the victim's van after the defendant threatened that the victim's friend would never see the victim again unless the friend left the van and the van's keys at a gas station. Taylor v. State, 302 Ga. App. 54, 690 S.E.2d 641 (2010).

Extortion not shown. — Debtor's claim that extortion, as defined in O.C.G.A. § 16-8-16, had been committed by a bank and the bank's director and was therefore a predicate act for purposes of the debtor's civil racketeering claims was without merit since the debtor admitted that the bank's foreclosure on some of the debtor's property was prompted by the debtor's failure to repay loans taken out for that property and, as such, the foreclosure was lawful. Tucker v. Morris State Bank, 2005 U.S. App. LEXIS 24544 (11th Cir. Nov. 14, 2005) (Unpublished).

Cited in Partain v. State, 129 Ga. App. 213, 199 S.E.2d 549 (1973); United States v. Romano, 482 F.2d 1183 (5th Cir. 1973); Sanders v. State, 135 Ga. App. 436, 218 S.E.2d 140 (1975); Brooks v. State, 141 Ga. App. 725, 234 S.E.2d 541 (1977); Quillan v. State, 160 Ga. App. 167, 286 S.E.2d 503 (1981); Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982); Bramblett v. State, 191 Ga. App. 238, 381 S.E.2d 530 (1989); Best Jewelry Mfg. Co. v. Reed Elsevier Inc., 334 Ga. App. 826, 780 S.E.2d 689 (2015).

ADVISORY OPINIONS OF THE STATE BAR

Committing offense results in Rules of Professional Conduct violation. — If an attorney were to indicate to an officer that as a result of the attorney's position as a member of the city council a favorable recommendation as to one of the attorney's clients would result in benefits flowing to the officer, or that an unfavorable

recommendation would result in harm, the attorney would have committed the offense of bribery, O.C.G.A. § 16-10-2(a)(1), or extortion, O.C.G.A. § 16-8-16(a)(4). The attorney would also have violated Rule 3.5(a) of the Georgia Rules of Professional Conduct. Adv. Op. No. 05-12 (July 25, 2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extortion, Blackmail and Threats, §§ 1 et seq., 22 et seq., 35 et seq., 53, 61 et seq.

C.J.S. — 35 C.J.S., Extortion, § 1 et seq.

ALR. — The boycott as a weapon in industrial disputes, 116 A.L.R. 484.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 123 A.L.R. 119; 91 A.L.R.2d 1046.

Extortion predicated upon statements or intimations regarding criminal liability, in connection with attempt to collect or settle a claim which defendant believed to be valid, 135 A.L.R. 728.

Criminal offense of obtaining money under false pretenses, or attempting to do so, predicated upon receipt or claim of benefits under insurance policy, 135 A.L.R. 1157.

What constitutes "loss from theft" within provisions of Internal Revenue Code concerning deduction of losses arising from theft, 62 A.L.R.2d 572.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 91 A.L.R.2d 1046.

Criminal liability of corporation for extortion, false pretenses, or similar offenses, 49 A.L.R.3d 820.

What constitutes "property" obtained within extortion statute, 67 A.L.R.3d 1021.

Retaking of money lost at gambling as robbery or larceny, 77 A.L.R.3d 1363.

Embezzlement, larceny, false pretenses, or allied criminal fraud by a partner, 82 A.L.R.3d 822.

Truth as defense to state charge of criminal intimidation, extortion, blackmail, threats, and the like, based upon threats to disclose information about victim, 39 A.L.R.4th 1011.

Injury to reputation or mental well-being as within penal extortion statutes requiring threat of "Injury to the Person," 87 A.L.R.5th 715.

What constitutes tax-deductible theft loss under 26 USCS § 165, 98 A.L.R. Fed. 229.

16-8-17. Misuse of Universal Product Code labels.

(a)(1) Except as provided in paragraph (2) of this subsection, a person who, with intent to cheat or defraud a retailer, possesses, uses, utters, transfers, makes, alters, counterfeits, or reproduces a retail sales receipt or a Universal Product Code label which results in a theft of property which exceeds $500.00 in value commits a felony and shall be punished by imprisonment for not less than one nor more than three years or by a fine or both.

(2) A person convicted of a violation of paragraph (1) of this subsection, when the property which was the subject of the theft resulting from the unlawful use of retail sales receipts or Universal Product Code labels is taken from three separate stores or retail establishments within one county during a period of seven days or less and when the aggregate value of the property which was the subject of each theft exceeds $500.00 in value, commits a felony and shall be punished by imprisonment for not less than one nor more than ten years.

(b) A person who, with intent to cheat or defraud a retailer, possesses 15 or more fraudulent retail sales receipts or Universal Product Code labels or possesses a device the purpose of which is to manufacture fraudulent retail sales receipts or Universal Product Code labels shall be guilty of a felony and punished by imprisonment for not less than one nor more than ten years. (Code 1981, § 16-8-17, enacted by Ga. L. 2000, p. 870, § 2; Ga. L. 2001, p. 4, § 16; Ga. L. 2012, p. 899, § 3-4/HB 1176.)

Editor's notes. — The former Code section, pertaining to the theft of motor vehicles, parts, and components, was based on Ga. L. 1916, p. 154, § 1; Code 1933, § 26-2603; Code 1933, § 26-1813, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 8.

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

For note on 2000 enactment of this Code section, see 17 Ga. St. U.L. Rev. 110 (2000).

JUDICIAL DECISIONS

Presenting receipt for purchases not made. — Because the testimony of defendant's girlfriend was sufficient to allow the jury to conclude that a store was a retailer, and because the defendant violated O.C.G.A. § 16-8-17(a)(1) by presenting a receipt for a refund of items that the defendant had not purchased, the trial court properly denied the defendant's motion for a new trial. Cooper v. State, 299 Ga. App. 199, 682 S.E.2d 154 (2009).

16-8-18. Entering automobile or other motor vehicle with intent to commit theft or felony.

If any person shall enter any automobile or other motor vehicle with the intent to commit a theft or a felony, he shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years, or, in the discretion of the trial judge, as for a misdemeanor. (Ga. L. 1933, p. 111, § 1; Code 1933, § 26-2637; Code 1933, § 26-1813.1, enacted by Ga. L. 1976, p. 186, § 1.)

JUDICIAL DECISIONS

State court does not have jurisdiction. — While O.C.G.A § 16-8-18 grants the trial judge discretion to impose misdemeanor punishment, this provision does not reduce the offense to a misdemeanor. Accordingly, a state court does not have jurisdiction. Bass v. State, 169 Ga. App. 520, 313 S.E.2d 776 (1984).

Nature of entry. — O.C.G.A. § 16-8-18 makes no distinction between an authorized entry and an unauthorized entry. Loggins v. State, 169 Ga. App. 511, 313 S.E.2d 769 (1984).

Conviction for criminal trespass was not inconsistent with acquittal under former Code 1933, § 26-1813.1 (see now

O.C.G.A. § 16-8-18). Favors v. State, 149 Ga. App. 563, 254 S.E.2d 886 (1979).

Theft by taking did not merge with entering an automobile because the defendant completed the latter offense at the time the defendant entered the truck with the intent of taking items stored inside the truck, and because different elements had to be demonstrated to find the defendant guilty of both offenses. Hawkins v. State, 219 Ga. App. 484, 465 S.E.2d 527 (1995).

Because: (1) the defendant was properly sentenced for felony theft by taking as the defendant admitted to the accusation which valued the items taken at greater than $100; and (2) the offenses of theft by taking and entering an automobile with intent to commit theft did not merge for purposes of sentencing as each offense required the proof of different facts, the sentence imposed by the trial court was upheld. Neslein v. State, 288 Ga. App. 234, 653 S.E.2d 825 (2007).

Burglary conviction and entering an automobile with intent to commit a theft conviction did not merge as the state was required to show unlawful entry into a warehouse to convict the defendant of burglary, but not to obtain a conviction for entry of an automobile with intent to commit a theft; the burglary offense was completed when the defendant entered the warehouse without authority and with the intent to commit the theft of the computers; the automobile offense occurred when the defendant entered the victim's car with the intent to take the computers. Morris v. State, 274 Ga. App. 41, 616 S.E.2d 829 (2005).

Intent to commit theft could be inferred by defendant's admitted action of attempting to break into an automobile trunk in which valuables might be stored. The fact that defendant may have failed in accomplishing the apparent purpose did not render a finding of guilty improper. Heflin v. State, 183 Ga. App. 149, 358 S.E.2d 298 (1987).

In a prosecution for violation of O.C.G.A. § 16-8-18, an instruction authorizing the jury to infer an intent to commit a theft where an individual breaks into an area of an automobile in which valuables might be stored was correct. Pound v. State, 230 Ga. App. 467, 496 S.E.2d 769 (1998).

Evidence of prior convictions. — Fact that the defendant entered different types of vehicles on different prior occasions or that the defendant used different methods to obtain entry into the vehicles did not render evidence of prior convictions for the same offense inadmissible. Sessions v. State, 207 Ga. App. 609, 428 S.E.2d 652 (1993).

Aggravated felony for purposes of federal sentencing enhancement. — District court did not err in determining that the defendant's prior offense of entering an automobile with intent to commit a theft or other felony, a violation of O.C.G.A. § 16-8-18, was an aggravated felony for purposes of U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(C) because: (1) O.C.G.A. § 16-8-18 and the charging document established that the defendant was convicted of entering an automobile with the intent to commit a theft; (2) the defendant's prior offense was an attempted theft offense, within the meaning of 8 U.S.C. § 1101(a)(43)(G) and (U), because, by entering the automobile, the defendant performed a substantial step toward a theft; and (3) the Georgia court formally imposed a sentence of one year. United States v. Berumen-Ceniceros, No. 07-11717, 2007 U.S. App. LEXIS 23596 (11th Cir. Oct. 3, 2007) (Unpublished).

Evidence sufficient for conviction. — See Hall v. State, 172 Ga. App. 371, 323 S.E.2d 261 (1984); Benton v. State, 178 Ga. App. 239, 342 S.E.2d 722 (1986); Groble v. State, 192 Ga. App. 260, 384 S.E.2d 281 (1989); Woods v. State, 196 Ga. App. 395, 396 S.E.2d 74 (1990); Hodges v. State, 222 Ga. App. 381, 474 S.E.2d 218 (1996); Williams v. State, 228 Ga. App. 622, 492 S.E.2d 290 (1997).

Following evidence found sufficient to justify a rational trier of fact to find the defendant guilty of entering a motor vehicle with intent to commit theft beyond a reasonable doubt: the defendant's presence at a motor vehicle, the defendant's possession of an item as the defendant fled, the defendant's flight itself, a cut hand and a bloodied broken window, and the discovery of a valuable tool which was

in the car. Fields v. State, 167 Ga. App. 400, 306 S.E.2d 695 (1983).

Defendant's written statement admitting that the defendant was present at the scene of the crime and during the other perpetrator's conversations about breaking into the car, that the defendant raised the hood of the get-away car and that the defendant fled on foot when the police arrived sufficed for conviction. Crumbley v. State, 207 Ga. App. 33, 427 S.E.2d 27 (1993).

Evidence was sufficient to convict, since, although no one saw the actual entry into the ambulance, it was after hours at a government facility with a locked gate, an ambulance was missing a battery, the hood was up, and the gate had been breached; finally, the defendants were stopped near the lot with the same type battery in their possession. Truax v. State, 207 Ga. App. 506, 428 S.E.2d 611 (1993).

Evidence was sufficient to support a conviction for entering an automobile with the intent to commit a theft or felony, since the defendant was found lying on the defendant's side inside the vehicle, rummaging under the seats, with no plausible explanation for defendant's behavior and with a series of tools and spare motor parts, commonly used to break into and steal cars. Williams v. State, 208 Ga. App. 572, 430 S.E.2d 883 (1993).

Although the evidence adduced at trial did not exactly track the specific description of the motor vehicle contained in the indictment, since the defendant was twice spotted in the vicinity of the vehicle and the defendant's fingerprints were matched to those of a suspect tool, the evidence was sufficient to permit a rational trier of fact to find the defendant guilty of entering a motor vehicle with intent to commit theft. Woods v. State, 208 Ga. App. 565, 431 S.E.2d 167 (1993).

Evidence was sufficient to sustain the defendant's conviction for auto theft under O.C.G.A. § 16-8-18 since: (1) a blue car was stolen near the time and place of the location where a red stolen car was recovered; (2) the defendant was arrested after being observed driving away from a restaurant in the blue car; and (3) documents bearing the defendant's alias were recovered in both the blue car and the red car. Horner v. State, 257 Ga. App. 12, 570 S.E.2d 94 (2002).

Evidence was sufficient to support the defendant's conviction for entering an auto with the intent to commit a theft since: (1) the victims saw the defendant in the victim's car, attempting to steal a speaker; (2) a car window had been smashed, and the interior of the car had been damaged; (3) the victims confronted the defendant, detained the defendant, and called the police; and (4) after the defendant was arrested, palm prints from the car were matched to the defendant's prints. Gary v. State, 259 Ga. App. 136, 575 S.E.2d 903 (2003).

Although circumstantial, evidence which identified the defendant as the perpetrator carrying burglary tools and in possession of property identified as taken from vehicles in a transmission shop, along with evidence that the defendant waived any issue regarding the trial court's failure to give a curative instruction or grant a mistrial, was sufficient to sustain the defendant's conviction under O.C.G.A. § 16-8-18. Davis v. State, 263 Ga. App. 230, 587 S.E.2d 398 (2003).

Defendant's boasting that the defendant stole the victim's cell phone, coupled with the victim's testimony that the phone was missing, provided ample circumstantial evidence to support the defendant's convictions of entering an auto with intent to commit a theft, and of theft. In the Interest of M.C.A., 263 Ga. App. 770, 589 S.E.2d 331 (2003).

Evidence supported the defendant's conviction for entering an automobile as the person that a firefighter saw in an alley was the person that the dispatcher saw breaking into the trucks, the firefighter saw the defendant in the alley, the defendant was barefoot, a pair of shoes was found near the tools taken from the trucks, and the defendant's attempts to flee were circumstantial evidence of guilt. Williams v. State, 273 Ga. App. 213, 614 S.E.2d 834 (2005).

Evidence supported the defendant's conviction for burglary and entering an automobile with the intent to commit a theft because there was evidence corroborating the defendant's confession regard-

ing how the defendant gained entry into both a warehouse and a car. Morris v. State, 274 Ga. App. 41, 616 S.E.2d 829 (2005).

Evidence was sufficient to support the defendant's conviction of entering an automobile or other motor vehicle with intent to commit theft or felony, as the defendant's recent, unexplained possession of tools stolen from a vehicle's cab supported an inference that the defendant committed the theft and, therefore, that the defendant had entered the vehicle with intent to commit a theft. Drake v. State, 274 Ga. App. 882, 619 S.E.2d 380 (2005).

Because sufficient evidence was presented that a juvenile was a party to the crime of entering an automobile with the intent to commit a theft or felony, and the evidence was corroborated by a police officer who questioned the juvenile's cohort, an adjudication based on the juvenile's commission of the act was upheld on appeal; thus, the juvenile's motion for a directed verdict was properly denied. In the Interest of B.D., 287 Ga. App. 185, 651 S.E.2d 129 (2007).

There was no merit to argument of juvenile defendant that circumstantial evidence was insufficient to prove the acts of entering an automobile and criminal attempt to commit theft from a vehicle since, during the early morning hours, the defendant was in the area where a car stereo was stolen and the attempted theft of tire rims occurred, the driver's license bearing the false name the defendant gave was found at the crime scene, the defendant returned to the car that the defendant was driving with a car stereo, and car stereo parts were found in the car the defendant was driving. In the Interest of C.M., 290 Ga. App. 788, 661 S.E.2d 598 (2008).

Evidence was sufficient to convict the defendant of entering a motor vehicle with intent to commit theft because the victim found the defendant going through a box of personal items in the victim's truck, and when the victim questioned the defendant, the defendant fled and barricaded up in a nearby gas station bathroom, which raised an inference of criminal intent. Woods v. State, 302 Ga. App. 891, 691 S.E.2d 913 (2010).

Evidence was sufficient to convict a defendant of theft in violation of O.C.G.A. § 16-8-18 as a party to the crime under O.C.G.A. § 16-2-20, given that the defendant drove the defendant's truck to a pharmacy, waited with the truck idling while the defendant's friend got out, smashed a car window, and stole a purse, then drove away with the friend and hid the friend at the defendant's apartment when the police came. Rinks v. State, 313 Ga. App. 37, 718 S.E.2d 359 (2011).

Evidence was sufficient to convict the defendant of first degree burglary and entering an auto because the state presented evidence that the defendant entered a dwelling house without authority with the intent to commit a theft as a victim's wallet was stolen from within the home lived in by two of the defendant's victims, and the defendant entered four cars with the intent to commit a theft. Daniel v. State, 342 Ga. App. 448, 803 S.E.2d 603 (2017).

Evidence sufficient for criminal attempt to enter automobile. — Evidence that defendants discussed theft of a car stereo, possessed tools to aid in the commission of such a crime, and that the defendants drove to a shopping center parking lot in search of a specific car to enter was sufficient to find the defendants guilty of criminal attempt to enter an automobile. Evans v. State, 216 Ga. App. 21, 453 S.E.2d 100 (1995).

Attempt to enter an automobile did not merge with loitering. — Merging of sentences for attempt to enter an automobile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18, and loitering under O.C.G.A. § 16-11-36 was not warranted because loitering required proof of presence in a place at a time or in a manner not usual for law-abiding individuals, and attempt to enter an automobile required performance of an act which constituted a substantial step toward the commission of entering an automobile, both elements not required by the other crime. Brown v. State, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Repeated pull of car's door handle sufficient. — Defendant's act of repeatedly pulling at a vehicle's door handle in a sorority house parking lot at 2:00 A.M.

amounted to more than a mere preparatory act, and was instead an act proximately leading to the consummation of the crime of entering an automobile, supporting the defendant's conviction for attempt to enter an automobile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18. Brown v. State, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Insufficient evidence for conviction. — An officer improperly arrested a defendant for sitting in a car, the owner of which the defendant could not identify. As the officer had no report of a stolen vehicle, nor was there any evidence that the vehicle had been broken into, the officer had no probable cause to remove the defendant from the vehicle and arrest the defendant; therefore, evidence consequently discovered in the vehicle was illegally obtained and properly suppressed. State v. Fisher, 293 Ga. App. 228, 666 S.E.2d 594 (2008).

Insufficient evidence of some charges. — Items stolen from the victims' vehicles found in the defendant's car, stopped as the vehicle left the area of the thefts, were sufficient to sustain convictions of entering an auto with the intent to commit theft, O.C.G.A. § 16-8-18; however, as there was no similar testimony as to items stolen from different victims, insufficient evidence supported other convictions because the defendant's presence at the scene of the crime, without any other direct evidence, was insufficient to convict the defendant of the crimes that a passenger admitted to committing. Walker v. State, 281 Ga. App. 94, 635 S.E.2d 577 (2006).

Lesser included offenses. — In a prosecution for theft by taking of an automobile, defendant's requested charge on the lesser included crime of entering an automobile was properly denied where there was no evidence that defendant entered the automobile with the intent to commit a theft or felony therein. Travis v. State, 243 Ga. App. 77, 532 S.E.2d 430 (2000).

Since entering an automobile was a lesser-included offense of theft by taking as a matter of fact, the trial court did not err in instructing the jury on the lesser-included offense where the facts supported both offenses. Williams v. State, 255 Ga. App. 775, 566 S.E.2d 477 (2002).

Because the evidence was sufficient to convict the defendant of entering a motor vehicle with intent to commit theft since: (1) the victim found the defendant going through a box of personal items in the victim's truck, and (2) when the victim questioned the defendant, the defendant fled and barricaded up in a nearby gas station bathroom, the defendant was not entitled to a lesser included offense charge of criminal trespass; the defendant did not tailor the instruction to the applicable portion of the statute, and, in any event, a criminal trespass charge was not warranted since the evidence showed that the defendant entered the truck with the intent to commit theft. Woods v. State, 302 Ga. App. 891, 691 S.E.2d 913 (2010).

Mistrial properly denied despite allegation that the defendant's character was put in evidence, given the overwhelming evidence of guilt, and the fact that the defendant's counsel declined to offer a curative instruction regarding the witness's statement; moreover, given the nature of the character statement, such was non-responsive to the state's questioning and unintentional. Ivey v. State, 284 Ga. App. 232, 644 S.E.2d 169 (2007).

Parties to crime. — Defendant was correctly convicted of being a party to the crime of entering an automobile with intent to commit a theft since the defendant drove the car used as transportation to and from the crime scene and a co-perpetrator concealed the fruits of the crime until after the co-perpetrator and the defendant left the scene. Oakes v. State, 233 Ga. App. 684, 505 S.E.2d 33 (1998).

Juvenile's sentence under O.C.G.A. § 15-11-63 vacated. — Although the state argued that a juvenile had been adjudicated on five separate petitions setting out five separate felonies, because the record revealed that the adjudication had occurred on only two prior occasions for acts which, if done by an adult, would have been felonies, the juvenile's sentence under O.C.G.A. § 15-11-63(a)(2)(B)(vii) was vacated, and the case was remanded for resentencing. In the Interest of P.R., 282 Ga. App. 480, 638 S.E.2d 898 (2006).

Cited in Massey v. State, 141 Ga. App. 557, 234 S.E.2d 144 (1977); Brooks v. State, 151 Ga. App. 384, 259 S.E.2d 743 (1979); Ligon v. State, 152 Ga. App. 661, 263 S.E.2d 534 (1979); Mills v. State, 160 Ga. App. 49, 286 S.E.2d 55 (1981); Matthews v. State, 161 Ga. App. 1, 289 S.E.2d 278 (1982); Austin v. State, 162 Ga. App. 709, 293 S.E.2d 10 (1982); Sledge v. State, 245 Ga. App. 488, 537 S.E.2d 753 (2000); Sinclair v. State, 248 Ga. App. 132, 546 S.E.2d 7 (2001); Ruffin v. State, 252 Ga. App. 289, 556 S.E.2d 191 (2001).

RESEARCH REFERENCES

Am. Jur. 2d. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 335 et seq.

ALR. — Automobiles: elements of offense defined in "joyriding" statutes, 9 A.L.R.3d 633.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 A.L.R.3d 1309.

Liability for personal injury or property damage caused by unauthorized use of automobile which had been parked with keys removed from ignition, 70 A.L.R.4th 276.

Burglary, breaking, or entering of motor vehicle, 72 A.L.R.4th 710.

Validity, construction, and application of Anti-Car Theft Act (18 USCS § 2119), 140 A.L.R. Fed 249.

What constitutes "aggravated felony" for which alien can be deported or removed under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(iii)) — Theft or burglary offenses under 8 U.S.C. § 1101(a)(43)(G), 62 A.L.R. Fed. 2d 255.

16-8-19. Conversion of leased personal property.

Reserved. Repealed by Ga. L. 1988, p. 763, § 2, effective July 1, 1988.

Editor's notes. — This Code section was based on Ga. L. 1968, p. 1048, § 1; Ga. L. 1969, p. 857, § 9. For present comparable provisions, see Code Section 16-8-4(a).

16-8-20. Livestock theft.

(a) A person commits the offense of livestock theft when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any livestock of another with the intention of depriving the owner of such livestock.

(b) For the purposes of this Code section, the term "livestock" means horses, cattle, swine, sheep, goats, rabbits, and any domestic animal produced as food for human consumption.

(c) Any person committing the offense of livestock theft commits a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten years and by a fine of $1,000.00; provided, however, that, if the fair market value of the livestock taken or appropriated is $100.00 or less, the person shall be guilty of a misdemeanor.

(d) For the purposes of this Code section, if any livestock is killed or mutilated and a portion thereof taken, the value of the whole animal

while alive or his entire carcass, whichever is greater, shall be considered for the purpose of distinguishing between a misdemeanor offense and a felony offense. (Code 1933, § 26-1817, enacted by Ga. L. 1974, p. 1006, § 1; Ga. L. 1995, p. 244, § 10; Ga. L. 2008, p. 458, § 7/SB 364.)

JUDICIAL DECISIONS

Cited in Gunter v. State, 155 Ga. App. 176, 270 S.E.2d 224 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Larceny § 58.

C.J.S. — 52B C.J.S., Larceny, §§ 22, 23.

ALR. — Dogs as subject of larceny, 92 A.L.R. 212.

What constitutes "loss from theft" within provisions of Internal Revenue Code concerning deduction of losses arising from theft, 62 A.L.R.2d 572.

Stealing carcass as within statute making it larceny to steal cattle or livestock, 78 A.L.R.2d 1100.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 A.L.R.3d 1309.

What constitutes tax-deductible theft loss under 26 USCS § 165, 98 A.L.R. Fed. 229.

16-8-21. Removal or abandonment of shopping carts.

(a) As used in this Code section, the term "shopping cart" means those pushcarts of the type which are commonly provided by grocery stores, drugstores, or other merchant stores or markets for the use of the public in transporting commodities in stores and markets and incidentally from the store to a place outside the store.

(b) It shall be unlawful for any person to remove a shopping cart from the premises of the owner of such shopping cart without the consent, given at the time of such removal, of the owner or of his or her agent, servant, or employee. For the purpose of this Code section, the premises shall include all the parking area set aside by the owner or on behalf of the owner for the parking of cars for the convenience of the patrons of the owner.

(c) It shall be unlawful for any person to abandon a shopping cart upon any public street, sidewalk, way, or parking lot other than a parking lot on the premises of the owner.

(d) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1975, p. 848, § 1; Ga. L. 2012, p. 162, § 1/HB 1093.)

RESEARCH REFERENCES

ALR. — What amounts to asportation which will support charge of larceny, 19 A.L.R. 724; 144 A.L.R. 1383.

16-8-22. Cargo theft.

(a) For purposes of this Code section, the term "vehicle" includes, without limitation, any railcar.

(b) Notwithstanding any provision of this article to the contrary, a person commits the offense of cargo theft when he or she unlawfully takes or, being in lawful possession thereof, unlawfully appropriates:

(1) Any vehicle engaged in commercial transportation of cargo or any appurtenance thereto, including, without limitation, any trailer, semitrailer, container, or other associated equipment, or the cargo being transported therein or thereon, which is the property of another with the intention of depriving such other person of the property, regardless of the manner in which the property is taken or appropriated; or

(2) Any trailer, semitrailer, container, or other associated equipment, or the cargo being transported therein or thereon, which is deployed by or used by a law enforcement agency, which is the property of another with the intention of depriving such other person of the property, regardless of the manner in which the property is taken or appropriated.

(c) The value of a vehicle engaged in commercial transportation of cargo and any appurtenance thereto and the cargo being transported which is taken or unlawfully appropriated shall be based on the fair market value of such vehicle, appurtenances, and cargo taken or unlawfully appropriated.

(d)(1) If the property taken is one or more controlled substances as defined in Code Section 16-13-21 with a collective value of less than $10,000.00, a person convicted of a violation of this Code section shall be punished by imprisonment for not less than one nor more than ten years, a fine of not less than $10,000.00 nor more than $100,000.00, or both.

(2) If the property taken is one or more controlled substances as defined in Code Section 16-13-21 with a collective value of at least $10,000.00 but less than $1 million, a person convicted of a violation of this Code section shall be punished by imprisonment for not less than five nor more than 25 years, a fine of not less than $50,000.00 nor more than $1 million, or both.

(3) If the property taken is one or more controlled substances as defined in Code Section 16-13-21 with a collective value of $1 million

or more, a person convicted of a violation of this Code section shall be punished by imprisonment for not less than ten nor more than 30 years, a fine of not less than $100,000.00 nor more than $1 million, or both.

(e)(1) Except as otherwise provided in subsection (d) of this Code section, if the property taken has a collective value of $1,500.00 or less, a person convicted of a violation of this Code section shall be punished as for a misdemeanor.

(2) Except as otherwise provided in subsection (d) of this Code section, if the property taken has a collective value of more than $1,500.00 but less than $10,000.00, a person convicted of a violation of this Code section shall be punished by imprisonment for not less than one nor more than ten years, a fine of not less than $10,000.00 nor more than $100,000.00, or both.

(3) Except as otherwise provided in subsection (d) of this Code section, if the property taken has a collective value of at least $10,000.00 but less than $1 million, a person convicted of a violation of this Code section shall be punished by imprisonment for not less than five nor more than 20 years, a fine of not less than $50,000.00 nor more than $1 million, or both.

(4) Except as otherwise provided in subsection (d) of this Code section, if the property taken has a collective value of $1 million or more, a person convicted of a violation of this Code section shall be punished by imprisonment for not less than ten nor more than 20 years, a fine of not less than $100,000.00 nor more than $1 million, or both.

(f) Notwithstanding subsections (d) and (e) of this Code section, if the property taken is a trailer, semitrailer, container, or other associated equipment, or the cargo being transported therein or thereon, which is deployed by or used by a law enforcement agency, regardless of its value, a person convicted of a violation of this Code section shall be punished by imprisonment for not less than one nor more than ten years, a fine of not less than $10,000.00 nor more than $100,000.00, or both.

(g) A person convicted of a violation of this Code section may also be punished by, if applicable, the revocation of the defendant's commercial driver's license in accordance with Code Section 40-5-151. (Code 1981, § 16-8-22, enacted by Ga. L. 2014, p. 195, § 1/HB 749.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2014, the subsection (g) designation was substituted for the second subsection (e) designation originally enacted.

Editor's notes. — Ga. L. 2014, p. 195, § 3/HB 749, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2014, and shall apply to all offenses committed on or after

such date. The enactment of Code Sections 16-8-22 and 16-8-23 shall not affect any prosecutions for acts occurring before the effective date of Code Sections 16-8-22 and 16-8-23 and shall not act as an abatement of any such prosecutions."

OPINIONS OF THE ATTORNEY GENERAL

Updating of crimes and offenses for which Georgia Crime Information Center is authorized to collect and file fingerprints. — Pursuant to authority granted to the Attorney General in O.C.G.A. § 35-3-33(a)(1)(A)(v), any misdemeanor offenses arising under O.C.G.A. §§ 16-8-14.1(a), 16-8-22, 16-11-90(b), 16-11-130.2, and 33-24-53, are designated as ones for which those charged are to be fingerprinted. 2014 Op. Att'y Gen. No. 2014-2.

16-8-23. Prohibited uses of fifth wheel.

(a) For the purposes of this Code section, the term "fifth wheel" means a device mounted on a truck tractor or similar towing vehicle, including, but not limited to, a converter dolly, which interfaces with and couples to the upper coupler assembly of a semitrailer.

(b) It shall be unlawful for any person to modify, alter, attempt to alter, and, if altered, sell, possess, offer for sale, move, or cause to be moved on the highways of this state a device known as a fifth wheel or the antitheft locking device attached to the fifth wheel with the intent to use the fifth wheel to commit or attempt to commit cargo theft as defined in Code Section 16-8-22.

(c) A person convicted of a violation of this Code section shall be punished by imprisonment for not less than one nor more than ten years, a fine of not less than $10,000.00 nor more than $100,000.00, or both. (Code 1981, § 16-8-23, enacted by Ga. L. 2014, p. 195, § 1/HB 749.)

Editor's notes. — Ga. L. 2014, p. 195, § 3/HB 749, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2014, and shall apply to all offenses committed on or after such date. The enactment of Code Sections 16-8-22 and 16-8-23 shall not affect any prosecutions for acts occurring before the effective date of Code Sections 16-8-22 and 16-8-23 and shall not act as an abatement of any such prosecutions."

ARTICLE 2

ROBBERY

RESEARCH REFERENCES

ALR. — Taking property from the person by stealth as robbery, 8 A.L.R. 359.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 123 A.L.R. 119; 91 A.L.R.2d 1046.

When person from whom property is taken is deemed to have been in posses-

sion thereof, as regards offense of robbery, 123 A.L.R. 1099.

Effect of failure or refusal of court, in robbery prosecution, to instruct on assault and battery, 58 A.L.R.2d 808.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 91 A.L.R.2d 1046.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine, 50 A.L.R.3d 397.

Receiver of stolen goods as accomplice of thief for purposes of corroboration, 74 A.L.R.3d 560.

Robbery by means of toy or simulated gun or pistol, 81 A.L.R.3d 1006.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 A.L.R.3d 1309.

Use of force or intimidation in retaining property or in attempting to escape, rather than in taking property, as element of robbery, 93 A.L.R.3d 643.

Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases, 2 A.L.R.4th 500.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Robbery: Identification of victim as person named in indictment or information, 4 A.L.R.6th 577.

16-8-40. Robbery.

(a) A person commits the offense of robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another:

(1) By use of force;

(2) By intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another; or

(3) By sudden snatching.

(b) A person convicted of the offense of robbery shall be punished by imprisonment for not less than one nor more than 20 years.

(c) Notwithstanding any other provision of this Code section, any person who commits the offense of robbery against a person who is 65 years of age or older shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years. (Laws 1833, Cobb's 1851 Digest, p. 791; Code 1863, § 4286; Code 1868, § 4323; Code 1873, § 4389; Code 1882, § 4389; Penal Code 1895, § 151; Ga. L. 1903, p. 43, § 1; Penal Code 1910, § 148; Code 1933, § 26-2501; Ga. L. 1957, p. 261, § 1; Code 1933, § 26-1901, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1984, p. 900, § 4.)

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982).

JUDICIAL DECISIONS

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General Consideration

Robbery violates social interest in security of person and protection of property rights. — Common-law burglary was recognized as an offense against habitation, whereas robbery was classified as a species of aggravated larceny which violated social interest in safety and security of the person as well as social interest in protection of property rights. Moore v. State, 140 Ga. App. 824, 232 S.E.2d 264 (1976).

When taking of property by force or intimidation is justified. — To justify taking of property by force or intimidation, party taking must be owner of specific property taken or be entitled to its possession, or in good faith believe that the party is the owner or entitled to its possession. Moyers v. State, 186 Ga. 446, 197 S.E. 846 (1938).

Robbery is a crime against possession, and is not affected by concepts of ownership. That being so, when two of the alleged victims of armed robbery were husband and wife, the fact that the stolen property may have been jointly owned does not preclude the appellant from being convicted of two counts of armed robbery. Carter v. State, 156 Ga. App. 633, 275 S.E.2d 716 (1980).

Person from whom property was taken must be owner, person in possession, or person in control. DePalma v. State, 225 Ga. 465, 169 S.E.2d 801 (1969).

Identity of person alleged to have been robbed is not an essential element of offense and need not be proved by direct evidence. McKisic v. State, 238 Ga. 644, 234 S.E.2d 908 (1977); Rollins v. State, 154 Ga. App. 585, 269 S.E.2d 81 (1980).

Intent to steal is a substantive element of robbery. Sledge v. State, 99 Ga. 684, 26 S.E. 756 (1896); Shehany v. Lowry, 170 Ga. 70, 152 S.E. 114 (1930); Thomas v. State, 54 Ga. App. 747, 189 S.E. 68 (1936); Moyers v. State, 186 Ga. 446, 197 S.E. 846 (1938).

Property need not be taken directly from one's person to constitute robbery. — To constitute robbery or larceny, it is unnecessary that taking of property should be directly from one's person, but it is sufficient if it is taken while in that person's possession and immediate presence. Osborne v. State, 200 Ga. 763, 38 S.E.2d 558 (1946); Banks v. State, 74 Ga. App. 449, 40 S.E.2d 103 (1946); Fincher v. State, 211 Ga. 89, 84 S.E.2d 76 (1954).

Taking from under personal protection of another, though not actually from physical body suffices. Clements v. State, 84 Ga. 660, 11 S.E. 505, 20 Am. St. R. 385 (1890); Jackson v. State, 114 Ga. 826, 40 S.E. 1001, 88 Am. St. R. 60 (1902).

Denial of motion to sever robbery counts from kidnapping counts not an abuse of discretion. — Trial court did not abuse the court's discretion by denying the defendant's motion to sever 12 counts of robbery and kidnapping because all 12 counts involved a distinctive modus operandi and took place over a period of less than a month in a single county and showed a common scheme, which justified the denial of the defendant's motion to sever. Fielding v. State, 299 Ga. App. 341, 682 S.E.2d 675 (2009).

Convictions for robbery and fleeing to elude. — Subsequent prosecution of defendant for robbery after defendant pled guilty to fleeing to elude did not violate double jeopardy since the offenses involved wholly different elements and

facts. Blackwell v. State, 230 Ga. App. 611, 496 S.E.2d 922 (1998).

Force must be contemporaneous with obtaining possession of property. — Under O.C.G.A. § 16-8-40(a)(1), the force used to commit robbery must be employed contemporaneously with obtaining possession of the property. Dutton v. State, 199 Ga. App. 750, 406 S.E.2d 85 (1991), cert. denied, 199 Ga. App. 905, 406 S.E.2d 85 (1991).

Possession initially by consent. — Although defendant had custody of a necklace pursuant to the victim's consent, possession of the necklace did not change to the defendant until the victim, by means of violence, had been dissuaded from seeking its return. That being so, it was the force which effected the taking, authorizing a conviction for robbery by force. Cantrell v. State, 184 Ga. App. 384, 361 S.E.2d 689 (1987).

Robbing one person of property belonging to two individuals. — When in single transaction, defendant robs another of property belonging to two individuals, only one robbery is committed. Jackson v. State, 236 Ga. 98, 222 S.E.2d 380 (1976).

Error in admitting similar transaction evidence required reversal. — While state presented sufficient evidence of the victim's age to support assault charge under O.C.G.A. § 16-5-21(a)(1), because the trial court clearly erred in admitting evidence of two burglaries the defendant committed in 1998 as similar transactions to help prove the issue of identity, defendant's aggravated assault, burglary, robbery, theft, and battery convictions were reversed. Usher v. State, 290 Ga. App. 710, 659 S.E.2d 920 (2008).

Earlier similar transaction evidence admissible. — Although eleven years separated defendant's earlier robbery from this armed robbery, part of that time defendant was in prison, and it is the similarity of the offenses within the meaning of Williams v. State, 261 Ga. 640, 409 S.E.2d 649 (1991) that determines the admissibility of such evidence, not whether the span of time between offenses is brief. Nelson v. State, 242 Ga. App. 63, 528 S.E.2d 844 (2000).

Evidence of sudden acquisition of money by defendant admissible. — Where there is other evidence of accused's guilt, and the crime is of such a nature that acquisition of money may be regarded as a natural or ordinary result of its perpetration, evidence is admissible of the sudden acquisition of money by the defendant at or subsequent to time offense was committed, although source of the money is not definitely traced or identified by prosecution; the other basis for admitting money into evidence is to demonstrate a dramatic change of financial condition before and after robbery in question. United States v. Morris, 647 F.2d 568 (5th Cir. 1981).

Recent, unexplained possession of stolen goods. — When a theft, whether by simple larceny, burglary, or robbery, is proven, recent unexplained possession of stolen goods by the defendant creates an inference or presumption of fact sufficient to convict. Selph v. State, 142 Ga. App. 26, 234 S.E.2d 831 (1977); Wells v. State, 151 Ga. App. 416, 260 S.E.2d 374 (1979); Brown v. State, 157 Ga. App. 473, 278 S.E.2d 31 (1981).

Unexplained possession of stolen goods without direct proof or other circumstantial evidence that the defendant committed the theft. Selph v. State, 142 Ga. App. 26, 234 S.E.2d 831 (1977).

What constitutes recent possession is a question for jury, to be determined very largely from character and nature of property stolen. Brown v. State, 157 Ga. App. 473, 278 S.E.2d 31 (1981).

Whether defendant's explanation of possession is satisfactory or reasonable is a jury question. Brown v. State, 157 Ga. App. 473, 278 S.E.2d 31 (1981).

Admission of evidence that defendant had been the perpetrator of two similar offenses was not error, where it is apparent from the record that offenses in question were not merely similar but were virtually identical; each involved an elderly victim, who was robbed by a person identified as the defendant, and in each case, defendant had gained entry into the victim's home based upon the promise of a free stove inspection and had then applied a putty or compound to cure an alleged heat leak in the stove. Mitchell v. State, 179 Ga. App. 421, 347 S.E.2d 1 (1986).

General Consideration (Cont'd)

Alleged evidence of a same or similar nature committed by a codefendant was properly excluded as the defendant's proffered evidence, via the testimony of the two victims of the other crime, failed to identify the codefendant as the perpetrator of that crime, and the defendant offered no evidence independent of these witnesses in an attempt to establish that the codefendant actually committed the other crime in question; moreover, the motive for the other crime and the murder and armed robbery defendant was charged with were different. Carr v. State, 279 Ga. 271, 612 S.E.2d 292 (2005).

Claim of right defense unavailable for robbery by intimidation — Because the affirmative defense of "claim of right" under O.C.G.A. § 16-8-10(2) was not, as a matter of law, available to a defendant in a prosecution for robbery by intimidation under O.C.G.A. § 16-8-40(a)(2), the trial court did not err in refusing to charge the jury on that principle. Richards v. State, 276 Ga. App. 384, 623 S.E.2d 222 (2005).

Evidence of victim's demeanor properly admitted. — In a prosecution for robbery by force or intimidation, the victim alleged being punched in the jaw by the defendant to force the victim to leave the victim's car, which the defendant then stole. Testimony of the victim's parent about the victim's crying and acting hysterical on the day of the crime was relevant and was not improper bolstering. Bridges v. State, 293 Ga. App. 783, 668 S.E.2d 293 (2008).

Robbery as predicate for career offender status. — Robbery under Georgia law is a crime of violence and can be used as a predicate conviction for purposes of the career offender provisions of U.S.S.G. § 4B1.1. United States v. Farris, 77 F.3d 391 (11th Cir. 1996), cert. denied, 519 U.S. 896, 117 S. Ct. 241, 136 L. Ed. 2d 170 (1996).

Cited in Massey v. State, 226 Ga. 703, 177 S.E.2d 79 (1970); Williams v. State, 126 Ga. App. 302, 190 S.E.2d 807 (1972); King v. State, 127 Ga. App. 83, 192 S.E.2d 392 (1972); Philpot v. State, 229 Ga. 636, 193 S.E.2d 844 (1972); Holcomb v. State, 230 Ga. 525, 198 S.E.2d 179 (1973); Allison v. State, 129 Ga. App. 364, 199 S.E.2d 587 (1973); Munsford v. State, 129 Ga. App. 547, 199 S.E.2d 843 (1973); Lowe v. State, 133 Ga. App. 420, 210 S.E.2d 869 (1974); Martin v. State, 133 Ga. App. 323, 211 S.E.2d 11 (1974); Arnold v. State, 133 Ga. App. 451, 211 S.E.2d 404 (1974); Taylor v. State, 134 Ga. App. 9, 213 S.E.2d 162 (1975); Moore v. State, 137 Ga. App. 735, 224 S.E.2d 856 (1976); Malone v. State, 142 Ga. App. 47, 234 S.E.2d 844 (1977); Jordan v. State, 239 Ga. 526, 238 S.E.2d 69 (1977); Key v. State, 147 Ga. App. 800, 250 S.E.2d 527 (1978); Crosby v. State, 150 Ga. App. 555, 258 S.E.2d 264 (1979); Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979); Fann v. State, 153 Ga. App. 634, 266 S.E.2d 307 (1980); Smith v. State, 154 Ga. App. 541, 268 S.E.2d 768 (1980); Durden v. State, 161 Ga. App. 314, 287 S.E.2d 767 (1982); Lemon v. State, 161 Ga. App. 692, 289 S.E.2d 789 (1982); Young v. Zant, 677 F.2d 792 (11th Cir. 1982); Bogan v. State, 165 Ga. App. 851, 303 S.E.2d 48 (1983); Banks v. State, 169 Ga. App. 645, 314 S.E.2d 480 (1984); Holmes v. State, 170 Ga. App. 92, 316 S.E.2d 491 (1984); Glass v. State, 171 Ga. App. 11, 318 S.E.2d 760 (1984); Byrd v. State, 171 Ga. App. 344, 319 S.E.2d 460 (1984); Wright v. State, 173 Ga. App. 408, 326 S.E.2d 584 (1985); Shepherd v. State, 173 Ga. App. 499, 326 S.E.2d 596 (1985); Kelly v. State, 174 Ga. App. 424, 330 S.E.2d 165 (1985); Geter v. State, 174 Ga. App. 694, 331 S.E.2d 68 (1985); Ford v. State, 180 Ga. App. 807, 350 S.E.2d 816 (1986); Nelson v. State, 181 Ga. App. 481, 352 S.E.2d 804 (1987); Boscaino v. State, 186 Ga. App. 133, 366 S.E.2d 789 (1988); Jones v. State, 188 Ga. App. 713, 374 S.E.2d 110 (1988); Pye v. State, 196 Ga. App. 531, 396 S.E.2d 250 (1990); Norman v. State, 212 Ga. App. 105, 441 S.E.2d 94 (1994); Cole v. State, 216 Ga. App. 68, 453 S.E.2d 495 (1994); Pennamon v. State, 216 Ga. App. 306, 454 S.E.2d 192 (1995); Gido v. State, 216 Ga. App. 330, 454 S.E.2d 201 (1995); Wright v. State, 222 Ga. App. 320, 474 S.E.2d 121 (1996); Bradford v. State, 223 Ga. App. 424, 477 S.E.2d 859 (1996); Carter v. State, 224 Ga. App. 445, 481 S.E.2d 238 (1997); Westmoreland v. State, 245 Ga.

App. 482, 538 S.E.2d 119 (2000); Rogers v. State, 255 Ga. App. 416, 565 S.E.2d 583 (2002); In the Interest of B.M., 289 Ga. App. 214, 656 S.E.2d 855 (2008); Grant v. State, 289 Ga. App. 230, 656 S.E.2d 873 (2008); Arnold v. State, 286 Ga. 418, 687 S.E.2d 836 (2010); Crowley v. State, 315 Ga. App. 755, 728 S.E.2d 282 (2012).

Indictment

Indictment need not state that person robbed was holding property as agent of real owner. — In indictment for robbery, ownership of property taken may be laid in the person having actual lawful possession of it, although the possessor may be holding it merely as agent of another; and it is not necessary to set forth in indictment the fact that person in whom ownership is laid is holding it merely as agent of real owner. Young v. State, 226 Ga. 553, 176 S.E.2d 52 (1970); Cline v. State, 153 Ga. App. 576, 266 S.E.2d 266 (1980); Miller v. State, 155 Ga. App. 587, 271 S.E.2d 719 (1980); Kent v. State, 157 Ga. App. 209, 276 S.E.2d 881 (1981).

Indictment need not use words "without consent" so long as that principle is somehow conveyed. — While it is undoubtedly true that there can be no robbery unless money or goods are taken without consent of owner, it is not essential that words "without consent" be stated in indictment, if equivalent words are employed, or if offense is charged in such language as to exclude any thought other than that the taking was without consent of owner. Shehany v. Lowry, 170 Ga. 70, 152 S.E. 114 (1930).

Indictment need not state separate value of each article taken. — Indictment charging defendant with offense of robbery by force from named person was not subject to demurrer for reason that it valued articles collectively, and did not state separate value of each. Burns v. State, 191 Ga. 60, 11 S.E.2d 350 (1940).

Sufficiency of indictment. — Trial court properly denied a defendant's motion for a directed verdict of acquittal as to the defendant's conviction for armed robbery based on an alleged insufficiency of the evidence based on what was stated in the indictment because there was no fatal variance when the indictment alleged that the armed robbery was committed by use of a handgun, and the evidence showed that the defendant used a BB gun. Palmer v. State, 286 Ga. App. 751, 650 S.E.2d 255 (2007), cert. denied, No. S07C1770, 2007 Ga. LEXIS 678 (Ga. 2007).

Because the testimony showed that the robbery victim referred to at trial was the same victim identified in the indictment, no fatal variance existed; while the state did not present any witnesses who referred to the victim by first and last name, the state did present testimony reflecting that a man had a backpack taken by force by the defendant, and the defendant referred to the victim by last name during the course of the defendant's own testimony. Boggs v. State, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Robbery by Force

Robbery by actual force implies violence. If there is any injury done to the person or if there is a struggle to retain possession of property before it is taken, it is force. Rivers v. State, 46 Ga. App. 778, 169 S.E. 260 (1933).

Force implies actual personal violence, struggle, and personal outrage. If there is any injury done the person, or if there is any struggle by the person to keep possession of property before the property is taken from the person, there will be sufficient force or actual violence to constitute robbery. Wallace v. State, 159 Ga. App. 793, 285 S.E.2d 194 (1981).

Force must be contemporaneous with obtaining possession of property. — Under O.C.G.A. § 16-8-40(a)(1), the force used to commit robbery must be employed contemporaneously with obtaining possession of the property. Dutton v. State, 199 Ga. App. 750, 406 S.E.2d 85 (1991), cert. denied, 199 Ga. App. 905, 406 S.E.2d 85 (1991).

When fist fight ensued between the victim and the robber, offense is robbery by force, not by intimidation. Taylor v. State, 135 Ga. App. 916, 219 S.E.2d 629 (1975).

Force implies actual personal violence, a struggle, and a personal outrage. If there is any injury done to the

Robbery by Force (Cont'd)

person, or if there is any struggle to keep possession of property before the property is taken from the person, there will be sufficient force or actual violence to constitute robbery. Henderson v. State, 209 Ga. 72, 70 S.E.2d 713 (1952).

Forcibly taking money or property from another for payment of demand against that person. — Violent taking of money or property from person of another by force or intimidation, without consent of owner, for purpose of converting same to use of taker for payment of demand claimed to be due the person by one from whom money or property is so taken, constitutes offense of robbery. Moyers v. State, 186 Ga. 446, 197 S.E. 846 (1938).

Use of force or intimidation only in effecting escape does not change larceny into robbery. Jackson v. State, 114 Ga. 826, 40 S.E. 1001, 88 Am. St. R. 60 (1902).

Using force to prevent recapture of article taken does not change larceny into robbery. Fanning v. State, 66 Ga. 167 (1880); Davis v. State, 24 Ga. App. 327, 100 S.E. 767 (1919).

Fact that victim makes no resistance does not aid defendant. — If element of force necessary to constitute robbery is present, it avails accused nothing if person robbed makes no resistance. McIntyre v. State, 41 Ga. App. 352, 152 S.E. 914 (1930).

For robbery not by force, victim must be conscious. Williams v. State, 9 Ga. App. 170, 70 S.E. 890 (1911); Bowen v. State, 16 Ga. App. 110, 84 S.E. 730 (1915).

To constitute robbery by force, it is not essential that victim be conscious as when the victim is beaten to unconsciousness prior to taking. Bowen v. State, 16 Ga. App. 110, 84 S.E. 730 (1915); Hines v. State, 16 Ga. App. 411, 85 S.E. 452 (1915).

Indictment insufficient to allege robbery by force. — Indictment for robbery by force, O.C.G.A. § 16-8-40(a)(1), was defective because the indictment failed to allege the essential element that the defendant took the "property of another," defined in O.C.G.A. § 16-8-1(3), and the defendant could admit all the allegations in the indictment and not be guilty of a crime. Defendant's general demurrer should have been granted. Cooks v. State, 325 Ga. App. 426, 750 S.E.2d 765 (2013).

Evidence of force was shown when the defendant took two 12-packs of beer from a store cooler, knocked a cashier aside, and ran out of the store with the beer. Dutton v. State, 199 Ga. App. 750, 406 S.E.2d 85 (1991), cert. denied, 199 Ga. App. 905, 406 S.E.2d 85 (1991).

Evidence that defendant grabbed the cashier's arm when the cashier opened the cash register to give the defendant change was sufficient to support a conviction of robbery by force, rather than theft by taking, even if the cashier managed to escape the defendant's grasp before the defendant took any money from the register. Watson v. State, 214 Ga. App. 650, 448 S.E.2d 718 (1994).

Confession admissible to support conviction. — Defendant's convictions for armed robbery and robbery by intimidation in violation of O.C.G.A. §§ 16-8-40(a)(2) and 16-8-41(a) were appropriate because the defendant's own confessions to participating in the crimes were corroborated by the testimony of the victims, among other evidence. Likewise, the defendant's codefendants' statements and testimony implicating the defendant in the crimes were corroborated by the defendant's confessions and the victims' testimony. Cantrell v. State, 299 Ga. App. 746, 683 S.E.2d 676 (2009).

Evidence sufficient to support conviction. — Evidence was sufficient to support a conviction where the defendant went into the victim's bedroom, grabbed the victim around the neck and demanded money, and then grabbed the victim's wallet and left. Spikes v. State, 247 Ga. App. 874, 545 S.E.2d 410 (2001).

Evidence was sufficient to convict defendant of robbery as it showed that defendant abducted the victim, that defendant agreed with two other assailants that they should cash a paycheck found on the victim's person, and that defendant drove the vehicle used to abduct the victim at least part of the time, including to a check-cashing store; thus, the evidence showed more than defendant's mere presence during the crime. Fulcher v. State, 259 Ga. App. 648, 578 S.E.2d 264 (2003).

Sufficient evidence supported defendant's conviction for robbery by entering an elderly person's home and taking money from the person by force; even though the person described defendant by another name and testified that defendant took an amount other than the amount the person originally reported, the jury was authorized to disregard that testimony and credit the person's statements made right after the crime that identified defendant, and which was corroborated by trial witnesses. Currington v. State, 259 Ga. App. 654, 578 S.E.2d 270 (2003).

There was sufficient evidence to support the trial court's conviction of defendant for armed robbery in violation of O.C.G.A. § 16-8-40, where defendant's claim that defendant was coerced into participating in the crime was found to be lacking in credibility. There was no showing by defendant of injuries sustained pursuant to defendant's claim that a gang, who remained unidentified, beat defendant up in order to coerce defendant to participate, nor was the fact that defendant was the sole occupant of the getaway car which took police on a high speed chase consistent with defendant's defense of coercion, and defendant's version of events in the store where the robbery occurred were flatly contradicted by the store cashier. Menefield v. State, 264 Ga. App. 171, 590 S.E.2d 180 (2003).

Viewed in the light most favorable to the verdict, the evidence sufficed for the jury to conclude that defendant was guilty of robbery by force when the evidence revealed that defendant punched the victim in the face, which caused the victim to lose consciousness, where, prior to the attack, the victim had at least $1,200 in the victim's wallet, where no one else was in the bathroom with defendant and the victim at the time that defendant knocked the victim unconscious, and where defendant ran out of the door just before the victim's friend entered the bathroom to find the victim regaining consciousness and realizing that the victim's money had been stolen. Robinson v. State, 267 Ga. App. 634, 600 S.E.2d 729 (2004).

Evidence supported defendant's conviction for malice murder and robbery by force because the defendant strangled the victim while the defendant and codefendant were riding in the victim's car and put the body in the trunk; the defendant told a friend that there were three people in the car, codefendant told the friend that the codefendant and defendant killed the victim, and they showed the friend the body; codefendant took money from the victim's sock, and the codefendant and defendant hid the body, retrieved it, and buried it, and defendant was driving the victim's car when the defendant was involved in an accident, which led to the discovery of the body. Shelton v. State, 279 Ga. 161, 611 S.E.2d 11 (2005).

Evidence supported defendant's conviction for robbery as a party under O.C.G.A. § 16-2-20(a), as it was defendant's idea to rob a store; the statements of defendant's three accomplices corroborated each other and there was additional evidence to corroborate those statements, including defendant's admissions that the defendant entered the store to see how many people were inside and reported it to the others and that the defendant divided the proceeds and kept a portion personally. Moore v. State, 274 Ga. App. 432, 618 S.E.2d 122 (2005).

Defendant's convictions for malice murder, burglary, robbery, aggravated assault, and concealing the death of another were supported by sufficient evidence because: (1) defendant broke into the office where the victim was living; (2) defendant hit the victim several times on the head and body with a pair of pliers; (3) defendant choked the victim with defendant's hands and arms, and with the pliers, until the victim was dead; (4) defendant took the victim's credit card and driver's license; and (5) defendant disposed of the victim's body. Young v. State, 280 Ga. 65, 623 S.E.2d 491 (2005).

Evidence was sufficient to support a robbery conviction based on the victim's testimony that the defendant threatened the victim with a knife and then threw the knife on the bed and where an officer found a knife lying on the bed; it was inconsequential that the defendant never touched the victim with the knife. Magana-Gonzalez v. State, 277 Ga. App. 195, 626 S.E.2d 167 (2006).

Robbery by Force (Cont'd)

Defendant's confession, and a victim's testimony that the defendant and the co-defendant threatened the victim with a knife and took the victim's money, were sufficient to support a conviction of robbery. Rivera v. State, 279 Ga. App. 1, 630 S.E.2d 152 (2006).

Defendant's convictions for robbery, battery, false imprisonment, and obstruction of an emergency telephone call were all upheld on appeal, as no error flowed from: (1) the trial court's admission of an audio recording of the attack on the victim and order granting the state two hearings regarding the admissibility of said recording; (2) the trial court's failure to give a curative instruction after the prosecutor injected a personal experience with domestic violence into the closing argument; (3) the trial court's failure to strike the testimony of similar transaction witnesses and issue a curative instruction; and (4) the trial court's order restricting the counsel's closing argument. Ellis v. State, 279 Ga. App. 902, 633 S.E.2d 64 (2006).

With regard to the defendant's conviction for robbery and related offenses, the victim's testimony, standing alone, was sufficient to establish the elements of the offense of robbery; however, the victim's testimony was corroborated by that of another witness, whose credibility was for the jury to have determined. Bills v. State, 283 Ga. App. 660, 642 S.E.2d 352 (2007).

There was sufficient evidence to support an adjudication of juvenile delinquency based on robbery by force after the victim identified the juvenile defendant as the leader of a group who caused the victim to fall off the victim's bicycle, grabbed the victim and ordered the victim to hand over the victim's money, hit the victim with a beer bottle, and searched the victim's pockets and took $20; under O.C.G.A. § 24-4-8, it was not necessary that the victim's testimony be corroborated. In the Interest of E.G., 286 Ga. App. 137, 648 S.E.2d 699 (2007).

There was sufficient evidence to support the defendant's conviction for robbery by use of force since the evidence established, via the testimony of the victim, that the defendant came into the victim's home to sell some items, that the defendant came into the victim's home uninvited, pushed the victim down, and took $500 from the victim's purse. Heath v. State, 291 Ga. App. 594, 662 S.E.2d 362 (2008).

Evidence that the defendant punched the victim in the jaw to force the victim to exit the victim's car, drove away, and admitted stealing the car to police was sufficient to convict the defendant of robbery by force or intimidation in violation of O.C.G.A. § 16-8-40(a)(1). Bridges v. State, 293 Ga. App. 783, 668 S.E.2d 293 (2008).

Defendant was properly convicted of armed robbery because the circumstantial evidence strongly supported a finding that the victim's body had been moved after the victim was shot by the defendant and that someone had gone through the victim's pockets; that evidence, together with testimony that the defendant returned to the defendant's group's vehicle with counterfeit money to split up, was sufficient to authorize a jury to find that every reasonable hypothesis was excluded except for the defendant's guilt of armed robbery. White v. State, 287 Ga. 208, 695 S.E.2d 222 (2010).

Evidence was sufficient to authorize the jury to find the defendant guilty of armed robbery and malice murder because the victim went missing shortly after coming into a substantial amount of cash, the defendant had access to the victim's home, and the defendant was seen driving around in the victim's two vehicles, selling the victim's property, and with a large amount of cash; the victim died from blunt trauma to the head, a mallet with blood on the mallet was found inside the house, and a witness testified that the defendant confided to the witness that the defendant killed the victim, placed the victim's body in a freezer, and took the victim's money. Cutrer v. State, 287 Ga. 272, 695 S.E.2d 597 (2010).

Rational trier of fact was authorized to find the defendant guilty beyond a reasonable doubt of being a party to the crime of robbery in violation of O.C.G.A. §§ 16-2-20 and 16-8-40 because the defendant's admission that the defendant was present at the scene of the robbery, in conjunction with the defendant's posses-

sion of the recently stolen item, which the jury could find was unsatisfactorily explained by the defendant, was sufficient to support the defendant's robbery conviction; the jury was entitled to reject the defendant's version of events because although the defendant contended that the defendant's videotaped police interview and the defendant's trial testimony created a reasonable hypothesis of innocence, the defendant's interview and trial testimony were not consistent with one another in all material respects, and the defendant's statements also were inconsistent with the testimony of the pursuing patrol officers. Boggs v. State, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Pursuant to O.C.G.A. § 16-2-20, because the defendant was not only present when a robbery was committed, but also actively aided and abetted the robbery's commission and received a portion of the money taken from the victim, the evidence was sufficient to find the defendant guilty of robbery by force beyond a reasonable doubt under O.C.G.A. § 16-8-40(a)(1). Brown v. State, 314 Ga. App. 375, 724 S.E.2d 410 (2012).

Sufficient evidence supported a defendant's convictions of robbery under O.C.G.A. § 16-8-40 and simple battery under O.C.G.A. § 16-5-23 when: (1) the defendant grabbed the victim by the throat, put the victim against a wall, and threw the victim onto a table; (2) the victim got a knife; (3) the defendant ran, taking the victim's gaming system and marijuana; and (4) the defendant's claim that the state's main witnesses were not credible was rejected as credibility was a jury matter. Slan v. State, 316 Ga. App. 843, 730 S.E.2d 565 (2012).

Evidence that the defendant and two others pulled the victim over, took the victim's vehicle and gun, grabbed the victim from behind and struck the victim, and took both the victim's vehicle and gun supported the defendant's convictions for robbery and theft by taking. Chambers v. State, 327 Ga. App. 663, 760 S.E.2d 664 (2014).

Included Offenses

Consolidation of indictments proper. — Trial court properly consolidated the indictments charging the defendant with armed robbery, criminal attempt to commit armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and theft by receiving stolen property because joinder was not prejudicial or erroneous since evidence of the various, intertwined crimes would have been admissible against the defendant had the indictments been tried separately; the trial court was authorized to find that the events in the indictments committed within a two-day period and involving guns and a car constituted a series of connected acts, and the connection between the robberies and the assaults helped identify defendant. Jackson v. State, 309 Ga. App. 796, 714 S.E.2d 584 (2011).

Robbery by force and armed robbery. — There was no merger of robbery by force and armed robbery when the evidence showed that the theft of the victim's pistol was accomplished by force and, subsequently, the defendant used the pistol to strike the victim's head and shoulders prior to stealing the victim's pocketbook. Denson v. State, 212 Ga. App. 883, 443 S.E.2d 300 (1994).

Robbery by intimidation and armed robbery. — Trial court properly charged the jury as to the lesser-included offense of robbery by intimidation as O.C.G.A. § 16-8-41 unequivocally provided that robbery by intimidation was a lesser-included offense of the offense of armed robbery; thus, in light of the evidence that the defendant robbed the victim by use of a firearm as an offensive weapon, which would authorize a conviction of armed robbery, the robbery by intimidation jury charge and conviction were authorized. Lancaster v. State, 281 Ga. App. 752, 637 S.E.2d 131 (2006).

Held not lesser included offense of armed robbery. — Trial court did not err in denying the defendant's request to charge on robbery by force as a lesser included offense of armed robbery since the person from whom the bank deposit was taken testified that the defendant was armed with a silver colored, stainless steel revolver. Regardless of whether a gun was ever recovered by law enforce-

Included Offenses (Cont'd)

ment officers or placed in evidence, the evidence proved the greater offense or none at all. Coker v. State, 207 Ga. App. 482, 428 S.E.2d 578 (1993).

Because the evidence showed a completed act of armed robbery under O.C.G.A. § 16-8-41, the trial court properly refused to instruct the jury on the lesser-included offense of robbery by intimidation under O.C.G.A. § 16-8-40(a)(2). Waters v. State, 294 Ga. App. 442, 669 S.E.2d 450 (2008).

Theft by taking not lesser included offense of armed robbery and robbery by intimidation. — Evidence showed that the defendant committed robbery either by use of a replica of a handgun or by intimidation and no evidence was presented that intimidation was not used in the robbery; therefore, the defendant was not entitled to a charge on theft by taking as a lesser included offense of armed robbery and robbery by intimidation. Espinoza v. State, 243 Ga. App. 665, 534 S.E.2d 127 (2000).

Failure to charge on robbery by intimidation. — Although robbery by intimidation is a lesser included offense of armed robbery, it is not error in an armed robbery case to fail to charge on robbery by intimidation where there is evidence of robbery by use of an offensive weapon, but no evidence of robbery by intimidation. Hill v. State, 228 Ga. App. 362, 492 S.E.2d 5 (1997).

Because the evidence showed the completed offense of armed robbery, and because the defendant did not deny that defendant's accomplices were armed, defendant was not entitled to a jury charge on the lesser included offense of robbery by intimidation. Brinson v. State, 245 Ga. App. 411, 537 S.E.2d 795 (2000).

Defendant's contention that the trial court should have granted defendant's motion for a directed verdict on armed robbery failed. The motion was mooted when defendant was convicted only of robbery, which does not require a weapon. Even if the trial court had directed a verdict on armed robbery, the lesser included charge of robbery by intimidation, which does not require evidence of the use of a weapon, would have still reached the jury. Smiley v. State, 260 Ga. App. 283, 581 S.E.2d 310 (2003).

When both robbery victims testified that the defendant wielded a gun during the robbery, and the defendant's accomplice, in a pretrial statement and in letters to the prosecutor, stated that the defendant used a gun to perpetrate the robbery, and when, even at trial, the accomplice did not deny that a gun was used during the robbery, the defendant, in a trial for armed robbery, was not entitled to a jury charge on the lesser included offense of robbery by intimidation. Jordan v. State, 278 Ga. App. 126, 628 S.E.2d 221 (2006).

No merger of robbery by intimidation and kidnapping. — When the defendant's kidnapping conviction was premised on the victim's testimony that after the defendant entered the victim's home without the victim's permission, the defendant forced the victim to move from a living room into the victim's bedroom with the insinuation that the defendant had a weapon, the crime of kidnapping was complete. Defendant's subsequent act of asking the victim for money and taking a bank envelope from the victim's purse without permission constituted the separate crime of robbery by intimidation. Hickey v. State, 267 Ga. App. 724, 601 S.E.2d 157 (2004).

Because a defendant forced the victim to drive to an abandoned house and then drove the victim through other neighborhoods before forcing the victim out of the car and refusing to return the victim's personal belongings, the defendant's convictions for kidnapping and robbery by intimidation under O.C.G.A. §§ 16-5-40(a) and 16-8-40 did not merge; pursuant to O.C.G.A. § 17-2-2(e), venue was proper in any county through which the vehicle traveled. Aldridge v. State, 310 Ga. App. 502, 713 S.E.2d 682 (2011).

Merger of aggravated battery and robbery offenses. — Trial court did not err in refusing to merge a defendant's robbery and aggravated battery offenses. The robbery offense required that the defendant, with intent to commit theft, took the property of the victim from the victim by use of force, O.C.G.A. § 16-8-40(a)(1), and the aggravated battery charge re-

quired proof that the defendant maliciously caused bodily harm to the victim by seriously disfiguring the victim's body or a member thereof, O.C.G.A. § 16-5-24(a). Taking property of the victim was not a fact required to establish aggravated battery, and causing serious disfigurement was not a fact required to establish robbery. Blanch v. State, 306 Ga. App. 631, 703 S.E.2d 48 (2010).

False imprisonment and robbery. — Trial court did not err in failing to merge false imprisonment with robbery because robbery did not require proof that the victim was confined and detained without legal authority, and false imprisonment did not require a theft. Bonner v. State, 308 Ga. App. 827, 709 S.E.2d 358 (2011).

Because the single continuous act of simple battery, O.C.G.A. § 16-5-23(a)(1), was the evidence required to show the "force" used to accomplish a robbery, O.C.G.A. § 16-8-40(a)(1), the defendant's battery convictions merged with the robbery conviction; the "use of force" charged in connection with the robbery was "hitting," which was the same type of force used in the continuous battery. Bonner v. State, 308 Ga. App. 827, 709 S.E.2d 358 (2011).

Merger of multiple counts of robbery. — Defendant's actions in taking the victim's cash and check card occurred simulationously and, thus, those counts should have merged but the taking of the car keys occurred at a separate time and thus did not merge. Andrews v. State, 328 Ga. App. 344, 764 S.E.2d 553 (2014).

Robbery by intimidation and theft by taking as lesser offenses of armed robbery. — When evidence on behalf of the defendant denied the charge of armed robbery, and was such that the evidence would have authorized jury to find the defendant guilty of either of the two lesser offenses of robbery by intimidation or theft by taking, failure of the trial court to charge on robbery by intimidation and theft by taking requires the grant of new trial. Hensley v. State, 228 Ga. 501, 186 S.E.2d 729 (1972).

There is no error in failing to charge on robbery by intimidation as a lesser included offense of armed robbery when all the credible evidence showed completion of the greater offense and no request was made for the charge. Lawrence v. State, 235 Ga. 216, 219 S.E.2d 101 (1975).

It is not error in an armed robbery case to fail to charge on robbery by intimidation where there is evidence of robbery by use of an offensive weapon, but no evidence of robbery by intimidation. Bixby v. State, 234 Ga. 812, 218 S.E.2d 609 (1975).

When the defendant, convicted of armed robbery, not only denied using a knife but denied orally threatening the victim, the evidence did not authorize charges on the lesser-included offenses of robbery and theft by taking. Hunter v. State, 261 Ga. App. 276, 582 S.E.2d 228 (2003).

Offenses of robbery and armed robbery did not merge as a matter of law, where separate incidents (simple taking of the pistol and then taking the other items at gunpoint) involved different actions, different specific objectives or intents, and different victims. Millines v. State, 188 Ga. App. 655, 373 S.E.2d 838 (1988).

Theft by taking as lesser included offense of robbery by intimidation. — It is not error to fail to charge defendant with theft by taking, as lesser offense included in charge of armed robbery or robbery by intimidation, unless evidence authorizes a finding of lesser offense. Sanders v. State, 135 Ga. App. 436, 218 S.E.2d 140 (1975).

Theft by taking as lesser included offense of robbery by sudden snatching. — In a prosecution for robbery by sudden snatching, where there was evidence to support defendant's written request to charge on the lesser included offense of theft by taking, the trial court's failure to give the requested charge was reversible error. King v. State, 214 Ga. App. 311, 447 S.E.2d 645 (1994).

Theft by deception as lesser included offense of robbery by sudden snatching. — In a prosecution for robbery by sudden snatching, where the evidence showed that defendant took cigarettes from the counter while the store clerk was distracted and did not show that the clerk was fraudulently induced to part with the cigarettes, the trial court's failure to give requested charge on theft by deception was not error. King v. State, 214 Ga.

Included Offenses (Cont'd)

App. 311, 447 S.E.2d 645 (1994).

Theft as lesser included offense when wallet taken from extremely intoxicated victim. — In a probation revocation case when the defendant removed a wallet from the pocket of an extremely intoxicated victim, the evidence did not support a showing that the defendant committed the offense of robbery under O.C.G.A. § 16-8-40(a), only the lesser included offense of theft under O.C.G.A. § 16-8-2; even if the evidence showed robbery by sudden snatching, the victim was not aware of the taking before the taking was completed and there was no evidence of constructive force supplied by intimidation, threat, or other means. Franklin v. State, 286 Ga. App. 288, 648 S.E.2d 746 (2007).

Shoplifting as lesser included offense of robbery by sudden snatching. — In a prosecution for robbery by sudden snatching, defendant's requested charge on shoplifting was not a complete and accurate statement of the law and, even though due to a typographical error was properly refused by the trial court; nevertheless, circumstances in the case reasonably raised the inference that defendant committed theft by shoplifting and authorized a proper request to charge on that offense. King v. State, 214 Ga. App. 311, 447 S.E.2d 645 (1994).

Motor vehicle theft as lesser included offense of robbery as matter of fact. — Since motor vehicle theft is not included under robbery as a matter of law, motor vehicle theft is a lesser included offense under robbery as a matter of fact in each case. Doucet v. State, 153 Ga. App. 775, 266 S.E.2d 554 (1980).

Simple battery not included offense. — Since simple battery focuses on injury to the person while robbery by force involves the taking of property from the person of another by doing physical violence to the victim, simple battery is not as a matter of law an offense included in robbery by force. Givens v. State, 184 Ga. App. 498, 361 S.E.2d 830, cert. denied, 184 Ga. App. 909, 361 S.E.2d 830 (1987).

Assault and battery as lesser offense of robbery. — When the defendant struck the victim, this alone amounts to assault and battery; but, as this amounted to injury to person done by actual force, and other elements of robbery were superadded, assault and battery lost its identity and was merged into greater crime of robbery. Rivers v. State, 46 Ga. App. 778, 169 S.E. 260 (1933).

Burglary and robbery are not lesser included offenses. — Statutory definitions of burglary and robbery make it clear that legislature intended to prohibit two designated kinds of general conduct, and that the two crimes, which are codified in separate chapters, are not established by same proof of all facts, thus neither crime is a lesser, or included, offense of the other as a matter of law or fact. Moore v. State, 140 Ga. App. 824, 232 S.E.2d 264 (1976).

No double jeopardy violation occurred when defendant was convicted of and sentenced for both burglary and robbery. Luke v. State, 171 Ga. App. 201, 318 S.E.2d 833 (1984).

Neither burglary nor robbery is a lesser or included offense of the other as a matter of law or fact for the facts must differ to convict for each offense. Luke v. State, 171 Ga. App. 201, 318 S.E.2d 833 (1984); Williams v. State, 178 Ga. App. 581, 344 S.E.2d 247 (1986).

Kidnapping is not included in crime of robbery as a matter of law. Chambley v. State, 163 Ga. App. 502, 295 S.E.2d 166 (1982).

Aggravated assault conviction merged with robbery conviction where victim was placed in fear of receiving bodily injury before the victim's money was taken. Luke v. State, 171 Ga. App. 201, 318 S.E.2d 833 (1984).

Defendants' robbery and aggravated assault convictions, under O.C.G.A. §§ 16-5-21 and 16-8-40, merged because, while aggravated assault did not require taking property from another, aggravated assault was proved by the same or less than all facts required to show robbery, as the assault forming the basis of the aggravated assault with intent to rob, which was pointing a pistol at the victim, was "contained within" the element of robbery requiring the defendants to have used force, intimidation, threat or coercion, or

placed the victim in fear of immediate serious bodily injury. Washington v. State, 310 Ga. App. 775, 714 S.E.2d 364 (2011).

Robbery and kidnapping did not merge as matter of fact. — When the facts supporting robbery charge included taking of property in presence of boys, and facts showing appellant's additional conduct of forcing the boys into various rooms and the attic and tying the boys were incidental to, but not part of, the robbery, that conduct constituted a separate crime, kidnapping, which did not merge with the robbery as a matter of fact. Chambley v. State, 163 Ga. App. 502, 295 S.E.2d 166 (1982).

Robbery by Snatching

As to origin of provision regarding robbery by snatching. — See Hickey v. State, 125 Ga. 145, 53 S.E. 1026 (1906).

Robbery by sudden snatching. — Robbery by sudden snatching occurs where any other force is used than is necessary for thief to obtain possession of property from owner who is off guard and where there is no resistance by owner or injury to the owner's person. Rivers v. State, 46 Ga. App. 778, 169 S.E. 260 (1933); Edwards v. State, 224 Ga. 684, 164 S.E.2d 120 (1968).

Evidence showing that the defendant entered a restaurant and intentionally confused the cashier so that the cashier would give the defendant too much money in exchange for certain large bills, and that, when the cashier stated a need to get the manager, the defendant grabbed the restaurant's money from the cashier's hand and ran was sufficient for conviction of theft by snatching. Burns v. State, 245 Ga. App. 332, 537 S.E.2d 768 (2000).

Evidence was sufficient to sustain the defendant's conviction for robbery by sudden snatching, under O.C.G.A. § 16-8-40(a)(3), when the defendant admitted going to the victim's house, witnesses saw the defendant running from the house with a purse in the defendant's hand, and the victim was less than six feet from the purse when the purse was taken. Williams v. State, 261 Ga. App. 793, 584 S.E.2d 64 (2003).

Although the victim never saw the defendant with the wallet, there was sufficient evidence to show that at the moment the defendant's companion darted in front of the victim's cart distracting the victim's attention, the defendant snatched the wallet from the victim's purse; despite the victim's detection of the defendant's efforts, nothing more was needed to prove the elements of the crime of robbery by sudden snatching. Andrews v. State, 270 Ga. App. 362, 606 S.E.2d 587 (2004).

Defendant's Georgia robbery by sudden snatching conviction counted as a crime of violence under U.S. Sentencing Guidelines Manual § 2K2.1 because that crime involves conduct that presents a serious potential risk of physical injury to another. If a sudden snatching victim perceives what is going on, the victim will ordinarily attempt to resist the snatching such that a violent encounter is reasonably likely to ensue, which presents a substantial risk of physical injury to the victim. United States v. Cooper, No. 15-11546, 2017 U.S. App. LEXIS 7347 (11th Cir. Apr. 26, 2017) (Unpublished).

Robbery by snatching involves element of force, and this must be included in charge to jury. Moore v. State, 20 Ga. App. 190, 92 S.E. 963 (1917).

Force is implicit in sudden snatching, both as a fact and as a legal proposition, the force being that effort necessary for the robber to transfer the property taken from the owner to the robber's possession. Dotson v. State, 160 Ga. App. 898, 288 S.E.2d 608 (1982).

Robbery by snatching where victim aware of theft. — When the store clerk's testimony indicated that the clerk was aware the defendant was stealing cigarettes from the counter, this evidence was sufficient to support the defendant's conviction of robbery by sudden snatching. King v. State, 214 Ga. App. 311, 447 S.E.2d 645 (1994).

Elements of robbery by snatching were satisfied where the victim saw defendant when defendant "reached in and grabbed" the victim's bag from the floor of the victim's vehicle as both of them were standing by the passenger door. Lawson v. State, 224 Ga. App. 645, 481 S.E.2d 856 (1997).

Evidence that the victim heard someone hit the victim's shopping cart while the

Robbery by Snatching (Cont'd)

victim was turned away getting an item in a grocery store, and that the victim turned and saw defendant running away with the victim's purse was sufficient to convict defendant of robbery by sudden snatching. Moore v. State, 265 Ga. App. 511, 594 S.E.2d 734 (2004).

Sufficient evidence supported defendant's conviction for robbery by snatching where the victim testified that the victim was aware of defendant getting close but did not want to tangle with defendant when defendant grabbed the victim's purse. Hughes v. State, 266 Ga. App. 652, 598 S.E.2d 43 (2004).

Defendant's conviction of robbery by snatching, O.C.G.A. § 16-8-40(a)(3), was supported by sufficient evidence that, from a distance of about 10 feet, a store owner watched the defendant pull a money bag from under a display on the counter and put it in the defendant's coat, and that the owner immediately confronted the defendant. Kendrick v. State, 279 Ga. App. 263, 630 S.E.2d 863 (2006).

Because the undisputed facts showed that the victim was conscious of the crime as the crime was being committed, the trial court's refusal to charge the jury on theft by taking as a lesser-included offense of robbery by snatching was not erroneous. Bettis v. State, 285 Ga. App. 643, 647 S.E.2d 340 (2007), cert. denied, No. S07C1535, 2007 Ga. LEXIS 862 (Ga. 2007).

Evidence was sufficient to show that a wallet was taken from the victim's "immediate presence" and that the victim was conscious of the robbery as the robbery occurred since the victim saw the defendant take the wallet from a cart only six feet away; the victim of a robbery by sudden snatching need not become aware of the taking prior to the taking, and it is sufficient if the evidence shows that the victim became aware of the taking as the crime was being committed. Brown v. State, 309 Ga. App. 511, 710 S.E.2d 674 (2011).

Immediate presence. — Since evidence showed the victim was less than six feet from her purse when the purse was taken, in a small, compact, mobile home, the purse was taken from her "immediate presence" pursuant to O.C.G.A. § 16-8-40(a)(3). Perkins v. State, 256 Ga. App. 449, 568 S.E.2d 601 (2002).

Victim's unawareness that purse had been taken until the crime was completed precluded conviction for robbery by sudden snatching. McNearney v. State, 210 Ga. App. 582, 436 S.E.2d 585 (1993); Grant v. State, 226 Ga. App. 506, 486 S.E.2d 717 (1997).

Because the state's evidence failed to show that the robbery victim was aware that something was being taken before that taking was complete, the defendant was entitled to a directed verdict of acquittal on a robbery by sudden snatching charge; however, given that: (1) the defendant gained entry to a back office by passing through a storage area, and the jury implicitly rejected an argument that the absence of an "Employees Only" sign meant, despite the victim's testimony to the contrary, that the defendant had permission to enter either the storage area or the office; and (2) the defendant admitted to entering the office without permission, took a cash bag, and reentered the store in a manner intended to hide the defendant from view, a burglary conviction was upheld. Smith v. State, 281 Ga. App. 91, 635 S.E.2d 385 (2006).

Robbery by snatching where victim scuffled with defendant. — When the evidence showed that a store clerk, in charge of the store during the owner's absence, had attempted in a scuffle to prevent the defendant from stealing the money, the defendant was properly convicted of robbery by snatching. Crockett v. State, 177 Ga. App. 92, 338 S.E.2d 538 (1985).

Theft by taking was not lesser included offense of robbery by sudden snatching where the victim saw the defendant take her purse out of her grocery cart when it was no more than two feet away from her. Bryant v. State, 213 Ga. App. 301, 444 S.E.2d 391 (1994).

Evidence of prior robbery by snatching. — Evidence as to commission of another robbery by snatching was erroneously admitted into evidence and did not tend to show that the robbery was a pattern crime and the handiwork of defen-

dant. Where the only connection between the two crimes was that they both were robberies committed by sudden snatching of property from a victim, they were not closely related in time, having occurred 18 months apart, they were not related as to locality, having occurred only within the same county, they were not related as to the similarity of property stolen, and they were not related as to the modus operandi. Higginbotham v. State, 207 Ga. App. 424, 428 S.E.2d 592 (1993).

Victim over age 65. — Conviction of robbery by snatching from a person over age 65 in violation of O.C.G.A. § 16-8-40(a)(3) and (c) was supported by sufficient evidence including: an eyewitness identification; defendant's unique clothing, which both the eyewitness and the victim identified; defendant's presence in the vicinity of the crime shortly after it occurred; and defendant's flight from the police. McDonald v. State, 256 Ga. App. 369, 568 S.E.2d 588 (2002).

Evidence sufficient for conviction of robbery by snatching. — Sufficient evidence supported the defendant's conviction for robbery by snatching, under O.C.G.A. § 16-8-40(a), as: (1) the evidence was sufficient to convict a codefendant of the same crime so it was sufficient to convict the defendant as a party to that crime under O.C.G.A. § 16-2-20(b)(3); and (2) the fact that no one saw the defendant with the victim's wallet or with the codefendant was inapposite as the victim saw the two of them in the same vicinity simultaneously. Barker v. State, 275 Ga. App. 213, 620 S.E.2d 457 (2005).

Evidence supported a defendant's conviction of robbery by sudden snatching. A pedestrian identified the defendant from a photographic lineup as the driver who snatched the victim's purse; the victim took down the car's license number; an officer saw the defendant driving the car and learned that the defendant often used the car; and the defendant previously pled guilty to two separate incidents of robbery by sudden snatching of a purse. Russell v. State, 288 Ga. App. 372, 654 S.E.2d 185 (2007).

Even if the defendant did not ever have physical possession of the money bag, there was sufficient evidence to support a robbery conviction under O.C.G.A. § 16-2-20 as: (1) after a struggle, the victim's money bag was taken by an assailant wearing a sweatshirt; (2) the victim identified the truck used in the robbery, the money bag, and the sweatshirt worn by the assailant; (3) the truck fled from police and then the suspects fled on foot; (4) defendant and codefendant were apprehended after a foot chase; and (5) the money bag was found in a nearby bush. Robertson v. State, 277 Ga. App. 231, 626 S.E.2d 206 (2006).

Sufficient evidence supported the defendant's robbery by snatching conviction as: (1) the victim got a good look at the defendant from about three feet away, immediately was able give a description to police, only a short time passed between the robbery and the identification, and the victim had a clear opportunity to see the robber up close during the middle of the day; and (2) trial counsel was not ineffective for failing to move to suppress evidence regarding the cash found in the defendant's pocket as that motion would have been denied. Fitzgerald v. State, 279 Ga. App. 67, 630 S.E.2d 598 (2006).

Testimony of a purse snatching victim that a juvenile was the one who snatched her purse was sufficient to support the adjudication of the juvenile as delinquent for robbery in violation of O.C.G.A. § 16-8-40(a)(3), although another witness testified that the witness, not the juvenile, snatched the victim's purse. The victim had ample opportunity to observe the juvenile while the victim wrestled with the juvenile for the purse and afterward, when the juvenile was detained by a bystander. In the Interest of B.L.L., 300 Ga. App. 208, 684 S.E.2d 352 (2009).

Evidence that a perpetrator grabbed money from the open cash registers in two establishments in the presence of employees and limited evidence, permitted a jury to conclude that the defendant was the perpetrator, including the law-enforcement officer's testimony as well as the jury's ability to reach that same conclusion after viewing the surveillance videos was sufficient to support a conviction for robbery by sudden snatching. Owens v. State, 317 Ga. App. 821, 733 S.E.2d 16 (2012).

Robbery by Snatching (Cont'd)

Evidence was sufficient to support the appellant's conviction of robbery by sudden snatching as, despite the appellant's contention to the contrary, the appellant was seen as the man with a red jacket who had snatched a purse from a woman's restroom and was the man chased and arrested that night. Martinez v. State, 337 Ga. App. 374, 787 S.E.2d 308 (2016).

Evidence sufficient for conviction of robbery by snatching and robbery by intimidation. — Evidence supplied by both victims, which included identification of the defendant by both victims as the perpetrator in photo line-ups and at trial, similar transaction evidence, prior convictions, a videotape of the crime, and exculpatory statements made by the defendant, supported robbery by snatching and robbery by intimidation convictions under O.C.G.A. § 16-8-40. Felder v. State, 260 Ga. App. 27, 579 S.E.2d 28 (2003).

Improper comment by court required reversal. — Because the trial court erroneously commented on the defendant's refusal to make a post-arrest statement to police, and the error, absent a curative instruction, was not harmless or the result of inadvertence, the defendant's robbery by sudden snatching conviction was reversed; thus, the trial court erred in denying the defendant a new trial on those grounds. Wright v. State, 287 Ga. App. 593, 651 S.E.2d 852 (2007).

Application

Evidence sufficient for conviction. — See Huff v. State, 167 Ga. App. 831, 308 S.E.2d 20 (1983); Smith v. State, 168 Ga. App. 92, 308 S.E.2d 226 (1983); Carter v. State, 168 Ga. App. 177, 308 S.E.2d 438 (1983); Hambrick v. State, 174 Ga. App. 444, 330 S.E.2d 383 (1985); Williams v. State, 178 Ga. App. 80, 342 S.E.2d 18 (1986); Brown v. State, 179 Ga. App. 538, 346 S.E.2d 908 (1986); Mitchell v. State, 179 Ga. App. 421, 347 S.E.2d 1 (1986); Jones v. Kemp, 794 F.2d 1536 (11th Cir.), cert. denied, 479 U.S. 965, 107 S. Ct. 466, 93 L. Ed. 2d 411 (1986); Daniel v. State, 180 Ga. App. 179, 348 S.E.2d 720 (1986); Cunningham v. State, 182 Ga. App. 266, 355 S.E.2d 762 (1987); McCounly v. State, 191 Ga. App. 266, 381 S.E.2d 552 (1989); Keener v. State, 215 Ga. App. 117, 449 S.E.2d 669 (1994); Wright v. State, 222 Ga. App. 613, 475 S.E.2d 670 (1996); Hodges v. State, 222 Ga. App. 381, 474 S.E.2d 218 (1996); Davis v. State, 223 Ga. App. 346, 477 S.E.2d 639 (1996); Shropshire v. State, 224 Ga. App. 504, 480 S.E.2d 919 (1997); Jackson v. State, 226 Ga. App. 604, 487 S.E.2d 142 (1997); Anderson v. State, 228 Ga. App. 617, 492 S.E.2d 252 (1997); Locklin v. State, 228 Ga. App. 696, 492 S.E.2d 712 (1997); Boone v. State, 229 Ga. App. 379, 494 S.E.2d 100 (1997); In re M.G., 233 Ga. App. 23, 503 S.E.2d 302 (1998); Burks v. State, 239 Ga. App. 427, 521 S.E.2d 416 (1999); Johnson v. State, 247 Ga. App. 157, 543 S.E.2d 439 (2000); King v. State, 246 Ga. App. 100, 539 S.E.2d 614 (2000).

Testimony by the victim, in which the victim positively identified the defendant as the man who entered the victim's home, and committed the crimes of robbery by intimidation, kidnapping, aggravated assault, aggravated assault with a knife, aggravated battery and possession of a knife during the commission of a crime, charged in the indictment and eyewitness testimony that defendant entered the victim's premises minutes before the attack of the victim was sufficient to authorize the jury's finding that defendant was guilty, beyond a reasonable doubt, of committing the crimes charged in the indictment. Mobley v. State, 211 Ga. App. 709, 441 S.E.2d 73 (1994).

In light of the overwhelming evidence produced at trial, even though one victim expressed some uncertainty regarding defendant's identity, a rational trier of fact could determine defendant's guilt beyond a reasonable doubt of armed robbery, aggravated assault, and possession of a firearm by a convicted felon. Billings v. State, 212 Ga. App. 125, 441 S.E.2d 262 (1994).

Evidence was sufficient to convict defendant of robbery, aggravated assault, felony obstruction of a law enforcement officer, attempting to elude a law enforcement officer and driving under the influence of drugs. Chisholm v. State, 231 Ga. App. 835, 500 S.E.2d 14 (1998).

Evidence in the form of testimony from defendant's accomplices that defendant

repeatedly struck the victim in the face while asking the victim "where the money was" and choked the victim when the victim could not immediately find the money in the victim's truck after defendant took the victim to the truck because the victim told defendant that the money was there, coupled with defendant's possession of the victim's beeper, was sufficient to sustain defendant's convictions for robbery, kidnapping with bodily injury, and aggravated battery. Rutledge v. State, 263 Ga. App. 308, 587 S.E.2d 808 (2003).

Evidence was sufficient to support defendant's conviction for robbery by intimidation where defendant demanded money from the victim while displaying a knife that, although closed, had a quick release button, and fearing for personal safety and that of the victim's spouse, the victim gave defendant money. Ogden v. State, 266 Ga. App. 399, 597 S.E.2d 491 (2004).

Notwithstanding the inability of a cab driver and a victim to positively identify defendant at trial, the evidence was sufficient to support defendant's robbery conviction where: (1) a cab driver chased defendant from the time that defendant snatched the victim's purse until the driver caught defendant; (2) the cab driver did not lose sight of defendant during the chase; (3) the cab driver held defendant until the police took custody of the defendant; and (4) the cab driver and the victim identified defendant as the victim's assailant when the defendant was first captured. Lawrence v. State, 267 Ga. App. 515, 600 S.E.2d 444 (2004).

Robbery of a jailer. — Evidence was sufficient to convict the defendant of robbery, under O.C.G.A. § 16-8-40(a), and false imprisonment, under O.C.G.A. § 16-5-41(a), after the defendant tricked a jailer into letting the defendant out of the defendant's cell, subsequently elbowed the jailer in the stomach, spun the jailer around, locked the jailer in the cell, and retrieved the jailer's key from the floor where it had fallen during the scuffle. Forehand v. State, 270 Ga. App. 365, 606 S.E.2d 589 (2004).

Robbery of a safe. — Defendant's convictions for armed robbery, possession of a firearm during the commission of a crime, robbery by intimidation, and criminal damage to property in the second degree were supported by sufficient evidence because, inter alia, defendant's sibling let the defendant and two others into a restaurant after hours, the defendant pointed a gun at the sibling's coworker, and then beat on a safe and pried open the cash registers looking for money; all four coconspirators involved, including the defendant, gave statements to police implicating themselves and their codefendants, and a bill was introduced showing that repair of the safe damaged during the robbery attempt cost $1,000.00. Polite v. State, 273 Ga. App. 235, 614 S.E.2d 849 (2005).

Robbery conviction supported by use of stick. — Evidence showing that the defendant took the victim's property by attacking the victim with a stick was sufficient to support the defendant's robbery conviction. Hernandez v. State, 274 Ga. App. 390, 617 S.E.2d 630 (2005).

Because a victim's identification of the defendant as the robber was corroborated by other witnesses, the evidence was sufficient to support the defendant's conviction for armed robbery as well as to provide probable cause for a search warrant; because it was proper for the witnesses to identify the defendant from a videotape, the trial court did not err by denying the defendant's motions to suppress and in limine. Bradford v. State, 274 Ga. App. 659, 618 S.E.2d 709 (2005).

Evidence sufficient for attempted robbery. — Evidence was sufficient to support the defendant's conviction for aggravated assault and attempted robbery; the description of the crimes as the crimes occurred by a witness to a 9-1-1 operator, the 9-1-1 tape transcript of that call, the observations of the police officers who responded to the call of the witness that an African-American person was beating a Hispanic person with a baseball bat while trying to take money out of the Hispanic person's pockets, and the testimony of the witness at trial was sufficient to overcome evidence that the witness gave a false name to police, that the witness was unable to identify the defendant at trial, and that the victim did not testify at trial. Williams v. State, 275 Ga. App. 491, 621 S.E.2d 512 (2005).

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Defendant's convictions for robbery, burglary, and false imprisonment, in violation of O.C.G.A. §§ 16-8-40(a), 16-7-1(a), and 16-5-41(a), respectively, were supported by sufficient evidence because the victim and a codefendant both positively identified the defendant as a participant in a criminal event, wherein three individuals burst into the victim's apartment, robbed the victim at gunpoint, and tied the victim up; the lack of physical evidence did not alter the sufficiency as the identification testimony from a photographic line-up and at trial was within the trier of fact's credibility determination, and denial of the defendant's new trial motion under O.C.G.A. § 5-5-23 was proper. Tucker v. State, 275 Ga. App. 611, 621 S.E.2d 562 (2005).

Because the state presented sufficient evidence from multiple witnesses that the defendant was the person who took the one victim's purse, including another victim's identification of the defendant the night of the robbery, and the credibility of the witnesses presented at trial, and the accuracy of their identifications, were matters for the jury, the defendant's robbery conviction was supported by sufficient evidence; hence, the defendant's "mere presence" argument was rejected. Brown v. State, 281 Ga. App. 463, 636 S.E.2d 177 (2006).

Delinquency for juvenile taking cigarettes by force. — There was sufficient evidence to support an adjudication for delinquency based on criminal attempt to commit robbery under O.C.G.A. §§ 16-4-1 and 16-8-40; a rational trier of fact was authorized to find that the defendant, in "reaching at" the victim and grabbing the victim's jacket prior to shooting the victim, attempted to take the victim's cigarettes by force, intimidation, or sudden snatching. In the Interest of B.S., 284 Ga. App. 680, 644 S.E.2d 527 (2007).

Although the victim could not identify the defendant as the robber, there was sufficient evidence to support the defendant's robbery conviction: witnesses saw the robber leave in a tan truck driven by someone else; the tan truck sped away from police officers; when officers stopped the truck, the defendant, the passenger, ran away; a money bag stolen in the robbery was found in a bush near the truck; the sweatshirt the robber wore was found in the truck; and the truck was registered to the defendant and was driven by a co-worker of the victim who was familiar with the victim's routine of making bank deposits. Lee v. State, 284 Ga. App. 435, 644 S.E.2d 196 (2007).

Armed robbery by taking cash and blank checks from deceased parent. — In a case wherein a defendant confessed that after killing the defendant's mother the defendant took cash and blank checks from the mother's purse and drove away in the mother's car, sufficient evidence existed to support the defendant's conviction for armed robbery and theft by taking a motor vehicle, in addition to the defendant's conviction for malice murder; as a result, the trial court did not err by denying the defendant's motion for a directed verdict of acquittal on the counts charging armed robbery and theft by taking a motor vehicle. Hester v. State, 282 Ga. 239, 647 S.E.2d 60 (2007).

Because the state presented sufficient evidence supporting the convictions entered against the first two defendants, a letter one of the defendants wrote was admissible against all as a statement of a coconspirator; no error resulted from the admission of a red baseball bat; and the first defendant's trial counsel was not ineffective. The first defendant's convictions of armed robbery and possession of a firearm during the commission of a felony and the second defendant's convictions of the lesser included offense of robbery were upheld on appeal. Williamson v. State, 285 Ga. App. 779, 648 S.E.2d 118 (2007).

Defendant's aggravated assault and robbery convictions were upheld on appeal as evidence including the defendant's admission and flight from the scene authorized the jury to conclude that the defendant went to an apartment complex intending to participate in the robbery, and in fact participated in the robbery by acting as a lookout and an additional show of force; hence, the jury was authorized to infer criminal intent from the defendant's conduct before, during, and after the commission of the crime. Millender v. State,

286 Ga. App. 331, 648 S.E.2d 777 (2007), cert. denied, No. S07C1717, 2008 Ga. LEXIS 80 (Ga. 2008).

Armed robbery of pizza delivery man. — Defendant's conviction for armed robbery of a pizza delivery man was upheld on appeal since any error raised on appeal was not properly preserved for appellate review; even if preserved, any error was found harmless in light of the overwhelming evidence of the defendant's guilt established by an accomplice's testimony and the identification of the defendant by the victim. Johnson v. State, 287 Ga. App. 533, 652 S.E.2d 179 (2007).

Court rejected a defendant's argument that the victim had volunteered money and that there was thus no robbery in a case when the defendant had raped the victim and said that the victim would not be going home; the record showed that the victim feared that the victim would not see the victim's family again if the defendant and the victim left the area and that the victim had therefore reminded the defendant of the money on the victim's credit cards to keep the defendant from driving toward the interstate. Smith v. State, 287 Ga. App. 222, 651 S.E.2d 133 (2007).

Single witness can support robbery conviction. — Evidence of a single eyewitness, specifically, the victim, was sufficient to support the defendant's robbery conviction. Scott v. State, 288 Ga. App. 738, 655 S.E.2d 326 (2007).

Upon reviewing the evidence in the light most favorable to the verdict, the Supreme Court of Georgia found that sufficient evidence was presented to support the defendant's malice murder and robbery convictions including evidence regarding the defendant's actions after the commission of the crimes, properly admitted DNA evidence, and the defendant's confession. Carter v. State, 283 Ga. 76, 656 S.E.2d 524 (2008).

Despite waiving error regarding a show up identification because: (1) a victim's identification of the defendant as one of the perpetrators of a burglary, robbery, and battery was sufficient and non-suggestive; and (2) the corroborating testimony from the defendant's two accomplices was admissible to support the defendant's convictions as both accomplices testified as to the defendant's involvement in the crimes, those convictions were upheld on appeal; thus, a new trial was properly denied. Carr v. State, 289 Ga. App. 875, 658 S.E.2d 419 (2008).

Single witness can support robbery conviction. — Victim's testimony alone, including the victim's identification of the defendant as the perpetrator, was sufficient to establish the essential elements of robbery. Thomas v. State, 322 Ga. App. 734, 746 S.E.2d 216 (2013).

Bank teller's testimony, including the bank teller's identification of the defendant as the robber and the bank teller's description of being very scared, was sufficient, standing alone, to support the defendant's robbery conviction. Coleman v. State, 325 Ga. App. 700, 753 S.E.2d 449 (2014).

Robbery of marijuana. — Evidence was sufficient to support two defendants' conviction of felony murder based on robbery when the defendants and a third person arranged to meet the victim to buy marijuana but decided before the meeting to take the marijuana instead; the first defendant brought a pistol and handed the pistol to the third person; the defendants and the third person ran away after the victim handed them the marijuana; and the third person fatally shot the victim when the victim pursued the three. Allen v. State, 283 Ga. 304, 658 S.E.2d 580 (2008).

Evidence supported the defendant's convictions of burglary, kidnapping with bodily injury, rape, aggravated assault, robbery, and theft by taking when a treating physician stated that the 86-year-old victim's injuries, including blood inside her vagina and bruises and contusions on her vagina, were consistent with forcible penetration; when the defendant admitted entering the victim's home, removing her clothing, restraining her with electrical cords, hitting her, putting a plastic bag over her head, forcing her from one room to another, and taking her money and her car; and when DNA from the defendant matched the DNA of two hair roots found on the victim's living room floor. Smith v. State, 291 Ga. App. 545, 662 S.E.2d 323 (2008).

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Armed robbery of a grocery store. — There was sufficient evidence to support a defendant's conviction for armed robbery of a grocery store as the state met the state's burden of proving that the fingerprints taken from a cash register that the robber touched and opened could only have been impressed at the time the crime was committed and that the fingerprints matched the defendant's fingerprints. Moreover, the defendant's association with the car seen at the time of the robbery, the defendant's knowledge of a planned robbery, and the close match between the defendant's description and that of the robber all corroborated the fingerprint evidence against the defendant. Reid v. State, 293 Ga. App. 453, 667 S.E.2d 221 (2008).

Juvenile delinquency from robbery of pocketbook. — Pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the defendant juvenile's statements to the police corroborated an accomplice's testimony that the juvenile struck a woman unconscious, caused her serious bodily injury, used force to steal her pocketbook, and dragged her down onto her front yard; accordingly, the evidence was sufficient to adjudicate the juvenile delinquent under O.C.G.A. §§ 16-5-21(a)(2), 16-5-40(a), and 16-8-40(a)(1). In re D. T., 294 Ga. App. 486, 669 S.E.2d 471 (2008).

Cons. — Evidence was sufficient to support the defendant's conviction for conspiracy to commit armed robbery because evidence was presented that the defendant and a codefendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed that the defendant heard gunshots and left the restaurant, while the codefendant gave a similar statement to the police. Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Evidence was sufficient to support the defendant's convictions for felony murder and armed robbery. One witness testified that the witness saw the defendant and the defendant's accomplice chasing the victim just prior to the shooting, while other witnesses testified that the witnesses saw the defendant and the defendant's accomplice fleeing the scene. Milford v. State, 291 Ga. 347, 729 S.E.2d 352 (2012).

Evidence that the defendant and an accomplice entered a store, and the defendant approached two women, pulled out a gun, forced the women and children to the back of the store, and forced them to lie on the floor while the defendant and the accomplice forced an employee to give them money was sufficient to support defendant's robbery and false imprisonment convictions. Taylor v. State, 318 Ga. App. 115, 733 S.E.2d 415 (2012).

Evidence including DNA evidence, the victim's testimony regarding the nature of the attack and description of the attacker, and the store surveillance video of an individual who wore clothing similar to that worn by the attacker and who appeared to be the same race as the attacker, supported the defendant's convictions for rape, kidnapping, armed robbery, theft by taking, and three counts of possession of a gun during the commission of a crime. Glaze v. State, 317 Ga. App. 679, 732 S.E.2d 771 (2012).

Evidence that the defendant's wallet was found on the victim's kitchen table, a plastic grocery bag containing the defendant's blood stained clothes were discovered, and DNA testing showed that the blood on the defendant's windbreaker came from the victim and the blood spatter was consistent with the wearer having struck the victim, was sufficient to support the defendant's convictions for malice murder and robbery. Hall v. State, 292 Ga. 701, 743 S.E.2d 6 (2013).

Robbery of a mattress. — Evidence was sufficient to support the defendant's convictions for robbery and aggravated assault because the defendant was advised that the mattresses that the defendant was loading into the defendant's truck belonged to the victim; and when the victim attempted to remove the mattresses from the defendant's truck, the defendant attacked the victim, punching the victim in the face, pushing the victim

to the ground, and punching the victim in the chest. Aldridge v. State, 325 Ga. App. 774, 755 S.E.2d 19 (2014).

Evidence sufficient to prove robbery by intimidation. — Because the victim identified the defendant as the person who robbed the victim, the evidence was sufficient to support the defendant's conviction for robbery by intimidation. Smith v. State, 274 Ga. App. 852, 619 S.E.2d 358 (2005).

Because the defendant waived a Confrontation Clause, as well as any other constitutional objection, to testimony concerning a statement overheard from a woman fleeing the scene of the crime, and the victim's testimony, as well as the defendant's own admission, supported a robbery by intimidation conviction, such was upheld on appeal. Jordan v. State, 283 Ga. App. 85, 640 S.E.2d 672 (2006).

Even though the victim was the only witness who could testify that the defendant was the perpetrator of the crimes of robbery by force and aggravated assault, the victim's testimony was enough to establish the defendant's identity as one of the assailants; moreover, the lack of corroboration went only to the weight of the evidence and the victim's credibility, matters which were solely within the purview of the jury. Thomas v. State, 282 Ga. App. 522, 639 S.E.2d 531 (2006).

Armed robbery of taxi cab. — Defendant's convictions on two counts of armed robbery and two counts of possession of a firearm by a convicted felon were upheld on appeal because sufficient evidence existed to support the finding that the defendant was the perpetrator of two taxi cab robberies; the victims had an opportunity to observe the defendant during the crimes and then provided accurate descriptions to the police along with identifying defendant in show-up and photographic line-ups without hesitation. Peeler v. State, 286 Ga. App. 400, 649 S.E.2d 775 (2007).

Evidence supported a conviction of robbery by intimidation or force when the defendant chased the victim in the defendant's vehicle and then attacked the victim to obtain a jogging suit that the defendant had lent to another victim. The fact that the jogging suit belonged to the defendant was irrelevant as robbery was a crime against possession; furthermore, as both victims testified that the defendant had taken a pair of sneakers after the attack, it was immaterial that the state did not introduce the actual sneakers at trial. Windham v. State, 294 Ga. App. 72, 668 S.E.2d 526 (2008).

Following evidence was sufficient to convict the defendant of kidnapping with bodily injury, aggravated sodomy, rape, and robbery by intimidation: 1) the victim's testimony of being repeatedly raped by the defendant at knife point, forced to perform oral sex, beaten, robbed, and threatened with death; 2) a nurse's testimony that the victim was crying, rocking back and forth, and had bruised cheeks; and 3) evidence that the defendant's DNA matched sperm cell DNA found on the victim's body. Sanders v. State, 297 Ga. App. 897, 678 S.E.2d 579 (2009).

Evidence that the defendant with the defendant's armed codefendant entered a home the victim was visiting dressed as law enforcement officers and handcuffed and robbed the victim, then ordered the victim to retrieve a motorcycle from the victim's home, was sufficient to support a guilty verdict of robbery by intimidation in violation of O.C.G.A. § 16-8-40(a)(2). Lyons v. State, 300 Ga. App. 254, 684 S.E.2d 388 (2009).

Evidence authorized the jury to conclude that the defendant was guilty beyond a reasonable doubt of malice murder, armed robbery, and aggravated assault because the defendant and the defendant's codefendants entered an apartment masked and armed with an assault rifle, and the defendant fired the rifle at the victim and fatally wounded the victim. Zackery v. State, 286 Ga. 399, 688 S.E.2d 354 (2010).

There was some competent evidence to support each fact necessary to show that the defendant either committed a robbery or participated as a party to the crime because the victim testified that a gray car seemed to be following the victim before the robbery, one of the defendant's cousins testified that the defendant discussed the plan to rob a delivery van before the crime, and two of the defendant's cousins testified that immediately after the crime

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the defendant drove to an apartment building where stolen goods were loaded into the defendant's car. McKinley v. State, 303 Ga. App. 203, 692 S.E.2d 787 (2010).

Evidence presented at the trial was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of murder, felony murder, armed robbery, and aggravated assault because it was for the jury to determine the credibility of the witnesses, and the jury was authorized to disbelieve the alibi defense the defendant proffered. Newsome v. State, 288 Ga. 647, 706 S.E.2d 436 (2011).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder, armed robbery, and aggravated assault beyond a reasonable doubt because although the defendant denied to police that the defendant had any contact with the silver car that was connected to the robbery, the defendant's fingerprints were found on the outside of the car, and an eyewitness's physical description of the second gunman from the robbery matched the defendant. Carter v. State, 289 Ga. 51, 709 S.E.2d 223 (2011).

Evidence insufficient to support conviction. — With regard to a jail escape wherein the night jailer was overtaken by at least two inmates, the defendants' convictions for false imprisonment and robbery were reversed on appeal as the state failed to present evidence that either intentionally advised, encouraged, hired, counseled, or procured anyone to commit the crimes since the state presented evidence that only two inmates attacked the night jailer, none of which included the defendants. Under the circumstances presented, the state failed to present evidence which excluded every other reasonable hypothesis save that of the defendants' guilt. Shearin v. State, 293 Ga. App. 794, 668 S.E.2d 300 (2008).

Jury Instructions

Jury instructions. — Trial court did not err, in the defendant's robbery case, in declining to give the defendant's pattern instruction stating in part that intimidation involved creating fear in the victim of an apprehension to life and limb as the jury instruction the trial court gave was proper and the defendant's pattern instruction did not define intimidation but merely stated an alternative means by which robbery by intimidation may be committed. Kilpatrick v. State, 274 Ga. App. 645, 618 S.E.2d 719 (2005).

Omission of the element of "taking" from a jury charge definition of "robbery" by sudden snatching was harmless error, where the omission apparently was inadvertent and the jury otherwise was in fact clearly informed of all the elements of the offense. Whitehead v. State, 177 Ga. App. 259, 339 S.E.2d 365 (1985).

Instruction to infer guilt based on recent possession. — Trial court's instruction to the jurors that the jurors could infer the defendant's guilt to robbery or auto theft from the defendant's possession of a victim's car keys unless there was a reasonable explanation for that possession did not unconstitutionally shift the burden of proof to the defendant. Johnson v. State, 277 Ga. 82, 586 S.E.2d 306 (2003).

Failure to define robbery in charge is not error absent request. Gore v. State, 162 Ga. 267, 134 S.E. 36 (1926).

Failure to instruct regarding intent to steal. — Since intent to steal is a substantial element in commission of offense of robbery, failure to so instruct jury is error. Sanford v. State, 217 Ga. 825, 125 S.E.2d 478 (1962).

Cases when failure to charge regarding intent to steal was not reversible error. — See Rutherford v. State, 54 Ga. App. 750, 189 S.E. 67 (1936); Thomas v. State, 54 Ga. App. 747, 189 S.E. 68 (1936).

Lesser-included offense charges not given when not supported by evidence. — Where the evidence showed that either an attempted robbery by sudden snatching occurred or that no crime at all was committed, there was no error in failing to charge the jury on the lesser offenses of theft by taking and criminal trespass. Whitehead v. State, 177 Ga. App. 259, 339 S.E.2d 365 (1985).

In a prosecution for armed robbery, even

though defendant may have intended simple robbery, defendant was not entitled to a charge on the lesser included offense where evidence showed defendant's accomplices committed armed robbery. Martin v. State, 213 Ga. App. 146, 444 S.E.2d 103 (1994).

Defendant was not entitled to an instruction regarding theft by taking under O.C.G.A. § 16-8-2 as a lesser included offense of robbery under O.C.G.A. § 16-8-40(a)(1), (2) or as a sole defense because there was no evidence to support either instruction, when the defendant admitted to removing the victim's purse by force, which constituted robbery, allegedly as payment for drugs that the defendant had given to the victim. Miller v. State, 259 Ga. App. 244, 576 S.E.2d 631 (2003).

With regard to the defendant's conviction for armed robbery of a taxi driver, the defendant was not entitled to a jury instruction on the lesser included offense of robbery by sudden snatching as, although there was evidence from which the jury could have found that the defendant took the money from the taxi driver's pocket by snatching the money rather than through use of the gun, the evidence further showed without dispute that, by the time defendant completed the robbery, the defendant had taken additional money from the taxi meter after brandishing the handgun and hitting the taxi driver with the gun. Ortiz v. State, 292 Ga. App. 378, 665 S.E.2d 333 (2008), cert. denied, No. S08C1851, 2008 Ga. LEXIS 928 (Ga. 2008).

Trial court did not err in failing to give a jury charge on robbery as a lesser offense of armed robbery because the evidence was uncontradicted that a video store was robbed at gunpoint, the gun was brandished throughout the incident, and the defendant participated in the robbery while the gun was being used to accomplish the robbery; in light of the overwhelming evidence against the defendant, it was highly probable that the failure to give the lesser charge did not contribute to the verdicts. Rainly v. State, 307 Ga. App. 467, 705 S.E.2d 246 (2010).

Trial court did not err in refusing to instruct the jury on the lesser offense of theft by taking as the evidence showed that the codefendant admitted taking the victim's wallet and removing money without permission and that the victim resisted and was injured during the altercation, and the defendant admitted the defendant was concerned in the commission of the robbery, making the defendant a party to the crime. Bellamy v. State, 324 Ga. App. 319, 750 S.E.2d 395 (2013).

Trial court did not err in refusing to give an instruction on theft by taking as a lesser included offense of robbery by sudden snatching as the victim's testimony was sufficient to support the charge of robbery by snatching and the defense was that another individual committed the crime. Copeland v. State, 325 Ga. App. 668, 754 S.E.2d 636 (2014).

Charge on theft by taking not authorized. — When the state's evidence requires a verdict of guilty of robbery by sudden snatching, and the defendant's evidence if believed would require an acquittal on the ground of mistaken identity, it is not error to fail to charge on the offense of theft by taking. Teague v. State, 169 Ga. App. 285, 312 S.E.2d 818 (1983), aff'd, 252 Ga. 534, 314 S.E.2d 910 (1984).

With regard to the defendant's conviction for robbery by force, the trial court did not err by failing to give the defendant's requested instruction on the lesser included offense of theft-by-taking since all of the state's evidence showed the completed offense of robbery by use of force, and the defendant testified that the defendant committed no offense at all. Therefore, because all the evidence showed either the completed offense of robbery by use of force or no offense, there was no evidence to support an instruction on the lesser included offense of theft-by-taking. Heath v. State, 291 Ga. App. 594, 662 S.E.2d 362 (2008).

Evidence did not support a charge on theft by taking, O.C.G.A. § 16-8-2, as a lesser included offense of robbery by sudden snatching, O.C.G.A. § 16-8-40(a)(3), because the evidence showed that the victim was conscious of the crime as the crime was being committed; even if the victim did not actually see the defendant pick up the wallet, when the victim saw the defendant running toward the exit of a

Jury Instructions (Cont'd)

store with the wallet the victim gave chase but was unable to stop the defendant. Brown v. State, 309 Ga. App. 511, 710 S.E.2d 674 (2011).

Trial court did not err by failing to charge the jury on unarmed robbery or theft by taking as lesser-included offenses to armed robbery in light of the overwhelming evidence of the defendant's guilt and the failure to give the lesser-included instructions neither created any reasonable likelihood that the state's burden of proving all essential elements of armed robbery was lessened, or that the charge as given likely affected the outcome of the proceedings. Boccia v. State, 335 Ga. App. 687, 782 S.E.2d 792 (2016).

When defense is mistaken identity charge of theft by taking not justified. — When state's evidence requires verdict of guilty of robbery by sudden snatching, and the defendant's evidence if believed would require acquittal on ground of mistaken identity, it is not error to fail to charge on offense of theft by taking. Hinton v. State, 127 Ga. App. 108, 192 S.E.2d 717 (1972).

Charge may omit intimidation when not supported by evidence. — When one is indicted for robbery "by force and intimidation," and on trial it appears from evidence that, if robbery was committed, it was by force or violence and not by intimidation, it is not error for the court to fail to charge law relating to robbery by intimidation and punishment for one found guilty of robbery by intimidation. Perdue v. State, 225 Ga. 814, 171 S.E.2d 563 (1969).

Charge properly stating law of robbery by intimidation. — When the charge referred to the victim's "fear or apprehension of danger to his life or limb …" rather than to a victim's "fear of immediate serious bodily injury …" as set forth by O.C.G.A. § 16-8-40, the charge as given was not an erroneous statement of the law of robbery by intimidation. Turner v. State, 180 Ga. App. 141, 348 S.E.2d 572 (1986).

Charging both robbery by intimidation and by force. — Trial court does not err in charging the jury on robbery by intimidation as well as robbery by force. Daniel v. State, 180 Ga. App. 179, 348 S.E.2d 720 (1986); Anderson v. State, 207 Ga. App. 187, 427 S.E.2d 564 (1993).

Jury instructions on immediate presence proper in robbery by sudden snatching case. — In a case of robbery by sudden snatching in violation of O.C.G.A. § 16-8-40(a)(3), the trial court correctly instructed the jury that the "immediate presence" of the victim stretched very far and included objects under the victim's control. In this case, the defendant snatched money from a cash drawer as the cashier walked 10 to 11 feet away with the cashier's back turned. Sweet v. State, 304 Ga. App. 474, 697 S.E.2d 246 (2010).

Sentence

Sentence of life in prison without parole properly imposed on defendant who had prior convictions. — Trial court did not have the power to sentence the defendant, who was convicted of armed robbery after the defendant was already convicted of committing other felonies, to probation, or to suspend any part of the defendant's sentence, and because life in prison was the maximum penalty for armed robbery, the trial court properly sentenced the defendant to life in prison without parole. Thompson v. State, 265 Ga. App. 696, 595 S.E.2d 377 (2004).

Prior out-of-state drug convictions used to impose recidivist sentence. — Defense counsel was not ineffective for failing to object to the trial court's use of prior felonies defendant committed in California to sentence him as a recidivist under O.C.G.A. § 17-10-7(c), as the elements of Cal. Health & Safety Code §§ 11054(f), 11350(a) (possession of cocaine) were sufficiently similar to those of O.C.G.A. §§ 16-13-26(1)(D), 16-13-30(c); and the elements of Cal. Penal. Code § 211 (robbery) were sufficiently similar to those of O.C.G.A. § 16-8-40. Williams v. State, 296 Ga. App. 270, 674 S.E.2d 115 (2009).

Sentencing appropriate. — Nothing in Georgia's First Offender Act, O.C.G.A. § 42-8-60 et seq., required the trial court sua sponte to consider defendant's status

as a first offender; the trial court did not err by adopting a sentence that was consistent with the sentence the prosecutor agreed to recommend if defendant pled guilty to robbery by intimidation, and the appellate court refused to review the argument that defendant's sentence of five years' incarceration followed by five years' probation was excessive because the sentence fell within the statutory limits established by O.C.G.A. § 16-8-40(b) Gibson v. State, 257 Ga. App. 134, 570 S.E.2d 437 (2002).

Defendant's 20-year prison sentence imposed on the defendant's robbery conviction was within that allowed by law and, thus, was not void; accordingly, the trial court did not err in denying the defendant's petition that sought to correct the defendant's sentence on the ground the sentence was void. Daniel v. State, 262 Ga. App. 474, 585 S.E.2d 752 (2003).

State did not have the right to appeal sentences imposed by the trial court contrary to a plea agreement under O.C.G.A. § 5-7-1(a)(6) because the 15-year sentences, with five years to serve and the remainder on probation, were not void; they were within the 20-year range of punishments for robbery and aggravated assault, O.C.G.A. §§ 16-5-21(b) & 16-8-40(b). State v. Harper, 279 Ga. App. 620, 631 S.E.2d 820 (2006) was overruled. State v. King, 325 Ga. App. 445, 750 S.E.2d 756 (2013).

Appellant failed to show that the sentence imposed for robbery was void because the appellant's 20-year sentence fell within the statutory range of punishment for armed robbery under O.C.G.A. § 16-8-40(b). Williams v. State, 331 Ga. App. 46, 769 S.E.2d 760 (2015).

Sentencing inappropriate. — Lower court erred in sentencing the defendant to 20 years to serve on the criminal attempt to commit robbery count because the maximum sentence the defendant could have received was 10 years as convicted of the offense of criminal attempt to commit a felony, not punishable by death or life imprisonment, could be punished by imprisonment for not less than one year nor more than one-half the maximum period of time for which the defendant could have been sentenced if the defendant had been convicted of the crime attempted; the maximum sentence for robbery was 20 years; and half that time was 10 years. Ranger v. State, 330 Ga. App. 578, 768 S.E.2d 768 (2015).

Restitution order proper. — Evidence was sufficient to sustain an award of $800 restitution under O.C.G.A. § 17-14-7(b) as a special condition of probation because in the course of the robbery with which the defendant was charged under O.C.G.A. § 16-8-40(a)(2), the defendant took $500 cash and $300 in money orders from the car of the victim. Ezebuiro v. State, 308 Ga. App. 282, 707 S.E.2d 182 (2011).

Supervised release properly revoked as robbery was violation of condition of supervised release. — Inmate's supervised release was properly revoked and a sentence of imprisonment imposed because there was sufficient evidence to establish that the inmate committed a violation of a condition thereof by committing robbery and aggravated battery in Georgia. United States v. Hart, 552 Fed. Appx. 930, (11th Cir. 2014) (Unpublished).

RESEARCH REFERENCES

Am. Jur. 2d. — 67 Am. Jur. 2d, Robbery, § 1 et seq.

C.J.S. — 77 C.J.S., Robbery, § 1 et seq.

ALR. — Threat to arrest or prosecute and acts in connection therewith as force or putting in fear for purposes of robbery, 27 A.L.R. 1299.

What constitutes attempt to commit robbery, 55 A.L.R. 714.

Offense of larceny, embezzlement, robbery, or assault to commit robbery, as affected by defendant's intention to take or retain money or property in payment of, or as security for, a claim, or to collect a debt, or to recoup gambling losses, 116 A.L.R. 997.

Gambling or lottery paraphernalia as subject of larceny, burglary, or robbery, 51 A.L.R.2d 1396.

Purse snatching as robbery or theft, 42 A.L.R.3d 1381.

What constitutes larceny "from a person," 74 A.L.R.3d 271.

Retaking of money lost at gambling as robbery or larceny, 77 A.L.R.3d 1363.

Use of force or intimidation in retaining property or in attempting to escape, rather than in taking property, as element of robbery, 93 A.L.R.3d 643.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

Participation in larceny or theft as precluding conviction for receiving or concealing the stolen property, 29 A.L.R.5th 59.

Robbery: Identification of victim as person named in indictment or information, 4 A.L.R.6th 577.

What is "property of another" within statute proscribing larceny, theft, or embezzlement of property of another, 57 A.L.R. 6th 445.

Construction and application of enhanced sentencing provision of Armed Career Criminal Act (ACCA), 18 U.S.C.A. § 924(e) — United States Supreme Court cases, 67 A.L.R. Fed. 2d 1.

"Intimidation" as element of bank robbery under 18 USCA § 2113(a), 163 A.L.R. Fed. 225.

16-8-41. Armed robbery; robbery by intimidation; taking controlled substance from pharmacy in course of committing offense.

(a) A person commits the offense of armed robbery when, with intent to commit theft, he or she takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon. The offense of robbery by intimidation shall be a lesser included offense in the offense of armed robbery.

(b) A person convicted of the offense of armed robbery shall be punished by death or imprisonment for life or by imprisonment for not less than ten nor more than 20 years.

(c)(1) The preceding provisions of this Code section notwithstanding, in any case in which the defendant commits armed robbery and in the course of the commission of the offense such person unlawfully takes a controlled substance from a pharmacy or a wholesale druggist and intentionally inflicts bodily injury upon any person, such facts shall be charged in the indictment or accusation and, if found to be true by the court or if admitted by the defendant, the defendant shall be punished by imprisonment for not less than 15 years.

(2) As used in this subsection, the term:

(A) "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through V of Code Sections 16-13-25 through 16-13-29.

(B) "Pharmacy" means any place licensed in accordance with Chapter 4 of Title 26 wherein the possessing, displaying, compounding, dispensing, or retailing of drugs may be conducted, including any and all portions of any building or structure leased,

used, or controlled by the licensee in the conduct of the business licensed by the State Board of Pharmacy at the address for which the license was issued. The term pharmacy shall also include any building, warehouse, physician's office, or hospital used in whole or in part for the sale, storage, or dispensing of any controlled substance.

(C) "Wholesale druggist" means an individual, partnership, corporation, or association registered with the State Board of Pharmacy under Chapter 4 of Title 26.

(d) Any person convicted under this Code section shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7. (Laws 1833, Cobb's 1851 Digest, p. 791; Ga. L. 1858, p. 98, § 1; Code 1863, §§ 4287, 4288; Code 1868, §§ 4324, 4325; Code 1873, §§ 4390, 4391; Code 1882, §§ 4390, 4391; Ga. L. 1890-91, p. 83, § 1; Penal Code 1895, §§ 152, 153; Penal Code 1910, §§ 149, 150; Code 1933, §§ 26-2502, 26-2503; Ga. L. 1937, p. 490, § 1; Ga. L. 1957, p. 261, §§ 2, 3; Code 1933, § 26-1902, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 810, § 1; Ga. L. 1976, p. 1359, § 1; Ga. L. 1981, p. 1266, § 1; Ga. L. 1985, p. 1036, § 1; Ga. L. 1994, p. 1959, § 3; Ga. L. 1999, p. 81, § 16.)

Cross references. — Jurisdiction of the Court of Appeals over certain crimes, § 15-3-3. Time limitation on prosecutions for crimes punishable by death or life imprisonment, § 17-3-1.

Editor's notes. — Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977), held that imposition of the death penalty where the victim is not killed is in violation of U.S. Const., amend. 8. The Supreme Court of Georgia, in Collins v. State, 239 Ga. 400, 236 S.E.2d 759 (1977), held that the rationale of Coker must be applied also to armed robbery.

Ga. L. 1994, p. 1959, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Sentence Reform Act of 1994.'"

Ga. L. 1994, p. 1959, § 2, not codified by the General Assembly, provides: "The General Assembly declares and finds:

"(1) That persons who are convicted of certain serious violent felonies shall serve minimum terms of imprisonment which shall not be suspended, probated, stayed, deferred, or otherwise withheld by the sentencing judge; and

"(2) That sentences ordered by courts in cases of certain serious violent felonies shall be served in their entirety and shall not be reduced by parole or by any earned time, early release, work release, or other such sentence-reducing measures administered by the Department of Corrections."

Ga. L. 1994, p. 1959, § 16, not codified by the General Assembly, provides: "The provisions of this Act shall apply only to those offenses committed on or after the effective date of this Act; provided, however, that any conviction occurring prior to, on, or after the effective date of this Act shall be deemed a 'conviction' for the purposes of this Act and shall be counted in determining the appropriate sentence to be imposed for any offense committed on or after the effective date of this Act."

Ga. L. 1994, p. 1959, § 17, not codified by the General Assembly, provides: "In the event any section, subsection, sentence, clause, or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses, or phrases of this Act, which shall remain of full force and effect as if the section, subsection, sentence, clause, or phrase so declared or

adjudged invalid or unconstitutional were not originally a part hereof. The General Assembly declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional."

Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: "The General Assembly declares and finds: (1) That the 'Sentence Reform Act of 1994,' approved April 20, 1994 (Ga. L. 1994, p. 1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated, deferred, or withheld by the sentencing court; (2) That in State v. Allmond, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the 'Sentence Reform Act of 1994,' that the provisions of the First Offender Act would still be available to the sentencing court, which would mean that a person who committed a serious violent felony could be sentenced to less than the minimum mandatory ten-year sentence; and (3) That, contrary to the decision in State v. Allmond, it is the expressed intent of the General Assembly that persons who commit a serious violent felony specified in the 'Sentence Reform Act of 1994' shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment."

Law reviews. — For article on recidivism and convictions based on nolo contendere pleas, see 13 Ga. L. Rev. 723 (1979). For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982).

For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 159 (1994).

For comment criticizing Chaffin v. Stynchcombe, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973), permitting imposition of increased sentence by jury after retrial, see 23 Emory L.J. 879 (1974).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similiarity of the statutory provisions, cases decided prior to the 1994 amendment of the sentencing provisions in this Code section are included in the annotations.

Code section not unconstitutionally vague. — Although O.C.G.A. § 16-8-41 allows the sentencing judge broad discretion, the statute does not provide two different maximum sentences and is not unconstitutionally vague. Corey v. State, 216 Ga. App. 180, 454 S.E.2d 154 (1995).

Proof of venue. — State failed to prove venue for armed robbery and hijacking a motor vehicle since the facts showed that the victim was forced at gunpoint into the victim's car in a parking lot in one county and then ordered the victim to drive into a second county (the place of trial) where the victim was taken from the car and shot; both offenses were complete in the first county and neither O.C.G.A. § 16-8-1 nor O.C.G.A. § 17-2-2(d) were applicable to confer venue in the second county. Bradley v. State, 272 Ga. 740, 533 S.E.2d 727 (2000).

Evidence that an armed robbery oc-

curred very near, within sight distance, of the intersection of two roads, and an officer's testimony that the officer was familiar with the area and that the intersection of the two roads was in DeKalb County was sufficient to prove venue beyond a reasonable doubt in DeKalb County. Alexis v. State, 313 Ga. App. 283, 721 S.E.2d 205 (2011).

Relationship to other laws. — Defendant's prior conviction for attempted armed robbery pursuant to an Alford plea qualified as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924, because the record showed that the defendant's plea was knowing and voluntary, and supported by a factual basis. United States v. Wade, 551 Fed. Appx. 546 (11th Cir. 2014), overruled on other grounds, Wade v. United States, Nos. 1:15-CV-1712-RWS-JSA,
1:11-CR-337-RWS-JSA-1, 2016 U.S. Dist. LEXIS 29169 (N.D. Ga. 2016) (Unpublished).

Relationship to O.C.G.A. § 17-10-7. — Even if armed robbery is considered a capital offense for the purposes of certain Georgia statutes, it is not excluded from the provisions of O.C.G.A. § 17-10-7(c). To the contrary, O.C.G.A. § 16-8-41(d) specifically provides that a person convicted of armed robbery shall be subject to the sentencing and punishment provisions of O.C.G.A. § 17-10-7. Farmer v. State, 268 Ga. App. 831, 603 S.E.2d 16 (2004).

Construction with O.C.G.A. § 15-11-28. — Superior court exceeded the court's authority in transferring the prosecution of two juveniles to juvenile court after the state elected to pursue the cases in superior court as O.C.G.A. § 15-11-28(b)(1) granted the court concurrent jurisdiction over the cases before the court, and the court was obligated to retain jurisdiction prior to indictment; moreover, armed robbery qualified as an act which would be considered a crime if tried in a superior court and for which the child may be punished by loss of life, imprisonment for life without possibility of parole, or confinement for life in a penal institution. State v. Henderson, 281 Ga. 623, 641 S.E.2d 515 (2007).

Armed robbery consists of armed taking of property of another, regardless of value. — There is not a fatal variance between allegation that accused took $1,034.00 and proof that all of the money at a motel was taken, since offense of armed robbery is committed merely by armed taking of property of another, regardless of whether its value is great or small. Bell v. State, 227 Ga. 800, 183 S.E.2d 357 (1971).

Crime of robbery requires only that property, regardless of value, be taken from the person of another, and a variance between the amount of money alleged in the indictment and the proof at trial cannot constitute a fatal variance. Bonds v. State, 203 Ga. App. 51, 416 S.E.2d 329, cert. denied, 203 Ga. App. 905, 416 S.E.2d 329 (1992).

Location not an element of offense. — Particular location of a robbery is not an element of the offense of armed robbery. Hindman v. State, 234 Ga. App. 758, 507 S.E.2d 862 (1998).

Property need not be taken directly from one's person. — To constitute robbery it is unnecessary that taking of property should be directly from one's person; it is sufficient if it is taken while in the person's possession and immediate presence. Fincher v. State, 211 Ga. 89, 84 S.E.2d 76 (1954).

Immediate presence sufficient. — There was sufficient evidence to support the defendant's conviction for armed robbery, and the state proved that the property was taken from the victims' persons or immediate presence despite the victims being in another room when the property was taken as, considering that the victims were held at gunpoint in the bedroom while property was taken from the living room, the theft was not too far afield to be outside the victims' immediate presence. Jennings v. State, 292 Ga. App. 149, 664 S.E.2d 248 (2008).

Trial court did not err in convicting the defendant of armed robbery of a restaurant, O.C.G.A. § 16-8-41(a), and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), because the evidence sufficed to show that money was taken from the immediate presence of a restaurant employee; the defendant kept the employee from the cash register at gunpoint and commanded

General Consideration (Cont'd)

the employee not to move. Jones v. State, 302 Ga. App. 147, 690 S.E.2d 460 (2010).

Defendant was properly convicted of the armed robbery of a victim because the victim was held at gunpoint in the victim's living room while property was taken from the victim's bedroom; the theft was not too far afield to be outside the victim's "immediate presence" as required under O.C.G.A. § 16-8-41. Ham v. State, 303 Ga. App. 232, 692 S.E.2d 828 (2010).

Evidence sufficiently established that the defendant took property from the person and immediate presence of the victim because the evidence established that the victim was being held at gunpoint in the kitchen while the defendant stole items from various rooms in the house. Patterson v. State, 312 Ga. App. 793, 720 S.E.2d 278 (2011), cert. denied, No. S12C0574, 2012 Ga. LEXIS 327 (Ga. 2012).

Because the armed robbery count of the indictment sufficiently alleged the elements of armed robbery, trial counsel was not ineffective for failing to challenge it, and the trial court did not err in denying the defendant's motion for new trial as to the ineffective assistance claim; that the property was taken from the person or immediate presence of another is necessarily inferred from the allegation of a use of an offensive weapon to accomplish the taking, and the alleged offense of "armed robbery" can be accomplished only via a taking from the person or immediate presence of another. Patterson v. State, 312 Ga. App. 793, 720 S.E.2d 278 (2011), cert. denied, No. S12C0574, 2012 Ga. LEXIS 327 (Ga. 2012).

Gravamen of the offense of armed robbery is the taking of items from the possession of another by use of an offensive weapon and not the identification of the specific owner of the item taken; it does not matter exactly whose property was taken so long as it was taken from a person or the immediate presence of another. Avila v. State, 322 Ga. App. 225, 744 S.E.2d 405 (2013).

"Theft" is word of broad connotation. — Word "theft" in O.C.G.A. § 16-8-41(a) is not, like "larceny," a technical word of art with a narrowly defined meaning, but a word of general and broad connotation, covering any criminal appropriation of another's property to the taker's use. Emmett v. State, 199 Ga. App. 650, 405 S.E.2d 707 (1991), cert. denied, 199 Ga. App. 905, 405 S.E.2d 707 (1991).

It is not necessary that property be permanently appropriated. — Slightest change of location whereby complete dominion of property is transferred from true owner to trespasser is sufficient asportation. It is not required that property taken be permanently appropriated. James v. State, 232 Ga. 834, 209 S.E.2d 176 (1974); Glidewell v. State, 169 Ga. App. 858, 314 S.E.2d 924 (1984); Sanders v. State, 242 Ga. App. 487, 530 S.E.2d 203 (2000).

Robbery is a crime against possession and is not affected by concepts of ownership. Carter v. State, 156 Ga. App. 633, 275 S.E.2d 716 (1980); Byse v. State, 169 Ga. App. 856, 315 S.E.2d 58 (1984); Kelly v. State, 234 Ga. App. 893, 508 S.E.2d 228 (1998).

Robbing two victims constitutes two offenses. — Where two of alleged victims of armed robbery were husband and wife, fact that stolen property may have been jointly owned does not preclude appellant from being convicted of two counts of armed robbery. Carter v. State, 156 Ga. App. 633, 275 S.E.2d 716 (1980).

Two armed robbery convictions under O.C.G.A. § 16-8-41(a) did not merge pursuant to O.C.G.A. § 16-1-7(a)(1) as: (1) a store's money was taken from the immediate presence of two employees, who were both responsible for and had possession of the store's receipts, regardless of which employee may actually have been counting the money when the robbery occurred; (2) each employee who was robbed was a victim, regardless of who owned the money; and (3) as two victims were robbed, the defendant could be charged with the robbery of each victim. Green v. State, 265 Ga. App. 126, 592 S.E.2d 901 (2004).

Taking two separate sums of money from same victim, at same time, constitutes one robbery. Creecy v. State, 235 Ga. 542, 221 S.E.2d 17 (1975); Randolph v. State, 246 Ga. App. 141, 538 S.E.2d 139 (2000).

Defendant's voluntary confession held admissible under totality of circumstances. — Based on the totality of the circumstances and the undisputed evidence, because the defendant's confession to a police detective was voluntary and admissible under former O.C.G.A. § 24-3-50 (see now O.C.G.A. § 24-8-824), not coerced or received as a result of promises made, and not subject to exclusion due to improper methods used by the police, the trial court did not err in admitting the evidence; further, exclusion of the confession was not required based on a violation of the defendant's right to counsel. Swain v. State, 285 Ga. App. 550, 647 S.E.2d 88 (2007).

Confession admissible. — Defendant's convictions for armed robbery and robbery by intimidation in violation of O.C.G.A. §§ 16-8-40(a)(2) and 16-8-41(a) were appropriate because the defendant's own confessions to participating in the crimes were corroborated by the testimony of the victims, among other evidence. Likewise, the defendant's codefendants' statements and testimony implicating the defendant in the crimes were corroborated by the defendant's confessions and the victims' testimony. Cantrell v. State, 299 Ga. App. 746, 683 S.E.2d 676 (2009).

Robbing one person of property belonging to two individuals. — When in single transaction, the defendant robs another of property belonging to two individuals, only one robbery is committed. Jackson v. State, 236 Ga. 98, 222 S.E.2d 380 (1976).

Possession initially by consent. — Although the defendant had custody of a necklace pursuant to the victim's consent, possession of the necklace did not change to the defendant until the victim, by means of violence, had been dissuaded from seeking its return. That being so, it was the force which effected the taking, authorizing a conviction for robbery by force. Cantrell v. State, 184 Ga. App. 384, 361 S.E.2d 689 (1987).

Taking property is an essential element of crime of armed robbery. Woodall v. State, 235 Ga. 525, 221 S.E.2d 794 (1975).

When the appellants moved for a directed verdict of acquittal of armed robbery on grounds that a convenience store clerk fled the store before any property was actually taken, the trial court did not err by denying the appellants' motion for a directed verdict of acquittal since the victim fled the scene after the victim was threatened with a knife and the property was stolen before the victim could even drive away, which was sufficient to constitute a theft from the victim's immediate presence. Morgan v. State, 195 Ga. App. 732, 394 S.E.2d 639 (1990).

When the defendants' accomplice put a gun to the victim's head and ordered the victim to "drop the money on the floor" and, at the same time as the victim dropped the money, the victim pushed the gun away, drew a revolver and shot the accomplice, the facts were sufficient to support a finding of a "taking" within the meaning of the offense of armed robbery. State v. Watson, 239 Ga. App. 482, 520 S.E.2d 911 (1999).

Intent element inferred from allegation of defendant's use of offensive weapon to accomplish taking. — Upon the defendant's challenge to two armed robbery convictions, despite the fact that it was not explicitly stated in the indictment that the defendant intended to commit a theft, such intent was necessarily inferred from the allegation of the use of an offensive weapon to accomplish a taking. Thus, considering the allegations of the indictment as a whole, there was no failure to allege all of the elements of the crime of armed robbery, and there was no reasonable doubt that the defendant was sufficiently informed of the charges and protected from the subsequent prosecution for the same crime. Beals v. State, 288 Ga. App. 815, 655 S.E.2d 687 (2007).

Indictment sufficient. — Count 1 in the indictment was not defective, and trial counsel was not deficient in failing to attack the count as the defendant was sufficiently informed of the charges against the defendant and also protected from subsequent prosecution for the same crime because, although Count 1 did not track the criminal attempt statute exactly, read as a whole, Count 1 asserted that, with intent to commit armed robbery, the defendant committed a substan-

General Consideration (Cont'd)

tial step toward commission of the crime by pointing a gun at the victim and grabbing the victim's person; and, although Count 1 referenced an attempt to commit robbery, it clearly alleged use of a gun, and armed robbery occurred when a person committed a robbery by use of an offensive weapon. Wilson v. State, 344 Ga. App. 285, 810 S.E.2d 303 (2018).

Replacement of two jurors on panel. — Trial court did not err in replacing two jurors on the panel despite the fact that a transcription of the voir dire was absent from the record in a prosecution for burglary and armed robbery as the appellate court was able to decide, based upon a review of the arguments surrounding the state's motion, that the trial court did not err in replacing two jurors on the jury panel due to the defendant's racially motivated strikes; further, the defendant waived appellate review of the court's re-seating procedure. Pitts v. State, 278 Ga. App. 176, 628 S.E.2d 615 (2006).

State's peremptory strikes were valid. — While the defendant made out a prima facie case of racial discrimination regarding the state's use of three peremptory strikes, sufficient race-neutral reasons existed for those strikes; thus, given the court's jury charges and recharge to the jury, the court's responses to questions from the jury, and waiver of improper bolstering objection on appeal, the defendant's aggravated assault and armed robbery convictions were upheld on appeal as was the court's denial of motion for a new trial. LeMon v. State, 290 Ga. App. 527, 660 S.E.2d 11 (2008).

Intent must be proved beyond a reasonable doubt. — Since the intent to commit theft is an essential element of the offense of armed robbery, the state must prove this element beyond a reasonable doubt. McCleskey v. Zant, 580 F. Supp. 338 (N.D. Ga. 1984), rev'd on other grounds sub nom. McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), aff'd, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), cert. denied, 501 U.S. 1282, 112 S. Ct. 38, 115 L. Ed. 2d 1118 (1991).

"Immediate presence". — Armed robbery convictions are upheld where items are taken out of physical presence of victim if what was taken was under the victim's control or his responsibility. Mitchell v. State, 157 Ga. App. 146, 276 S.E.2d 658 (1981).

One's "immediate presence" in the context of armed robbery stretches fairly far, and robbery convictions are usually upheld as to taking even out of physical presence of victim, if what was taken was under the victim's control or the victim's responsibility and if the victim was not too far distant. Welch v. State, 235 Ga. 243, 219 S.E.2d 151 (1975); Battle v. State, 155 Ga. App. 541, 271 S.E.2d 679 (1980); Waters v. State, 161 Ga. App. 555, 289 S.E.2d 21 (1982).

Evidence that employee was in charge of the cash drawer from which money was taken while the employee stepped away briefly to alert the manager was sufficient to show a taking from the employee's "immediate presence." Wilson v. State, 207 Ga. App. 528, 428 S.E.2d 433 (1993).

Even if the robbery victim succeeded in escaping from the store before the money was taken from the cash register, the "immediate presence" requirement was satisfied and a charge on simple robbery was not authorized. Matthews v. State, 268 Ga. 798, 493 S.E.2d 136 (1997).

Defendant was found to have used a weapon to take money from the victim's "immediate presence" under Georgia's armed robbery statute, O.C.G.A. § 16-8-41, despite the fact that the victim was in the backroom when the defendant took the money because the money was under the victim's control until the defendant ordered the victim at gunpoint into the backroom. Smith v. State, 261 Ga. App. 25, 581 S.E.2d 673 (2003).

Elements of crime that one takes another's property from the person or immediate presence of another by use of offensive weapon properly met. — See Wright v. State, 166 Ga. App. 295, 304 S.E.2d 105 (1983).

Even though store owner fled upon seeing the defendant enter the owner's store with a shotgun, the defendant's subsequent takings from store were within the store owner's "immediate presence." Maddox v. State, 174 Ga. App. 728, 330 S.E.2d 911 (1985).

Handbag was taken from "the person or immediate presence" of the victim where, even though the defendant took the handbag after forcing the victim to walk 150 feet away from the car where her handbag was located, the handbag was still under her control or responsibility, and she was not too far distant. Sypho v. State, 175 Ga. App. 833, 334 S.E.2d 878 (1985).

Taking property from under one's personal protection suffices. — Meaning of legal phrase "immediate presence" is not that taking must necessarily be from actual contact of the body, but if it is from under personal protection it will suffice. Within this doctrine, the person may be deemed to protect all things belonging to the individual, within a distance, not easily defined, over which influence of personal presence extends. Welch v. State, 235 Ga. 243, 219 S.E.2d 151 (1975).

Motion to suppress evidence of armed robbery properly denied. — Because the defendant's grandfather, as the head of household, possessed the authority over the entire house including the defendant's bedroom where the defendant lived rent-free, the trial court properly found that the consent given by the grandfather was properly granted, and hence served as the proper basis to deny the defendant's motion to suppress the evidence seized in that bedroom; as a result, the defendant's armed robbery conviction was upheld on appeal. Rhone v. State, 283 Ga. App. 553, 642 S.E.2d 185 (2007).

That victim was incapacitated at time of taking cannot extricate the defendant's conduct from the definition of armed robbery in O.C.G.A. § 16-8-41(a). Young v. State, 251 Ga. 153, 303 S.E.2d 431 (1983).

When intent to rob arises not important. — When the evidence is sufficient to authorize a finding that the theft was completed after force was employed against the victim, a conviction for armed robbery is authorized, regardless of when the intent to take the victim's property arose, regardless of whether the victim was incapacitated, and even if the victim was killed instantly. Hudson v. State, 234 Ga. App. 895, 508 S.E.2d 682 (1998).

Identity of person alleged to have been robbed is not an essential element of offense and need not be proved by direct evidence. McKisic v. State, 238 Ga. 644, 234 S.E.2d 908 (1977); Rollins v. State, 154 Ga. App. 585, 269 S.E.2d 81 (1980); Page v. State, 191 Ga. App. 420, 382 S.E.2d 161 (1989).

Identity of the person alleged to have been robbed is not an essential element of the crime of armed robbery. Kelly v. State, 234 Ga. App. 893, 508 S.E.2d 228 (1998).

Term "serious bodily injury" is not unconstitutionally vague. Beck v. State, 254 Ga. 51, 326 S.E.2d 465 (1985), cert. denied, 474 U.S. 872, 106 S. Ct. 195, 88 L. Ed. 2d 164 (1985), 495 U.S. 940, 110 S. Ct. 2194, 109 L. Ed. 2d 521 (1990).

Classification of injury as serious upheld. — O.C.G.A. § 16-8-41 authorizes the ten-year incarceration based upon disfigurement amounting to serious bodily harm; thus, the judgment of the trial court who classified the injury as amounting to serious bodily injury where there is at least some evidence to support such a determination will be held. Timmons v. State, 166 Ga. App. 489, 304 S.E.2d 453 (1983).

Armed robbery is capital offense for speedy trial purposes. — Notwithstanding that the death penalty can no longer be imposed, this punishment statute places the offense of armed robbery within the definition of a capital offense and the state was not required to try the defendant on the armed robbery charges by the end of the next term after the defendant's demand for trial. Accordingly, the trial court did not err in denying the defendant's motion for discharge and acquittal pursuant to O.C.G.A. § 17-7-170. White v. State, 202 Ga. App. 291, 414 S.E.2d 297 (1991).

Accomplices need not have actual possession of firearm. — When a party has committed armed robbery and possession of a firearm during the commission of a felony, an accomplice who is concerned in the commission of those crimes is likewise guilty of both offenses, notwithstanding the fact that the accomplice did not have actual possession of the firearm. Howze v. State, 201 Ga. App. 96, 410 S.E.2d 323 (1991).

Res gestae evidence properly admitted. — Trial court properly admitted

General Consideration (Cont'd)

the excited utterances of an armed robbery victim as part of the res gestae free from all suspicion of device or afterthought; moreover, Crawford did not apply, as the statements were not made to a police officer during a subsequent investigation of the crime, nor were the statements made to an officer or 9-1-1 operator for the purpose of proving a fact regarding some past event. Fields v. State, 283 Ga. App. 208, 641 S.E.2d 218 (2007).

Extrinsic evidence held harmless. — Defendant's conviction for armed robbery and aggravated assault was affirmed because given the overwhelming evidence, it was highly unlikely that the admission of the testimony concerning the subsequent burglary contributed to the verdict in this case, even if it was erroneous to allow such evidence. Hutchinson v. State, 318 Ga. App. 627, 733 S.E.2d 517 (2012).

Evidence of bullets properly admitted. — With regard to a defendant's convictions on two counts of armed robbery, possession of a firearm during the commission of a crime, failure to obey a traffic control device, fleeing and attempting to elude a police officer, reckless driving, failure to stop at the scene of an accident, and possession of a firearm by a convicted felon, the trial court properly denied the defendant's motion for a new trial and sufficient evidence existed to support the defendant's convictions as the trial court did not err in admitting into evidence certain bullets found in the defendant's possession at the time of the defendant's arrest based on the state allegedly not providing a proper chain of custody; the bullets, unlike fungible articles, were distinct and recognizable physical objects that were identifiable by observation, eliminating the necessity of a chain-of-custody showing. Green v. State, 287 Ga. App. 248, 651 S.E.2d 174 (2007).

Defendant arrested and indicted within statute of limitation. — Trial court did not abuse the court's discretion in denying the defendant's motion to dismiss an indictment charging the defendant with armed robbery, O.C.G.A. § 16-8-41, for a violation of the defendant's right to due process because the defendant failed to show that the defense was prejudiced by the six year delay between the commission of the crime and the defendant's arrest or that the state deliberately delayed the arrest to obtain a tactical advantage; the defendant was arrested and indicted for armed robbery, a noncapital felony, within the applicable seven-year statute of limitation, O.C.G.A. §§ 16-8-41(a) and 17-3-1(c), and the mere existence of the possibility that the latent prints could have established "the real perpetrator" if the prints had matched the prints of another offender in the government's database did not establish actual prejudice. Billingslea v. State, 311 Ga. App. 490, 716 S.E.2d 555 (2011).

Plain error doctrine not applicable. — Defendant's attempt to invoke the plain error doctrine with regard to the state's closing argument allegedly eliciting sympathy for the victim in violation of the prohibition against asking the jurors to place themselves in the same position of the victim was misplaced where the plain error doctrine applied only to capital cases and criminal cases in which a violation of O.C.G.A. § 17-8-57 occurred, and neither category applied to the defendant's trial for armed robbery. Foster v. State, 267 Ga. App. 363, 599 S.E.2d 309 (2004).

Denial of motion to withdraw plea to greater offense was an abuse of discretion. — Trial court abused the court's discretion in denying the defendant's motion to withdraw a guilty plea to false imprisonment charges because the state conceded that the defendant received ineffective assistance of counsel as to the less serious armed robbery and kidnapping offenses that were part of the same negotiated plea agreement, that were included in the same indictment, and that involved the same codefendants; the defendant should have been permitted to withdraw the guilty plea in order to avoid a manifest injustice. Clue v. State, 273 Ga. App. 672, 615 S.E.2d 800 (2005).

Evidence of plea not relevant or admissible. — Because the reasoning behind the robbery by intimidation plea between the defendant and the DeKalb County prosecutor did not appear on the face of the document itself, and the defendant would not have been able to testify as

to the prosecutor's reasons for accepting the defendant's plea, the evidence regarding the defendant's plea would not have made the defendant's desired inference that the defendant did not use a gun during the Gwinnett County robbery any more probable than it would have been without the evidence; thus, the trial court did not err by refusing to allow the defendant to present evidence of the plea. Johnson v. State, 331 Ga. App. 134, 770 S.E.2d 236 (2015), cert. denied, 2015 Ga. LEXIS 377 (Ga. 2015).

Cited in Massey v. State, 226 Ga. 703, 177 S.E.2d 79 (1970); Smith v. State, 228 Ga. 293, 185 S.E.2d 381 (1971); Spurlin v. State, 228 Ga. 763, 187 S.E.2d 856 (1972); Evans v. State, 228 Ga. 867, 188 S.E.2d 861 (1972); Simmons v. State, 126 Ga. App. 401, 190 S.E.2d 835 (1972); Hill v. State, 229 Ga. 307, 191 S.E.2d 58 (1972); Ezzard v. State, 229 Ga. 465, 192 S.E.2d 374 (1972); United States v. Jones, 352 F. Supp. 369 (S.D. Ga. 1972); Thomas v. State, 128 Ga. App. 538, 197 S.E.2d 452 (1973); Letbedder v. State, 129 Ga. App. 196, 199 S.E.2d 270 (1973); Bowman v. State, 231 Ga. 220, 200 S.E.2d 880 (1973); Ward v. State, 231 Ga. 484, 202 S.E.2d 421 (1973); Walker v. State, 130 Ga. App. 860, 205 S.E.2d 49 (1974); Brock v. State, 232 Ga. 47, 205 S.E.2d 272 (1974); Goughf v. State, 232 Ga. 178, 205 S.E.2d 844 (1974); Strong v. State, 232 Ga. 294, 206 S.E.2d 461 (1974); Keener v. MacDougall, 232 Ga. 273, 206 S.E.2d 519 (1974); Jones v. State, 232 Ga. 771, 208 S.E.2d 825 (1974); Harvey v. State, 233 Ga. 41, 209 S.E.2d 587 (1974); Bailey v. State, 233 Ga. 452, 212 S.E.2d 1 (1975); Freeman v. State, 233 Ga. 678, 212 S.E.2d 847 (1975); Bell v. State, 234 Ga. 119, 214 S.E.2d 653 (1975); Bixby v. State, 234 Ga. 812, 218 S.E.2d 609 (1975); Lawrence v. State, 235 Ga. 216, 219 S.E.2d 101 (1975); Chumley v. State, 235 Ga. 540, 221 S.E.2d 13 (1975); Painter v. State, 237 Ga. 30, 226 S.E.2d 578 (1976); Sheats v. State, 237 Ga. 757, 229 S.E.2d 600 (1976); Byrd v. Hopper, 405 F. Supp. 1323 (N.D. Ga. 1976); Stewart v. State, 239 Ga. 588, 238 S.E.2d 540 (1977); Woods v. State, 240 Ga. 265, 239 S.E.2d 786 (1977); Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977); Head v. Hopper, 241 Ga. 164, 243 S.E.2d 877 (1978); Thomas v. State, 146 Ga. App. 501, 246 S.E.2d 498 (1978); Amadeo v. State, 243 Ga. 627, 255 S.E.2d 718 (1979); Knight v. State, 243 Ga. 770, 257 S.E.2d 182 (1979); Gunn v. State, 244 Ga. 51, 257 S.E.2d 538 (1979); Hamilton v. State, 244 Ga. 145, 259 S.E.2d 81 (1979); Cobb v. State, 244 Ga. 344, 260 S.E.2d 60 (1979); McCranie v. State, 151 Ga. App. 871, 261 S.E.2d 779 (1979); Curry v. State, 155 Ga. App. 829, 273 S.E.2d 411 (1980); Stuckey v. Stynchcombe, 614 F.2d 75 (5th Cir. 1980); Choate v. State, 158 Ga. App. 8, 279 S.E.2d 459 (1981); Jackson v. State, 158 Ga. App. 702, 282 S.E.2d 181 (1981); Davis v. State, 159 Ga. App. 356, 283 S.E.2d 286 (1981); Wallace v. State, 159 Ga. App. 793, 285 S.E.2d 194 (1981); Paxton v. State, 160 Ga. App. 19, 285 S.E.2d 741 (1981); Richards v. State, 160 Ga. App. 489, 287 S.E.2d 394 (1981); Dunbar v. State, 163 Ga. App. 243, 292 S.E.2d 897 (1982); Coleman v. State, 163 Ga. App. 173, 293 S.E.2d 395 (1982); Parrish v. State, 160 Ga. App. 601, 287 S.E.2d 603 (1981); Gainey v. State, 161 Ga. App. 343, 287 S.E.2d 785 (1982); Sherrell v. State, 163 Ga. App. 345, 294 S.E.2d 559 (1982); Carswell v. State, 163 Ga. App. 743, 295 S.E.2d 548 (1982); Hardigree v. State, 164 Ga. App. 591, 298 S.E.2d 585 (1982); Chappell v. State, 164 Ga. App. 77, 296 S.E.2d 629 (1982); Young v. Zant, 677 F.2d 792 (11th Cir. 1982); Chambless v. State, 165 Ga. App. 194, 300 S.E.2d 201 (1983); Green v. State, 165 Ga. App. 205, 300 S.E.2d 208 (1983); Bogan v. State, 165 Ga. App. 851, 303 S.E.2d 48 (1983); Johnson v. Balkcom, 695 F.2d 1320 (11th Cir. 1983); Miller v. State, 169 Ga. App. 668, 314 S.E.2d 684 (1984); Graham v. State, 171 Ga. App. 242, 319 S.E.2d 484 (1984); Young v. Kemp, 760 F.2d 1097 (11th Cir. 1985); Thomas v. Kemp, 766 F.2d 452 (11th Cir. 1985); Geter v. State, 174 Ga. App. 694, 331 S.E.2d 68 (1985); Wilson v. State, 175 Ga. App. 41, 332 S.E.2d 352 (1985); Wallace v. State, 175 Ga. App. 685, 333 S.E.2d 874 (1985); Beck v. State, 181 Ga. App. 681, 353 S.E.2d 610 (1987); Prince v. State, 257 Ga. 84, 355 S.E.2d 424 (1987); Commercial Plastics & Supply Corp. v. Molen, 182 Ga. App. 202, 355 S.E.2d 86 (1987); Blankenship v. Home Depot, Inc., 182 Ga. App. 358, 356 S.E.2d

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61 (1987); Merritt v. State, 183 Ga. App. 135, 358 S.E.2d 293 (1987); Russell v. State, 183 Ga. App. 209, 358 S.E.2d 631 (1987); Peoples v. State, 184 Ga. App. 439, 361 S.E.2d 848 (1987); Eaton v. State, 184 Ga. App. 652, 362 S.E.2d 455 (1987); Studdard v. State, 185 Ga. App. 319, 363 S.E.2d 837 (1987); Dawson v. State, 186 Ga. App. 718, 368 S.E.2d 367 (1988); Stoe v. State, 187 Ga. App. 171, 369 S.E.2d 793 (1988); Mays v. State, 198 Ga. App. 402, 401 S.E.2d 597 (1991); Brown v. State, 199 Ga. App. 773, 406 S.E.2d 248 (1991); Dobbs v. State, 199 Ga. App. 793, 406 S.E.2d 252 (1991); Alford v. State, 204 Ga. App. 14, 418 S.E.2d 397 (1992); Sumlin v. State, 207 Ga. App. 408, 427 S.E.2d 868 (1993); Crawford v. State, 210 Ga. App. 36, 435 S.E.2d 64 (1993); Hogan v. State, 210 Ga. App. 122, 435 S.E.2d 494 (1993); Bradford v. State, 223 Ga. App. 424, 477 S.E.2d 859 (1996); Rogers v. State, 234 Ga. App. 507, 507 S.E.2d 25 (1998); Lemattey v. State, 234 Ga. App. 889, 508 S.E.2d 215 (1998); Busch v. State, 234 Ga. App. 766, 507 S.E.2d 868 (1998); Sanders v. State, 242 Ga. App. 487, 530 S.E.2d 203 (2000); Davis v. State, 249 Ga. App. 579, 548 S.E.2d 678 (2001); Kemper v. State, 251 Ga. App. 665, 555 S.E.2d 40 (2001); Guild v. State, 255 Ga. App. 285, 564 S.E.2d 862 (2002); Rogers v. State, 255 Ga. App. 416, 565 S.E.2d 583 (2002); Darnell v. State, 257 Ga. App. 555, 571 S.E.2d 547 (2002); Clark v. State, 258 Ga. App. 347, 574 S.E.2d 344 (2002); Jackson v. State, 262 Ga. App. 451, 585 S.E.2d 745 (2003); Fernandez v. State, 263 Ga. App. 750, 589 S.E.2d 309 (2003); Hunter v. State, 261 Ga. App. 276, 582 S.E.2d 228 (2003); Anderson v. State, 261 Ga. App. 456, 582 S.E.2d 575 (2003); Bennett v. State, 266 Ga. App. 502, 597 S.E.2d 565 (2004); Blake v. State, 272 Ga. App. 181, 612 S.E.2d 33 (2005); Holman v. State, 272 Ga. App. 890, 614 S.E.2d 124 (2005); Herndon v. State, 277 Ga. App. 374, 626 S.E.2d 579 (2006); Jaheni v. State, 285 Ga. App. 266, 645 S.E.2d 735 (2007); Ford v. Schofield, 488 F. Supp. 2d 1258 (N.D. Ga. 2007); Smith v. State, 289 Ga. App. 742, 658 S.E.2d 156 (2008); Styles v. State, 291 Ga. App. 255, 661 S.E.2d 641 (2008); Hyde v. State, 291 Ga. App. 662, 662 S.E.2d 764 (2008); Sillah v. State, 291 Ga. App. 848, 663 S.E.2d 274 (2008); Lemming v. State, 292 Ga. App. 138, 663 S.E.2d 375 (2008); Baez v. State, 297 Ga. App. 893, 678 S.E.2d 583 (2009); Bonker v. State, 298 Ga. App. 867, 681 S.E.2d 256 (2009); Tolbert v. State, 300 Ga. App. 51, 684 S.E.2d 120 (2009); Souder v. State, 301 Ga. App. 348, 687 S.E.2d 594 (2009); Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742 (2010); Jackson v. State, 309 Ga. App. 24, 709 S.E.2d 44 (2011); Anthony v. State, 315 Ga. App. 701, 727 S.E.2d 528 (2012); Martinez v. State, 318 Ga. App. 254, 735 S.E.2d 785 (2012); Russell v. State, 319 Ga. App. 472, 735 S.E.2d 797 (2012); Ellis v. State, 292 Ga. 276, 736 S.E.2d 412 (2013); Hyman v. State, 320 Ga. App. 106, 739 S.E.2d 395 (2013); McGlasker v. State, 321 Ga. App. 614, 741 S.E.2d 303 (2013); Jones v. State, 322 Ga. App. 310, 744 S.E.2d 830 (2013); Young v. State, 329 Ga. App. 70, 763 S.E.2d 735 (2014); Turner v. State, 331 Ga. App. 78, 769 S.E.2d 785 (2015); McGil v. State, 339 Ga. App. 130, 793 S.E.2d 442 (2016); Johnson v. State, 341 Ga. App. 384, 801 S.E.2d 82 (2017); Floyd v. State, 342 Ga. App. 438, 803 S.E.2d 597 (2017).

Identification

Acne as factor in identification. — There was sufficient evidence to support an armed robbery conviction when the defendant and another person entered a store and demanded money from the cashier; the defendant, who was wearing a blue hooded sweatshirt, held a silver-topped gun to the cashier's ribs; the owner's spouse saw the defendant leaving the store with a bank bag and noticed that the defendant had acne; a bank bag and a loaded handgun were found in the defendant's bedroom; police found photographs of the defendant with acne scars and wearing a blue hooded sweatshirt with a silver and black handgun resting on a chair; and the cashier identified the defendant in a photographic line-up and identified the defendant, the gun, and the bank bag at trial. Melendez v. State, 291 Ga. App. 402, 662 S.E.2d 183 (2008).

Evidence was sufficient to support convictions of murder, felony murder, and

armed robbery when the defendant and the codefendant offered to give the victim a ride, the defendant pointed a gun at the victim and told the victim to give the defendant the victim's money; the defendant became angry when the defendant saw that there was no money in the victim's wallet, and the defendant shot the victim in the neck, then dumped the victim's body and the wallet in a parking lot. Lockheart v. State, 284 Ga. 78, 663 S.E.2d 213 (2008).

Evidence was legally sufficient to convict a defendant on charges of armed robbery, aggravated assault, false imprisonment, and possession of a firearm during the commission of a crime; the testimony of one of the defendant's accomplices, which implicated the defendant in the crimes, was corroborated by evidence that the defendant was captured with the two accomplices shortly after the robbery, that the defendant had a large amount of cash, a gun, and a roll of duct tape, and that the victim was able to identify all three men as the ones who robbed and assaulted the victim. Spragg v. State, 292 Ga. App. 37, 663 S.E.2d 389 (2008).

Testimony by a victim that the defendant and an accomplice, armed with handguns, forcibly entered the victim's apartment, raped and sodomized the victim, struck the victim with a gun, stole jewelry, bound the victim, and escaped in a car owned by the victim's prospective spouse, and evidence that 24 fingerprints lifted from the apartment and car matched the defendant's, was sufficient to convict the defendant of armed robbery. Crawford v. State, 292 Ga. App. 463, 664 S.E.2d 820 (2008).

Evidence supported a defendant's armed robbery conviction under O.C.G.A. § 16-8-41(a); the defendant's statements provided evidence that the robbery occurred, statements by an accomplice implicating the defendant were properly admitted under the coconspirator exception to the hearsay rule, and statements by additional witnesses provided corroboration of statements the accomplice made. Jackson v. State, 292 Ga. App. 312, 665 S.E.2d 20 (2008).

Admission of similar transaction evidence in a defendant's criminal trial was not error as the defendant's prior armed robbery and a pending charge of armed robbery involved similar victims and similar actions by the defendant; further, as the defendant failed to object to the admission at trial, the issue was waived for purposes of appellate review. Garvin v. State, 292 Ga. App. 813, 665 S.E.2d 908 (2008).

Victim was raped and robbed at gunpoint, and then murdered; the defendant blamed an accomplice. Although DNA collected from the victim was consistent with the accomplice, not the defendant, the latter's admission that the defendant and the accomplice picked up the victim intending to rob her, and that the defendant had sex with the victim after the accomplice raped her, was sufficient evidence to justify the denial of defendant's motion for a directed verdict on charges of kidnapping, rape, armed robbery, and the use of a firearm in the commission of a crime. Davis v. State, 292 Ga. App. 782, 666 S.E.2d 56 (2008).

Identification of defendant by accomplice. — Defendant's claim to the contrary notwithstanding, the record was replete with evidence corroborating the testimony of defendant's accomplice which identified the defendant as one of the perpetrators of an armed robbery. The fact that there was no claim that a store clerk's opinion as to the identity of the perpetrators was unfounded, the clerk's undisputed res gestae testimony that the clerk heard a customer identify one of the perpetrators as the defendant, and the clerk's testimony that the clerk had been sprayed in the face with mace corroborated this aspect of the accomplice's testimony as well. Carter v. State, 266 Ga. App. 691, 598 S.E.2d 76 (2004).

Jury determines accuracy of eyewitness identification. — Determination of witness credibility, including the accuracy of eyewitness identification, is within the exclusive province of the jury. Evidence that the defendant wielded, and attempted to use, a gun during the robbery of a pool hall owner was sufficient to convict the defendant for armed robbery where the question of eyewitness identification of the defendant was a jury matter.

Identification (Cont'd)

Bartley v. State, 267 Ga. App. 367, 599 S.E.2d 318 (2004).

Because a burglary victim recognized the defendant before a photographic lineup was introduced, the defendant did not show deficient performance or prejudice based on trial counsel's failure to object to the lineup; in any event, the evidence was sufficient to sustain the convictions for armed robbery, aggravated assault, burglary, making terroristic threats, and possession of a firearm during the commission of the felonies under O.C.G.A. §§ 16-5-21(a)(1), (a)(2), 16-7-1(a), 16-8-41(a), 16-11-37(a), and 16-11-106(b)(1). Williams v. State, 270 Ga. App. 845, 608 S.E.2d 310 (2004).

Witnesses less than 100 percent certain of identification. — Fact that witnesses said the witnesses were less than 100 percent certain of their identification of the defendant in robberies did not render the evidence insufficient to support the convictions for armed robbery; one witness identified the defendant as one of the robbers of a shoe store, a second witness identified the defendant as one of the robbers of a restaurant, the defendant's love interest's vehicle was used as the getaway car in both robberies, the evidence showed that the defendant's girlfriend called a phone registered to a name used by the defendant as an alias during the time of each robbery, and there was proper admission of similar transaction evidence. Walker v. State, 280 Ga. App. 457, 634 S.E.2d 93 (2006).

Convictions of armed robbery, possession of a firearm during a crime, and carrying a concealed weapon were supported by sufficient evidence including guns, money, and a knife stolen from a robbery victim found in a car in which the defendant was passenger, the fact that the defendant, when arrested, was wearing a sweatshirt identified by the victims as the sweatshirt worn by one of the perpetrators, and the testimony of another of the perpetrators, who stated that the defendant was one of the participants in the robbery. Callahan v. State, 280 Ga. App. 323, 634 S.E.2d 102 (2006).

Convictions for armed robbery, aggravated assault, fleeing to elude a police officer, and reckless driving were all upheld on appeal, given the sufficiency of the identification evidence supplied by the victim, an investigating officer, and the arresting officer, as well as observations made by the latter in apprehending the defendant; moreover, the defendant's failure to object to the admission of a photographic lineup and show-up as impermissibly suggestive precluded appellate review of those issues. Newton v. State, 280 Ga. App. 709, 634 S.E.2d 839 (2006).

Evidence is sufficient for conviction for murder, felony murder, aggravated assault, armed robbery, and possession of a firearm during the commission of a felony based on sufficient evidence describing the defendant's encounter with the victim, an eyewitness's identification, and similar transaction evidence used to show identity and a course of conduct. Clark v. State, 280 Ga. 899, 635 S.E.2d 116 (2006).

Based on the defendant's admission to two armed robberies, and identification evidence linking the defendant to commission of a third robbery offense: (1) convictions for the offenses were upheld; and (2) no inconsistency with the indictment existed regarding the second robbery charge as the victim therein testified to also using the last name stated in the indictment. Monfort v. State, 281 Ga. App. 29, 635 S.E.2d 336 (2006).

Evidence was sufficient to sustain the defendant's convictions of two counts of armed robbery under O.C.G.A. § 16-8-41(a) and possession of a firearm by a convicted felon under O.C.G.A. § 16-11-131; the victims of both armed robberies, who testified as to the defendant's conduct of holding them up with a gun and taking cash, identified the defendant as the perpetrator, and when the officers apprehended the defendant, the defendant had a gun. Robinson v. State, 281 Ga. App. 76, 635 S.E.2d 380 (2006).

Because each of the three defendants made statements implicating themselves in the crimes of malice murder in violation of O.C.G.A. § 16-5-1 and armed robbery in violation of O.C.G.A. § 16-8-41(a) and because money and electronic equipment were stolen from the home, there was sufficient evidence to convict the defen-

dants of the crimes. Brooks v. State, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 549 U.S. 1215, 127 S. Ct. 1266, 167 L. Ed. 2d 91 (2007).

Sufficient evidence supported the defendant's convictions of two counts of felony murder under O.C.G.A. § 16-5-1, armed robbery under O.C.G.A. § 16-8-41, aggravated assault under O.C.G.A. § 16-5-21, possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106, and possession of a firearm by a first offender probationer under O.C.G.A. § 16-11-131; two witnesses testified that the defendant had told the witnesses that the defendant shot the victim, and one of the witnesses testified that the defendant stated that the shooting occurred during a robbery, the defendant discarded a gun that was later found to be the murder weapon while fleeing police on another crime, and the defendant admitted to police that the murder weapon was the defendant's, that the defendant stole $100 from the victims, and that the defendant shot the murder victim. Chenoweth v. State, 281 Ga. 7, 635 S.E.2d 730 (2006).

Appeals court rejected a contention that the defendant lacked any prior knowledge that the defendant's vehicle was being used to commit armed robberies, and that at most, the evidence could only characterize the defendant as an accessory after the fact and not a party to the crime, given that the state's evidence tended to show that the codefendant informed the defendant for the first time that the codefendant had just committed an armed robbery using the car and convinced the defendant to call the police and lie about the car being stolen, all within three minutes after the robbery occurred; further, an additional robbery was committed using the car after the defendant reported the car stolen. Lee v. State, 281 Ga. App. 479, 636 S.E.2d 547 (2006).

Armed robbery, attempted armed robbery, and possession of a firearm during the commission of a crime convictions were upheld on appeal based on sufficient evidence supporting the defendant's guilt, specifically, a security surveillance videotape, eyewitness testimony, and the defendant's voluntary admission to police. Smith v. State, 281 Ga. App. 587, 636 S.E.2d 748 (2006).

Because: (1) the testimony of the defendant's two accomplices adequately described the defendant's involvement in an armed robbery of a restaurant; (2) the defendant later told one cohort not to speak if caught; (3) the same handgun that the defendant used in the prior and subsequent robberies was used to rob the restaurant; and (4) all three robberies were performed in the same manner and on the same day, sufficient evidence was presented to support the defendant's armed robbery conviction as a party to the crime. Boone v. State, 282 Ga. App. 67, 637 S.E.2d 795 (2006).

Given that all three victims identified the defendant as the perpetrator of the crimes of armed robbery and false imprisonment, the defendant's theft of the father's money at gunpoint, as well as duct-taping the parents and detaining all three victims in the basement, the evidence sufficed to sustain the conviction for one count of armed robbery and three counts of false imprisonment; moreover, conflicts in the testimony, even between the state's witnesses, went to the credibility of the witnesses, which was a matter for the jury to resolve. Feldman v. State, 282 Ga. App. 390, 638 S.E.2d 822 (2006).

Because conflicts and inconsistencies in the testimony of the witnesses, including the state's witness, were a matter of credibility for the jury to decide, and because the defendant cited no authority suggesting that the instructions in question were incorrect statements of the law, and did not explain an assertion that they were confusing, convictions of armed robbery, aggravated assault, and possession of a firearm during the commission of a felony were upheld on appeal as supported by sufficient evidence. Lattimore v. State, 282 Ga. App. 435, 638 S.E.2d 848 (2006).

Distinctive hairstyle used in identification. — Because the person who stole the victim's vehicle had a distinctive hairstyle, and the defendant, who had the same hairstyle, was apprehended while in possession of the vehicle soon after the crime was committed, there was sufficient evidence to support a conviction for armed robbery in violation of O.C.G.A. § 16-8-41,

Identification (Cont'd)

aggravated assault with intent to rob in violation of O.C.G.A. § 16-5-21, and possessing a firearm during commission of a felony in violation of O.C.G.A. § 16-11-106. Hall v. State, 277 Ga. App. 413, 626 S.E.2d 611 (2006).

Evidence was sufficient to support both an armed robbery and a burglary conviction as: (1) the defendant admitted to possessing a gun stolen in the robbery and other items used in commission of the crimes; (2) the defendant fled when confronted by police; and (3) the defendant asked another person in the courthouse why that person snitched on the defendant; the state's failure to produce or ever locate the weapon used by the defendant was immaterial as was the fact that the defendant was acquitted of the charge of possession of a firearm during the commission of a felony. Roberts v. State, 277 Ga. App. 730, 627 S.E.2d 446 (2006).

Evidence supported convictions for armed robbery and aggravated assault when using the defendant's mother's telephone number, the defendant contacted the victim and arranged a meeting to buy shoes, when the victim identified the car the defendant was driving, which was registered to the defendant's mother, since the victim identified the defendant from a pretrial police photo array and at trial, and since, at the meeting arranged by the defendant, the victim was shot in the face and the defendant then rummaged through the victim's car where the victim kept the shoes. Waddell v. State, 277 Ga. App. 772, 627 S.E.2d 840 (2006), cert. denied, 127 S. Ct. 731, 2006 U.S. LEXIS 9304, 166 L.Ed.2d 567 (2006).

Victim's identification sufficient. — Evidence supported defendant two's conviction for armed robbery, kidnapping, and aggravated assault as, notwithstanding the absence of an in-court identification of the defendant and the state's failure to present fingerprint evidence, a victim's testimony concerning the victim's on-the-scene identification supported the finding that the defendant perpetrated the crimes; there was also sufficient evidence that the cash seized from the defendant's love interest's house had been put there by defendant two. Oliver v. State, 273 Ga. App. 754, 615 S.E.2d 846 (2005).

Evidence supported the defendant's conviction for armed robbery as: (1) the victims had the opportunity and the ability to identify the defendant; (2) there was sufficient evidence that the gun taken from the defendant's house was the gun that the defendant carried during the robbery; and (3) fingerprint evidence was not essential to the state's case. Oliver v. State, 273 Ga. App. 754, 615 S.E.2d 846 (2005).

Evidence, including a gun and penny wrappers and a green coin basket found in the defendant's bedroom, was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of armed robbery and kidnapping after a restaurant was robbed; the basket matched a basket used by the restaurant and the pennies had been exchanged by the same bank that supplied the restaurant. Brown v. State, 275 Ga. App. 66, 619 S.E.2d 759 (2005).

Defendant's convictions for armed robbery, kidnapping, and kidnapping with bodily injury, in violation of O.C.G.A. §§ 16-8-41 and 16-5-40, respectively, were supported by sufficient evidence as the defendant robbed a restaurant manager at gunpoint, forced the manager and others into the restaurant freezer, and the defendant caused injury and made threats to the victims; the defendant's claim that the defendant was forced against the defendant's will to participate in the crime, which was also committed by three codefendants, was not found credible, and several victims testified that the defendant not only held a gun, but that the defendant also threatened the victims with bodily harm if the victims did not cooperate. Isaac v. State, 275 Ga. App. 254, 620 S.E.2d 483 (2005).

Evidence was sufficient for a rational trier of fact to conclude that the defendant was guilty of all four counts of armed robbery beyond a reasonable doubt as the two sets of two victims each from the two different robberies identified the defendant as the perpetrator and the defendant had the victims' property at the time the defendant was apprehended. Blunt v. State, 275 Ga. App. 409, 620 S.E.2d 572 (2005).

Tattoo as factor in identification of armed robbery perpetrator. — Evidence was sufficient to support burglary, aggravated assault, kidnapping, false imprisonment, and armed robbery convictions after one of the victims opened the door to the victim's home when the victim recognized one of the defendant's accomplices, when the defendant and another then pushed the door open and rushed inside, and when the defendant grabbed the first victim, pointed a gun at the first victim's head, took money from the second victim's wallet, kept the gun pointed at both victims during the entire incident, ripped the telephone cord out of the wall, and instructed the accomplices to bind and blindfold the victims, which they did; the victims both identified the defendant as the gunman from a police photo array and made an in-court identification at trial, and any conflict between the victims' testimony that the gunman had a tattoo on the gunman's arm and a trial demonstration revealing no tattoo on the defendant's arm was a matter for the jury to resolve and did not affect the suplastifficiency of the identification. Kates v. State, 269 Ga. App. 8, 603 S.E.2d 342 (2004).

In addition to the second codefendant's testimony, the state showed that, shortly after the murder, the defendant was in possession of the victim's cab, that the victim's blood was found in the vehicle and on the defendant, and that the defendant made incriminating admissions to others; thus, the evidence was sufficient to authorize a rational trier of fact to find proof beyond a reasonable doubt of the defendant's guilt of malice murder, armed robbery, aggravated assault, hijacking a motor vehicle, and possession of a firearm during the commission of a felony. Wicks v. State, 278 Ga. 550, 604 S.E.2d 768 (2004).

Recognition of voice as sufficient. — Evidence that a store employee recognized one of the robbers' voices as belonging to the defendant, that the defendant's car was found behind the store with proceeds of the robbery and a loaded pistol, and that the defendant was found in a dumpster behind the store was sufficient to support convictions for false imprisonment and armed robbery. Woods v. State, 266 Ga. App. 53, 596 S.E.2d 203 (2004).

Uncorroborated identification of defendant. — Evidence supported the defendant's conviction of armed robbery even though the victim's identifications of the defendant in a photographic lineup and at trial were uncorroborated; the victim testified that defendant held a handgun to the victim's head while an accomplice took the victim's money and wallet, which authorized the jury to convict the defendant. Eady v. State, 273 Ga. App. 261, 614 S.E.2d 868 (2005).

Expert testimony that a shell casing at the crime scene came from a pistol found in the defendant's apartment, along with two witnesses' identifications of the defendant, and expert testimony that a bullet extracted from a victim's head possibly came from the defendant's pistol, although it was too damaged to say with complete certainty, sufficiently supported the defendant's convictions for murder, armed robbery, and possession of a firearm during the commission of a felony. Escobar v. State, 279 Ga. 727, 620 S.E.2d 812 (2005).

Identification of gun and defendant. — Defendant's conviction for two counts of armed robbery was upheld on appeal because the evidence showed that the defendant was identified by one of the victims shortly after the robbery spree of a dry cleaners and a beauty shop and, while another victim was not able to identify the defendant, the victim was able to identify the gun used, which was the same gun found in the defendant's vehicle after the robberies, as was a mask and other criminal tools. Butler v. State, 276 Ga. App. 161, 623 S.E.2d 132 (2005).

Identification by love interest. — As a robber's unique shirt was recorded by a convenience store security camera, and the defendant's love interest identified it as the defendant's shirt, and as the defendant could not say exactly where the defendant was that evening, the evidence was legally sufficient to sustain the convictions for armed robbery and possession of a firearm during the commission of a felony. Brown v. State, 277 Ga. App. 169, 626 S.E.2d 128 (2006).

Sufficient evidence supported convictions of felony murder, armed robbery,

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aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm in the commission of a felony where, upon pulling into an apartment complex to turn around and ask for directions, the victims were approached by the defendant and another person, the defendant pulled out a gun and told the victims to "give it up," when one of the victims hesitated, the defendant shot the victim, the defendant then stole that victim's money and jewelry, and later, the gunshot victim died; the second victim described the defendant, who was wearing a specific jersey at the time of the crimes, and two witnesses who knew the defendant testified that the defendant robbed and shot the victim while wearing that jersey. Davis v. State, 280 Ga. 442, 629 S.E.2d 238 (2006).

Convictions of armed robbery, possession of a firearm during the commission of a crime, false imprisonment, and hijacking a motor vehicle were supported by sufficient evidence since a perpetrator identified as the defendant robbed a pizza restaurant at gunpoint, ordered everyone into a cooler, and took the restaurant manager's vehicle, after which an officer discovered the defendant the next day driving the manager's vehicle and wearing a hat identical to that worn by the perpetrator, and since a customer at the restaurant identified the defendant as the robber in a photo line-up and at trial; while three of the four crimes arising out of the incident were committed after the customer, who was the only witness to identify the defendant, was ordered into the cooler, only one robber entered the restaurant and the jury was authorized to infer that the person identified by the customer also committed the crimes committed after the customer was in the cooler. Head v. State, 279 Ga. App. 608, 631 S.E.2d 808 (2006).

While the trial court's act of including "level of certainty" language in the court's pattern jury charge on eyewitness identification was erroneous, the error was harmless, given that the victim was able to describe the physical characteristics of the armed robber, and there was evidence other than the victim's identification connecting the defendant to the crime, specifically, the victim's description of the car the armed robber used to get away and the defendant's presence at a nearby store shortly after the robbery; hence, it was highly probable that the "level of certainty" jury charge did not contribute to the judgment. Pasco v. State, 281 Ga. App. 5, 635 S.E.2d 269 (2006).

Identification of defendant in photo array. — Evidence was sufficient to convict the defendant of armed robbery under O.C.G.A. § 16-8-41(a) because the victim gave a detailed description of the defendant, the victim identified the defendant in a photographic array and in court, and the defendant admitted to the robbery. White v. State, 250 Ga. App. 783, 552 S.E.2d 927 (2001).

Evidence was sufficient to support the defendant's two armed robbery conviction as defendant's challenge to those convictions was meritless; the defendant's contention that the evidence was insufficient had to be rejected because it was premised on the argument that the victims' identification of the defendant as a perpetrator was tainted by an impermissibly suggestive photographic lineup and the photographic lineup procedure was not impermissibly suggestive. Evans v. State, 261 Ga. App. 22, 581 S.E.2d 676 (2003).

When the defendant's victim identified the defendant from a photo lineup and at trial as the person who forced the victim to open the vaults in the fast-food restaurant where the victim worked, then duct-taped the victim's limbs and repeatedly struck the victim as the victim lay face down on the floor, the evidence was sufficient beyond a reasonable doubt to allow the jury to convict the defendant of kidnapping with bodily injury, armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of certain crimes. Banks v. State, 269 Ga. App. 653, 605 S.E.2d 47 (2004).

Because the defendant admitted to knowing about a robbery beforehand, to being present at the robbery, and to telling one of the victims to get on the floor, all three of the defendant's accomplices put the defendant inside the home where the robbery occurred during the commission

of the crime, and the defendant's car was driven to and from the scene, there was sufficient evidence to support the verdict. Jones v. State, 270 Ga. App. 368, 606 S.E.2d 592 (2004).

Testimony provided by two accomplices, together with inside information which the defendant learned about the location of the robbery, the security camera on the premises, the people that worked there, how many people worked there, who was in the back area, and about the safe, when coupled with the fact that the gunman was not captured on the security camera, provided some evidence, though slight, that the robber had such inside information; under the circumstances, the accomplices' testimony was sufficiently corroborated, and the jury was authorized to find the defendant guilty. Ziegler v. State, 270 Ga. App. 787, 608 S.E.2d 230 (2004), cert. denied, 546 U.S. 1019, 126 S. Ct. 656, 163 L. Ed. 2d 532 (2005).

Defendant's multiple convictions for armed robbery, aggravated assault, kidnapping, possessing a firearm during the commission of a felony, burglary, and kidnapping with bodily injury were supported by sufficient evidence because the defendant and another robbed a store while holding the two owners at gunpoint, the defendant led police on a high-speed car chase, and the defendant broke into and robbed two homes, one of which had an occupant that the defendant beat; only one store owner's testimony was needed to establish the facts to support the aggravated assault conviction. Owens v. State, 271 Ga. App. 365, 609 S.E.2d 670 (2005).

In a prosecution for armed robbery and offenses related thereto, the trial court did not improperly allow hearsay evidence of identification, and hence, it was not error to allow a police officer to testify as to who the victims identified in the photo arrays as a law enforcement officer could testify to a pre-trial identification if the person who actually made the identification testified at trial and was subject to cross-examination. Monfort v. State, 281 Ga. App. 29, 635 S.E.2d 336 (2006).

As a cashier was only two feet from two robbers during the crime, which lasted about a minute, and the cashier looked at their faces, the fact that the cashier identified the defendant twice from photo arrays, and once at trial as the robber who had held the gun was sufficient to convict the defendant of armed robbery. Shabazz v. State, 293 Ga. App. 560, 667 S.E.2d 414 (2008).

Armed robbery convictions entered against both the first and second defendants were upheld on appeal, given sufficient identification evidence, making an erroneous "level of certainty" instruction harmless error, and because counsel for the first defendant was not ineffective. Taylor v. State, 282 Ga. App. 469, 638 S.E.2d 869 (2006), cert. dismissed, 2007 Ga. LEXIS 135 (Ga. 2007).

Evidence, which included uncontroverted testimony from an eyewitness who saw a defendant order a store employee into the street shortly before the employee was shot, the testimony of two other eyewitnesses, and the fact that calls had been made from the employee's stolen cellular phone to the defendant's mother, was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, armed robbery, and a number of other associated crimes. Horne v. State, 281 Ga. 799, 642 S.E.2d 659 (2007).

Because sufficient evidence identifying the defendant as the perpetrator of an armed robbery was presented by: (1) the convenience store clerk that was robbed at knife point; (2) the store's owner, who testified to seeing the defendant in the store at least ten times in the year prior to the robbery; and (3) the store's surveillance videotape, which matched the owner's description, the defendant's armed robbery conviction was upheld on appeal. Clark v. State, 283 Ga. App. 884, 642 S.E.2d 900 (2007).

Identity of perpetrator is issue for trier of fact. — Defendant's armed robbery conviction was upheld on appeal as: (1) issues related to the identity of the perpetrator were for the trier of fact, not the Court of Appeals of Georgia; and (2) identification testimony by a witness the defendant challenged was relevant, and thus admissible, and was not rendered inadmissible merely because such placed the defendant's character in issue. Buice v. State, 289 Ga. App. 415, 657 S.E.2d 326 (2008).

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There was sufficient evidence to support the defendant's conviction for armed robbery because the state met the state's burden of proving that the defendant took the property of another from the person or the immediate presence of another by use of an offensive weapon; the state offered the testimony of the bus counter clerk as to the facts of the robbery and as to the identification of the defendant as the gunman. That testimony, standing alone, was sufficient to support the defendant's conviction. Range v. State, 289 Ga. App. 727, 658 S.E.2d 245 (2008).

No likelihood of misidentification. — Because: (1) victim's identification of defendant was based upon independent memory which victim fairly accurately recalled in developing the composite sketch; (2) there was an independent basis for the victim's identifications; and (3) there was no substantial likelihood of misidentification under these circumstances, the trial court did not err in admitting the identification evidence and the trial court's finding that there was no likelihood of misidentification was supported by the record. Price v. State, 289 Ga. App. 763, 658 S.E.2d 382 (2008).

Trial court properly convicted the defendant of armed robbery and hijacking of a motor vehicle because: (1) there was sufficient evidence to establish the defendant committed the crimes based on the testimony of the victim, who identified the defendant as the individual who approached the victim's vehicle, pointed a gun, and demanded the vehicle; (2) two officers testified as to observing the defendant driving the stolen vehicle the same night; and (3) the victim's cell phone was found on the defendant's person when the defendant was arrested. Culver v. State, 290 Ga. App. 321, 659 S.E.2d 390 (2008).

Because the evidence showed that the victim sufficiently identified the defendant as the perpetrator of an aggravated assault and armed robbery (1) to officers at the scene, (2) by means of a photographic lineup, and (3) at trial, the appeals court rejected the defendant's sufficiency challenge as to that element. Wallace v. State, 289 Ga. App. 497, 657 S.E.2d 874 (2008).

Victim identification sufficient. — There was no merit to a defendant's argument that the evidence did not support an armed robbery conviction because the victims' identifications were unreliable. The victims' encounter with the defendant lasted up to three minutes and took place at a well-lit tennis court; the victims had a clear view of the defendant's face; one victim was close enough to the defendant to hand the defendant the victim's wallet; the descriptions the victims gave matched the defendant's height, build, age, and hairstyle; and the victims identified the defendant the same evening as the incident. Olive v. State, 291 Ga. App. 538, 662 S.E.2d 308 (2008).

While the state failed to produce a weapon, fingerprints, or other physical evidence tying the defendant to the crimes, pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the jury was authorized to accept the cashier's identification testimony; accordingly, the evidence was sufficient to support the defendant's conviction for armed robbery. Clowers v. State, 299 Ga. App. 576, 683 S.E.2d 46 (2009).

Single witness identification of defendant sufficient. — Sufficient evidence was presented to support a defendant's conviction for armed robbery because the victim, a taxi driver, identified the defendant as one of the perpetrators based, inter alia, on the victim's knowledge of the defendant from living in the same townhome complex; a single witness's testimony was sufficient to establish a fact under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8). Troutman v. State, 297 Ga. App. 196, 676 S.E.2d 836 (2009).

Sufficient evidence supported the defendant's convictions of armed robbery, O.C.G.A. § 16-8-41(a), rape, O.C.G.A. § 16-6-1(a)(1), aggravated assault, O.C.G.A. § 16-5-21(a)(2), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), kidnapping, O.C.G.A. § 16-5-40(a), and aggravated sodomy, O.C.G.A. § 16-6-2(a)(2), involving four different victims on three separate dates; both the husband and the wife, the victims in the first criminal incident, identified the defendant in court as the perpetrator of the crimes. Two sepa-

rate DNA analyses testified to by two forensic biologists showed that the defendant's sperm was present in the vaginas of the other two female victims. Robins v. State, 298 Ga. App. 70, 679 S.E.2d 92 (2009).

Jury determines accuracy of eyewitness identification. — Sufficient evidence was presented to the jury to support the defendant's convictions for armed robbery, aggravated assault, burglary, criminal attempt to commit aggravated sodomy, and possession of a knife during the commission of a crime because the victim's testimony alone was sufficient to support the convictions; regardless of any inconsistencies in the victim's testimony, it was for the jury to assess witness credibility, and the jury chose to believe the victim's identification of the defendant as the individual who committed the crimes. Williams v. State, 300 Ga. App. 839, 686 S.E.2d 446 (2009).

Testimony of an armed robbery victim and the victim's love interest, who were eyewitnesses to the defendant's crimes of armed robbery and aggravated assault, and who separately identified the defendant as the perpetrator of the robbery and assault, standing alone, was sufficient to establish the defendant's identity as the perpetrator. Crawford v. State, 301 Ga. App. 633, 688 S.E.2d 409 (2009).

Trial court did not err in convicting the defendant of armed robbery of a restaurant, O.C.G.A. § 16-8-41(a), and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), because sufficient evidence corroborated an accomplice's testimony that the defendant participated in the robbery; the driver corroborated that the driver picked the defendant up and dropped the defendant and the accomplice off at the defendant's residence near the restaurant about two-and-one-half hours before the robbery, the driver overheard the defendant speaking to the accomplice about committing a robbery, and two more witnesses confirmed that the two were together that evening. Jones v. State, 302 Ga. App. 147, 690 S.E.2d 460 (2010).

Trial court did not err in denying the defendant's motion to exclude the in-court identification by each of the armed robbery victims because each of the victims' identification of the defendant had an independent origin; each of the victims observed the defendant face to face in full daylight and identified the defendant's photograph within days of being robbed, and the first victim identified the defendant as the victim drove by in a car. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Evidence was sufficient to convict a defendant of armed robbery in violation of O.C.G.A. § 16-8-41(a) of the victim, a restaurant employee, who was pressure washing the exterior of the restaurant in a lit parking lot. The employee testified that the employee observed the defendant's face the entire time that the defendant held a gun to the employee's chest. Battise v. State, 309 Ga. App. 835, 711 S.E.2d 390 (2011).

Defendant's convictions for armed robbery, aggravated assault with a deadly weapon, burglary, and possession of a firearm during the commission of a crime were supported by sufficient evidence. While the defendant contended that the evidence against the defendant was purely circumstantial, an eyewitness's identification of the defendant as the second gunman during the photographic lineup constituted direct evidence of the defendant's guilt. Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Victim's identification sufficient. — Victim's testimony that the defendant was one of the two men who came into the victim's house, beat the victim with fists and a flashlight, and demanded the victim's keys and money authorized the jury to find the defendant guilty of burglary, aggravated battery, and criminal attempt to commit armed robbery. Garmon v. State, 317 Ga. App. 634, 732 S.E.2d 289 (2012).

Sufficient evidence existed to support the defendant's convictions for armed robbery and aggravated assault based on the victims' testimony that guns were used in the commission of the crimes, the testimony of the defendant's girlfriend, and the presence of a cell phone found near the scene of the crimes, and the victims identifying the defendant's accent was suffi-

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cient for the jury to infer that the defendant was an armed participant in the crimes. Jordan v. State, 320 Ga. App. 265, 739 S.E.2d 743 (2013).

Sufficient evidence supported the defendant's convictions for two counts of armed robbery with respect to two victims at the first residence, attempt to commit armed robbery with respect to one of the victims at the first residence, and two counts of burglary with respect to the two residences because the accomplice testimony was sufficiently corroborated by one of the witnesses, who identified the defendant. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

Simultaneous lineup not impermissibly suggestive. — With regard to the defendant's convictions for armed robbery, aggravated assault, burglary, and false imprisonment, the trial court did not err by denying the motion to suppress the out-of-court identifications of the defendant because the court found that the simultaneous lineup was not impermissibly suggestive as a matter of law based on the testimony of the officer who prepared and presented the lineup that the victims were admonished that the suspect may not be in the array. McCowan v. State, 325 Ga. App. 509, 753 S.E.2d 775 (2014).

Sufficient evidence supported the defendant's conviction for armed robbery based on the testimony of the employee, who identified the defendant and the codefendants, and a surveillance video, which showed them in the same clothing witnesses had seen them wearing; plus, the defendant's cell phone records placed the defendant in the area of the robbery at the time the robbery occurred, despite the defendant claiming to be in another city at the time. Carter v. State, 326 Ga. App. 144, 756 S.E.2d 232 (2014).

Identification and fingerprint evidence sufficient. — Jury was authorized to find the defendant guilty of armed robbery and possession of a firearm during the commission of a felony based on the witnesses' positive identification of the defendant's distinctive speech; the ski mask and salad bag found in the defendant's vehicle from the restaurant robbed; and the sudden, labored, and sweaty appearance of the defendant immediately after the robbery and high speed chase. Walker v. State, 329 Ga. App. 369, 765 S.E.2d 599 (2014).

Since the admission of the victim's identification of the defendant was not improper, the defendant's challenge to the sufficiency of the evidence based on that identification failed and the jury was authorized, based on the identification and the existence of the defendant's fingerprints on the victim's van, to find that the defendant committed both armed robbery and aggravated assault. Jackson v. State, 335 Ga. App. 500, 782 S.E.2d 287 (2016).

Identification of defendant. — Evidence identifying the defendant as the perpetrator of the armed robbery was sufficient; the defendant's spouse admitted to helping to plan the robbery, driving the defendant to the bank, waiting for the defendant, driving away after the defendant jumped in the open trunk and spending the money, the defendant's parent testified that defendant told the defendant's parent the defendant committed the robbery and the defendant's fingerprints were on the envelope containing the note the defendant gave the teller demanding the money. Keller v. State, 231 Ga. App. 546, 499 S.E.2d 713 (1998).

When the victim identified the defendant less than 15 minutes after a robbery, had been face-to-face with the robber for three or four seconds, gave the police a substantially correct description of the defendant's person, and demonstrated a high degree of certainty in the identification, the evidence was sufficient to support the defendant's convictions of armed robbery, aggravated assault, and possession of a firearm during the commission of a felony, even though no physical evidence tied the defendant to the robbery; the fact that the defendant was handcuffed during the "showup" identification did not make the identification unreasonably or unfairly conducted, and the credibility of the victim was a jury question. Tiggs v. State, 287 Ga. App. 291, 651 S.E.2d 209 (2007).

Evidence was sufficient to support a defendant's armed robbery conviction when an accomplice, who was wearing a mask and holding a gun when the accom-

plice entered the victim's bedroom, testified that the defendant had given the accomplice the mask and the gun and that the accomplice had shouted downstairs to the defendant during the robbery; the testimony was corroborated under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) by the victim's recognition of the defendant's voice from the shouted conversation during the robbery and by the defendant's resistance and flight when police arrived. Williams v. State, 287 Ga. App. 361, 651 S.E.2d 768 (2007).

Given the overwhelming evidence of the defendant's guilt, the effectiveness of trial counsel, and the absence of reversible error in excepting the lead detective from sequestration, instructing the jury, admitting similar transaction evidence, and admitting the defendant's custodial statement, the defendant's armed robbery and possession of a firearm convictions were upheld on appeal. Morgan v. State, 287 Ga. App. 569, 651 S.E.2d 833 (2007).

Indictment

Contents of indictment not fatal to conviction. — An over-inclusive list of items alleged to have been taken in an indictment for armed robbery is not fatal to the validity of a conviction. Booker v. State, 242 Ga. App. 80, 528 S.E.2d 849 (2000).

Despite the defendant's contention on appeal that two armed robbery convictions were void because the indictment failed to allege the essential element of intent to commit a theft because the defendant's contention amounted to a motion in arrest of judgment, the claim lacked merit as the indictment was not absolutely void. Beals v. State, 288 Ga. App. 815, 655 S.E.2d 687 (2007).

Whether the misnomer of an armed robbery victim constituted a defect in the indictment was not preserved for appellate review because the defendant filed no demurrer or motion in arrest of judgment contending that the indictment was void, nor did the defendant interpose any objection to the victim testifying; even if the alleged error had been preserved, the misnomer of the victim in the indictment was not a fatal error because the defendant's cross-examination of the victim revealed that the defendant was aware of the victim's identity as one of the robbery victims and was prepared to cross-examine the victim. Hester v. State, 304 Ga. App. 441, 696 S.E.2d 427 (2010).

Error in indictment charging felony murder. — In a prosecution for felony murder by aiding and abetting in an armed robbery, an indictment alleging that the defendant acted in concert with the perpetrator and relinquished control over money pursuant to their prearranged agreement negated an essential element of robbery — that the relinquishment of possession was the result of force or intimidation. State v. Epps, 267 Ga. 175, 476 S.E.2d 579 (1996).

Form of indictment. — An overinclusive list of items alleged to have been stolen in an indictment for armed robbery did not result in a variance between the indictment and the proof offered at trial so severe that it affected defendant's substantial rights, prejudiced the preparation of defendant's defense, or exposed defendant to the possibility of subsequently having to stand trial for the same charge. Denson v. State, 212 Ga. App. 883, 443 S.E.2d 300 (1994).

Because the indictment filed against the defendant set out all the essential elements of the offense of armed robbery, and the defendant could not admit to those allegations without being guilty of a crime, the indictment was sufficient to withstand a general demurrer; moreover, to the extent the defendant's attack on the indictment could be considered a special demurrer, seeking greater specificity, that demurrer was waived by the failure to interpose it prior to pleading to the indictment. Roberts v. State, 282 Ga. 548, 651 S.E.2d 689 (2007).

Indictment with variation in victim's identification. — Fact that armed robbery indictment alleged that the money taken by the defendant was the property of one person, when the evidence showed that it was the property of that person's daughter, did not deny the defendant's right to be definitely informed as to the charges against the defendant to be protected against another prosecution for the same offense. Wilson v. State, 250 Ga. 630, 300 S.E.2d 640, cert. denied, 464 U.S.

Indictment (Cont'd)

865, 104 S. Ct. 199, 78 L. Ed. 2d 174 (1983).

Defendant could be convicted of robbing each of two bank tellers during a single incident; each employee who was robbed was a victim, regardless of who owned the money. McCluskey v. State, 211 Ga. App. 205, 438 S.E.2d 679 (1993).

Proof of exact date of crime not necessary. — When the defendant was accused of committing armed robbery on or about September 15, 2001, the defendant was tried in August 2002, and the defendant testified that the robbery occurred "last fall," the evidence supported a finding that the crime was committed during the fall of 2001, which was within the seven-year statute of limitations for armed robbery pursuant to O.C.G.A. §§ 16-8-41(b) and 17-3-1(b); as the exact date of the commission of the crime was not a material allegation of the indictment, the commission of the offense could be proved to have occurred any time within the limitations period. Houston v. State, 267 Ga. App. 383, 599 S.E.2d 325 (2004).

Inappropriate conjunction in indictment not fatal. — Indictment which stated that the defendant took property of another from the person and immediate presence was merely the use of an inappropriate conjunction and not a fatal variance. Dobbs v. State, 204 Ga. App. 83, 418 S.E.2d 443 (1992).

Use of Weapon

Scissors. — Evidence that the defendant took money from the second victim while holding scissors, without evidence that the second victim owed the defendant money, supported the armed robbery conviction. Bradley v. State, 322 Ga. App. 541, 745 S.E.2d 763 (2013).

Rock covered by sock. — Evidence the defendant took a purse and a car from a woman after telling the woman to drive or die while pointing a sock covered rock at the woman supported the defendant's conviction for armed robbery. Hughes v. State, 323 Ga. App. 4, 746 S.E.2d 648 (2013).

Sufficient evidence supported the defendant's conviction for armed robbery based on the victim identifying the defendant as the person who hit the victim on the head, an accomplice's testimony, the victim's car keys were found in a bag that the defendant had been holding when stopped by an officer, and the defendant fled from the officers when the officers attempted to arrest the defendant. Brooks v. State, 323 Ga. App. 681, 747 S.E.2d 688 (2013).

Meat Cleaver. — Evidence the defendant entered the gift shop wielding a meat cleaver, made repeated demands for money, and the two victims were present and held in fear when the money was taken from the cash register and a video poker machine was sufficient to support the defendant's robbery convictions as to those two victims. Bradford v. State, 327 Ga. App. 621, 760 S.E.2d 630 (2014).

Evidence from a victim that the defendant robbed the victim of cash, cell phones, and a GPS unit at knifepoint was sufficient pursuant to O.C.G.A. § 24-14-8 to establish that the defendant committed armed robbery with a knife in violation of O.C.G.A. §§ 16-8-41(a) and 16-11-106(b)(1), although the defendant testified that the victim gave the defendant these items for drugs. Sanders v. State, 324 Ga. App. 4, 749 S.E.2d 14 (2013).

Sufficient evidence supported the defendant's conviction for armed robbery based on the evidence showing that the defendant was found by police hiding after a high speed chase, was in a car with two men who fit the description of the two men who robbed the restaurant, and the car contained a deposit slip identified by a restaurant worker. Martin v. State, 324 Ga. App. 252, 749 S.E.2d 815 (2013).

Evidence was sufficient to convict the defendant of armed robbery and burglary because three black males robbed the store, one of whom pointed a gun at the store manager; after the defendant was apprehended, the defendant made incriminating statements that the defendant took the stuff to pay bills and that the defendant did not know where the other two individuals were; and the bags found in the defendant's vicinity consisted of six cooler totes containing approximately $700 in merchandise from the store and a plastic bag containing money and the de-

posit slip from the store's safe. Brooks v. State, 324 Ga. App. 352, 750 S.E.2d 423 (2013).

Evidence was sufficient to convict the defendant of armed robbery because the state presented evidence that the defendant used force against the victim before taking the victim's money as the theft was completed after the defendant stabbed the victim to death with a knife. Bates v. State, 293 Ga. 855, 750 S.E.2d 323 (2013).

Sufficient evidence supported the defendant's convictions as a party to the crimes of armed robbery, aggravated assault against the manager and cashier, and possession of a firearm during the commission of the armed robbery because the law allowed the defendant to be charged with and convicted of the same offenses as the codefendant since the evidence showed that the defendant drove the codefendant to the fast food restaurant that was robbed and waited as the getaway driver. Broyard v. State, 325 Ga. App. 794, 755 S.E.2d 36 (2014).

Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault, and possession of a firearm during the commission of a felony because, although the two passengers of the car committed the actual armed robbery, there was evidence that the defendant, the driver of the car, knew that the two passengers were armed and that the defendant "kind of sort of" knew what they were going to do, which supported a finding that the defendant participated in the robbery as the getaway driver. Smith v. State, 325 Ga. App. 745, 754 S.E.2d 788 (2014).

Evidence was sufficient to convict the defendant of the four armed robberies as a party as the accomplice testified that the robberies were executed pursuant to a plan orchestrated and aided by the defendant; the accomplice never pointed the weapon at the defendant, nor demanded the defendant's property; and, although the defendant had successfully fled the property, the defendant circled back to the residence — while the accomplice was still there — and attempted to steal electronic equipment. Styles v. State, 329 Ga. App. 143, 764 S.E.2d 166 (2014).

Victim's testimony that the defendant pointed a gun at the victim, gave the gun to an accomplice, and took the victim's possessions, and that the victim was 100% sure the defendant was one of the robbers was sufficient to support a conviction for armed robbery. Hogan v. State, 330 Ga. App. 596, 768 S.E.2d 779 (2015).

Evidence was sufficient to support defendant's convictions for armed robbery, aggravated assault, false imprisonment, and possession of a firearm during the commission of a felony in violation of O.C.G.A. §§ 16-5-21, 16-5-41, 16-8-41, and 16-11-106, based on testimony from witnesses inside the bank, defendant's clothing, a text message between the defendant and the defendant's accomplice, and the defandant's accomplice's testimony, which was corroborated as required by O.C.G.A. § 24-14-8. Odle v. State, 331 Ga. App. 146, 770 S.E.2d 256 (2015).

Evidence that the defendant took a laptop during the burglary, including a codefendant's statement that the codefendant saw the defendant emerge from the victim's home with the laptop under the defendant's arm, and the fact that the defendant appeared with a camcorder taken from the victim the day after the murder and the gun used in the murder was found in defendant's home was sufficient to support an armed robbery conviction. Pitchford v. State, 294 Ga. 230, 751 S.E.2d 785 (2013), overruled on other grounds, State v. Chulpayev, 296 Ga. 764, 770 S.E.2d 808 (2015).

Evidence was sufficient to convict the defendant of armed robbery because the victim arranged to purchase a car from the defendant for $4000; the victim met the defendant and got into the defendant's car to go see the car for sale; when the defendant pulled into a driveway and unlocked the car doors, eight or nine masked people dressed in black with handguns and shotguns grabbed the victim, pulled the victim out of the car, beat the victim, and then robbed the victim of the $4000 cash the victim had to purchase the car, another $300 in cash the victim had, the victim's cell phone, and the victim's flip-flops; and the defendant told one of the men holding a gun to the victim's head not to shoot the victim. Logan-Goodlaw v. State, 331 Ga. App. 671, 770 S.E.2d 899 (2015).

Use of Weapon (Cont'd)

Evidence was sufficient to convict the defendant of rape, aggravated sodomy, and two counts of armed robbery because the co-defendant, the defendant, and a third man rushed into the apartment and secured the arms and legs of the male victims with duct tape while they ransacked the apartment looking for money and drugs; as the victim entered the bathroom and sat on the toilet, the defendant followed the victim in, stood in front of the victim, and forced the victim at gunpoint to perform oral sex on the defendant; the defendant later bent the victim over a sofa, and had sexual intercourse with the victim; and the victim identified the defendant as the man who sexually assaulted the victim. Traylor v. State, 332 Ga. App. 441, 773 S.E.2d 403 (2015).

Testimony of the victim identifying the defendant as the person who robbed the victim and identifying the handgun, and the testimony of the security guard and the bystander which aligned with the victim's account of the robbery was sufficient to support the defendant's convictions for armed robbery and possession of a firearm during the commission of a felony. Murphy v. State, 333 Ga. App. 722, 776 S.E.2d 657 (2015).

Canes. — Sufficient evidence supported convictions of malice murder and armed robbery when during an argument with a 79-year-old victim, the defendant struck the victim in the head several times with the victim's cane, causing the cane to break and an edge of the cane to cut the victim's neck, after which the defendant took the victim's wallet and car and drove to Atlanta. Harvey v. State, 284 Ga. 8, 660 S.E.2d 528 (2008).

In defendant's convictions for armed robbery, kidnapping, and aggravated assault in connection with robbery of a fast food restaurant, sufficient evidence existed to support the defendant's convictions based on a restaurant employee identifying the defendant as one of two perpetrators who confronted that employee and manager at gunpoint and threatened to shoot if the victims did not comply with the defendant's demand for money; also, evidence showed that the defendant forced the manager out of the manager's car at gunpoint, ordered the manager back across the parking lot and into the restaurant, and stole over $300.00 from the restaurant's safe as well as a cellular phone before fleeing. Holsey v. State, 291 Ga. App. 216, 661 S.E.2d 621 (2008).

There was sufficient evidence to support armed robbery and aggravated assault convictions. Two masked persons entered a restaurant, pointed a gun at the employees, forced the manager to give the individuals money, including rolls of change, ordered everyone to get on the floor, and then fled; an officer saw two people running, including the defendant, who were wearing the type of boots worn by the robbers; the defendant had a BB gun and $201 in cash, including several rolls of quarters; two restaurant employees identified the gun as the weapon used in the robbery; and a detective testified that when the defendant was arrested, the defendant was wearing the jacket and boots depicted on the surveillance videotape played for the jury. Williams v. State, 291 Ga. App. 279, 661 S.E.2d 658 (2008).

Crowbars. — State's evidence was sufficient to support the defendant's conviction for armed robbery because the evidence showed that: (1) the defendant had been in the victim's store twice on the night of the alleged robbery; (2) the victim identified the masked perpetrator as a Caucasian male wielding a crowbar; (3) trained police dogs followed a scent from a trail immediately behind the store to the residence where the defendant was located; (4) the defendant was the only Caucasian person at that location; (5) in the backyard of that residence, police officers found a crow bar with the victim's blood on it and a jacket whose pocket contained a receipt evidencing the purchase of a crowbar; (6) surveillance videotape from the location where the purchase of the crowbar was made supported the conclusion that the defendant was the person who purchased the crowbar; and (7) the defendant made a voluntary statement to the police that the jury could easily have interpreted as a confession. Lawrence v. State, 289 Ga. App. 163, 657 S.E.2d 250 (2008).

Constitutionality of "appearance of such weapon." — "Appearance of such weapon" in O.C.G.A. § 16-8-41(a) is not impermissibly vague, and the statute is therefore constitutional. Moody v. State, 258 Ga. 818, 375 S.E.2d 30 (1989).

To support conviction of armed robbery, offensive weapon must be used to effectuate robbery. Woods v. Linahan, 648 F.2d 973 (5th Cir. 1981).

What constitutes an offensive weapon. — See Fann v. State, 153 Ga. App. 634, 266 S.E.2d 307 (1980); Hambrick v. State, 174 Ga. App. 444, 330 S.E.2d 383 (1985); Clark v. State, 221 Ga. App. 273, 470 S.E.2d 816 (1996).

Term "offensive weapon" is not one that requires definition absent a request. Meminger v. State, 160 Ga. App. 509, 287 S.E.2d 296 (1981), rev'd on other grounds, 249 Ga. 561, 292 S.E.2d 681 (1982), vacated, 163 Ga. App. 338, 295 S.E.2d 235 (1982).

Trial counsel's failure to request a charge on the definition of "offensive weapon" under the armed robbery statute, O.C.G.A. § 16-8-41(a), did not constitute ineffective assistance of counsel. The charge given advised the jury of the applicable law, and the trial court was not required to instruct on the meaning of all words used, particularly words of common understanding. Collier v. State, 303 Ga. App. 31, 692 S.E.2d 697 (2010).

Hands and feet not weapons. — Defendant's hands and feet do not constitute offensive weapons for purposes of O.C.G.A. § 16-8-41. Wright v. State, 228 Ga. App. 779, 492 S.E.2d 680 (1997); Haugland v. State, 253 Ga. App. 423, 560 S.E.2d 50 (2002).

Not necessary that offensive weapon be a gun. — Under the plain words of the statute, it is not necessary to prove the offensive weapon involved was in fact a gun. Montgomery v. State, 208 Ga. App. 763, 432 S.E.2d 120 (1993).

It need not be shown that gun used was loaded. — When allegation that shotgun used by accused in effecting robbery was "loaded" related to no element which was a necessary ingredient of offense charged, the word "loaded" can therefore be properly treated as surplusage so that proof thereof was not necessary. Moody v. State, 216 Ga. 192, 115 S.E.2d 526 (1960).

Weapon can be instrument of constructive as well as actual force. — Armed robbery is committed if the weapon has been used as an instrument of constructive, as well as actual, force. Maddox v. State, 174 Ga. App. 728, 330 S.E.2d 911 (1985).

Manner of weapon's use determinative of its nature. — Manner in which a weapon is used may determine whether that weapon is an offensive weapon for the purpose of O.C.G.A. § 16-8-41. Banks v. State, 169 Ga. App. 571, 314 S.E.2d 235 (1984).

Menacing or threatening not required. — An armed robber need not use an offensive weapon in a menacing or threatening manner to accomplish the robbery. The element of "use" of an offensive weapon is satisfied whenever the victim is aware of the weapon, and it has the desired forceful effect of assisting to accomplish the robbery. Jackson v. State, 248 Ga. App. 7, 545 S.E.2d 148 (2001).

Toy pistol can be an offensive or deadly weapon under certain circumstances but is not necessarily a deadly weapon. Butts v. State, 153 Ga. App. 464, 265 S.E.2d 370 (1980).

Starter pistol used by the defendant had the appearance of an actual handgun, which most assuredly is an offensive weapon. Morgan v. State, 191 Ga. App. 226, 381 S.E.2d 402 (1989); Ledford v. State, 207 Ga. App. 705, 429 S.E.2d 124 (1993).

Armed robbery can be committed either with a real weapon or with a toy or replica weapon having appearance of being real. Adsitt v. State, 248 Ga. 237, 282 S.E.2d 305 (1981).

Where the evidence was that the defendant robbed the victim using a replica, article, or device having the appearance of an offensive weapon, so as to create a reasonable apprehension that it was an offensive weapon, the conviction was upheld. Jones v. State, 236 Ga. App. 330, 511 S.E.2d 882 (1999).

Evidence was sufficient to support the defendant's conviction for armed robbery when the defendant walked into a restaurant, opened the defendant's jacket and

Use of Weapon (Cont'd)

showed what appeared to be a gun, and demanded money. Gardner v. State, 261 Ga. App. 188, 582 S.E.2d 167 (2003).

Nunchucks were weapon. — Set of nunchucks constituted an offensive weapon and, therefore, supported a conviction for armed robbery. Livery v. State, 233 Ga. App. 882, 506 S.E.2d 165 (1998).

Vice grips. — Offensive weapon for purposes of armed robbery under O.C.G.A. § 16-8-41(a) includes not only weapons which are offensive per se, such as firearms loaded with live ammunition, but also embraces other instrumentalities not normally considered to be offensive weapons in and of themselves but which may be found by a jury to be likely to produce death or great bodily injury depending on the manner and means of their use; the jury was entitled to conclude that vise grips carried by defendant were a weapon for purposes of armed robbery under § 16-8-41(a) after a victim testified that the vise grips were heavy and that the victim was afraid that defendant would knock the victim out. Phillips v. State, 259 Ga. App. 331, 577 S.E.2d 25 (2003).

Ceramic vase is not per se an offensive or deadly weapon. Banks v. State, 169 Ga. App. 571, 314 S.E.2d 235 (1984).

Electric cord. — Jury may find an electric cord to be an "offensive weapon" within the meaning of O.C.G.A. § 16-8-41, depending upon the manner and means of its use. Davis v. State, 255 Ga. 598, 340 S.E.2d 869, cert. denied, 479 U.S. 871, 107 S. Ct. 245, 93 L. Ed. 2d 170 (1986).

Tire tool stuck in the waistband of defendant's pants constitutes an offensive weapon. Cook v. State, 179 Ga. App. 610, 347 S.E.2d 664 (1986).

Screwdriver. — Evidence was sufficient to show that theft occurred after force was employed where defendant, who had concealed self in the victim's van, attempted to stab the victim in the neck with a screwdriver and then drove away with the van a few moments after the victim escaped therefrom. Wynn v. State, 228 Ga. App. 124, 491 S.E.2d 149 (1997).

There was sufficient evidence to support defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41(a), where defendant went into a store, demanded money from the cash register, showed the clerk a screwdriver, which the clerk thought at the time was an ice pick, and defendant took money and fled; whether defendant pointed the screwdriver at the store clerk was immaterial, as it was found that defendant used the screwdriver to persuade the clerk to comply with defendant's demand and the robbery was accomplished while the victim was under a reasonable apprehension that defendant was using an offensive weapon. Houston v. State, 267 Ga. App. 383, 599 S.E.2d 325 (2004).

Pellet gun constituted an offensive weapon. Fleming v. State, 233 Ga. App. 483, 504 S.E.2d 542 (1998).

Stun gun can constitute an offensive weapon authorizing an armed robbery conviction under O.C.G.A. § 16-8-41(a). James v. State, 239 Ga. App. 541, 521 S.E.2d 465 (1999).

Use of plastic gun sufficient for armed robbery. — Because the evidence was sufficient to sustain the defendant's conviction for armed robbery under O.C.G.A. § 16-8-41(a), there was no error in the trial court's denial of the motion for directed verdict; although it was impossible to see on the videotape what the defendant held in the defendant's hand or what exactly was removed from the register, the evidence was sufficient to allow the trial court to conclude that the defendant displayed the plastic gun when the defendant removed a hand from the defendant's pocket and demanded money, consistent with the pattern from the defendant's earlier robberies in which the defendant either pointed the pocketed hand toward the victim or displayed the plastic gun. Rutledge v. State, 276 Ga. App. 580, 623 S.E.2d 762 (2005).

Lit cigarette constituted an offensive weapon when, after the defendant doused the victim, a store clerk, with gasoline, the defendant profanely insisted that the clerk give the defendant "the money" or the defendant would burn the clerk with the cigarette. Johnson v. State, 246 Ga. App. 109, 539 S.E.2d 605 (2000).

Pillow and sheets as deadly weapons. — When the defendants each raped

the victim while keeping a pillow over her face, causing her difficulty in breathing, and after the assault and while still keeping the pillow on her face, the men bound her by rolling her up in a sheet and rummaged through the house, taking her purse and its contents and approximately $300, it could not be said as a matter of law that the way the pillow and sheets were used could not make them into deadly weapons. Eady v. State, 182 Ga. App. 293, 355 S.E.2d 778 (1987).

Skillet. — Evidence was sufficient to support defendant's conviction of armed robbery since defendant repeatedly hit the victim with a skillet, and robbed the victim's cash while the victim was unconscious. Lord v. State, 259 Ga. App. 449, 577 S.E.2d 103 (2003).

Tree limb. — Convictions against the defendant for malice murder, burglary, armed robbery, and aggravated assault were supported by evidence that the defendant entered the victim's home, hit the victim multiple times about the head and face with a tree limb with a metal piece on it, and wrote a check in defendant's name from the victim's checkbook; evidence included witness testimony from the bank where the defendant cashed the check, the defendant's confession to police, and physical evidence. Bell v. State, 284 Ga. 790, 671 S.E.2d 815 (2009).

Height of assailants as evidence. — Evidence was sufficient to convict defendant of armed robbery after the victim indicated that the taller of the victim's two assailants had a gun during the robbery and testimony at trial established that the defendant was taller than the codefendant. Killings v. State, 296 Ga. App. 869, 676 S.E.2d 31 (2009).

Bludgeon device used as offensive weapon. — When the testimonies of the victim, a doctor, and other witnesses were a sufficient indication under former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6) of the severity of the blow to show that a bludgeon device was used as an offensive weapon, there was sufficient competent evidence to find the defendant guilty of armed robbery and aggravated assault under O.C.G.A. §§ 16-8-41(a) and 16-5-21(a), respectively. Garrett v. State, 263 Ga. App. 310, 587 S.E.2d 794 (2003).

Mere presence of weapon is insufficient. — When a gun, though present and used to threaten another, was not used to take the victim's property as required under O.C.G.A. § 16-8-41, an armed robbery has not been perpetrated. Dixon v. Hopper, 407 F. Supp. 58 (M.D. Ga. 1976), overruled on other grounds, Jarrell v. Balkcom, 735 F.2d 1242 (11th Cir. 1984).

Weapon retrieved in proximity. — Evidence was sufficient to convict the defendant of armed robbery when the defendant was found hiding in a utility closet in victim's home after the defendant's two accomplices fled, a rifle was recovered adjacent to the closet, and a police officer testified the rifle was the same weapon the officer had seen through the window. Edwards v. State, 209 Ga. App. 304, 433 S.E.2d 619 (1993).

Robbery with weapon taken from victim. — Defendant committed armed robbery by stealing the victim's pistol and then stealing her pocketbook. Denson v. State, 212 Ga. App. 883, 443 S.E.2d 300 (1994).

Perception of weapon. — Defendant's argument that defendant's "hands" did not constitute an offensive weapon and, therefore, defendant could not have been convicted of armed robbery, was rejected, as the cashier perceived that defendant, who kept one hand in defendant's coat pocket during the robbery, had a gun; thus, the evidence was legally sufficient to sustain defendant's conviction for armed robbery. Martin v. State, 264 Ga. App. 813, 592 S.E.2d 483 (2003).

Evidence was sufficient to support the defendant's conviction for armed robbery even though the teller involved in the bank holdup did not actually see a gun because the note defendant handed to the teller stated that there was a gun and that the defendant would shoot everyone in the bank if the teller did not give up the money, and where the defendant's hand was concealed under a shirt. Marlin v. State, 273 Ga. App. 856, 616 S.E.2d 176 (2005).

Record showed that the two armed robbery victims were in reasonable apprehension that there was a gun; thus, satisfying the statutory element of apprehension concerning a weapon. Smith v. State, 274 Ga. App. 568, 618 S.E.2d 182 (2005).

Use of Weapon (Cont'd)

Because the defendant claimed to have a gun, threatened to blow the victim's head off, and the victim saw a bulge in the defendant's clothing where the gun was allegedly hidden, the evidence was sufficient to find the defendant guilty of armed robbery under O.C.G.A. § 16-8-41(a). Forde v. State, 277 Ga. App. 410, 626 S.E.2d 606 (2006).

When a victim testified that the victim believed the defendant had a gun because of the way the defendant held the defendant's hand inside a jacket, which the victim demonstrated for the jury, and the victim said the victim was frightened because the victim believed the defendant might have a gun, and gave the defendant the drawer from a cash register, the evidence authorized a finding that the defendant used an article that had the appearance of a gun to persuade the victim to comply with the defendant's demand and that the defendant's acts created a reasonable apprehension on the part of the victim that the defendant was threatening the victim with a gun so the evidence was sufficient to support a conviction for armed robbery. Joyner v. State, 278 Ga. App. 60, 628 S.E.2d 186 (2006).

Trial court properly denied the defendant's motion for a directed verdict of acquittal regarding an armed robbery with respect to the defendant's assertion that there was insufficient evidence from which the jury could have inferred that the defendant was armed because the two victims of that robbery testified that the defendant was poking something into the side of one of the victims and that the victim testified that the victim thought the object was a gun. That testimony was sufficient to send to the jury the question of whether the defendant had committed armed robbery. Grant v. State, 289 Ga. App. 230, 656 S.E.2d 873 (2008).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of armed robbery based on the robbery of a Gwinnett County bank by use of a gun, or any replica, article, or device having the appearance of such weapon because the Gwinnett County bank teller testified that the defendant threatened to shoot the teller, and the defendant's stance, with a hand at the defendant's hip, made the teller believe that the defendant would follow through on that threat; and a bank teller in another county testified that, three days later, the defendant's gestures, including patting a hip, made that teller believe that the defendant had a gun when the defendant robbed that bank. Johnson v. State, 331 Ga. App. 134, 770 S.E.2d 236 (2015), cert. denied, 2015 Ga. LEXIS 377 (Ga. 2015).

Defendant's argument that the evidence was insufficient to support the defendant's armed robbery and felony murder convictions because only the codefendant used a gun was rejected because the defendant was a party to the crime under O.C.G.A. § 16-2-20, and the defendant also pretended that the defendant's cellphone was a gun, satisfying O.C.G.A. § 16-8-41(a)'s language of "device having the appearance of such weapon." Butts v. State, 297 Ga. 766, 778 S.E.2d 205 (2015).

Visibility of weapon. — Presence of a weapon during the commission of a robbery, necessary to a conviction for armed robbery, may be established by circumstantial evidence, and a conviction for armed robbery may be sustained even though the weapon itself is neither seen nor accurately described by the victim. Some physical manifestation of a weapon is required, however, or some evidence from which the presence of a weapon may be inferred. Hughes v. State, 185 Ga. App. 40, 363 S.E.2d 336 (1987); Tate v. State, 191 Ga. App. 727, 382 S.E.2d 688, cert. denied, 191 Ga. App. 923, 382 S.E.2d 688 (1989).

Evidence that the defendant merely approached the victim with the defendant's hand in the defendant's jacket pocket was insufficient to support a conviction of criminal attempt to commit armed robbery. Tate v. State, 191 Ga. App. 727, 382 S.E.2d 688, cert. denied, 191 Ga. App. 923, 382 S.E.2d 688 (1989).

It is not essential that a weapon be seen or be accurately described by the victim to support a conviction of armed robbery as long as there was some physical manifestation of a weapon or some evidence from which the presence of a weapon may be

inferred. Millis v. State, 196 Ga. App. 799, 397 S.E.2d 71 (1990).

Use of concealed offensive weapons "or other devices," may constitute armed robbery, but the evidence must at least show that there was an offensive weapon or an article having the appearance of one. Talbot v. State, 198 Ga. App. 636, 402 S.E.2d 366 (1991).

O.C.G.A. § 16-8-41 includes concealed offensive weapons provided there is either a physical manifestation of the weapon or some evidence from which the presence of a weapon may be inferred. Nicholson v. State, 200 Ga. App. 413, 408 S.E.2d 487 (1991).

Evidence showed use of an offensive weapon, where the victim could see "something" underneath defendant's shirt in the shape of a gun, even though the victim did not actually see it at the moment the victim was robbed. Howard v. State, 201 Ga. App. 164, 410 S.E.2d 782 (1991).

Evidence that defendant entered a pharmacy with a black plastic bag over defendant's hand and told the victim "I have a gun" was sufficient to establish the use of an offensive weapon in contravention of O.C.G.A. § 16-8-41. Brabham v. State, 240 Ga. App. 506, 524 S.E.2d 1 (1999).

Sufficient circumstantial evidence was presented authorizing the jury to conclude that the victim reasonably believed defendant had a gun because, even though defendant may not have physically displayed a weapon in view of the victim, defendant's note to the victim clearly and boldly recited that defendant had a gun and would kill defendant, and evidence was presented that one of defendant's hands was not visible to the victim during the robbery. Prins v. State, 246 Ga. App. 585, 539 S.E.2d 236 (2000), overruled on other grounds, Miller v. State, 285 Ga. 285, 676 S.E.2d 173 (2009).

Evidence was sufficient to convict the defendant of armed robbery because the victims' testimony that the victim's saw the shape of a gun during the robbery supported the conclusion that the victims were under a reasonable apprehension that the defendant was armed. Colkitt v. State, 251 Ga. App. 749, 555 S.E.2d 121 (2001).

Ample evidence supported defendant's convictions of two counts of armed robbery in violation of O.C.G.A. § 16-8-41(a), and one count of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(1), (2), where defendant was identified by defendant's companions in statements to the police, and also by two victims at trial, as the person who drove with the three companions to a store and, while pointing a gun at the various victims, robbed one person of money and lottery tickets, demanded and obtained money from a second person and shot that person, demanded money from the second person's spouse, and then fled with the three companions. Bates v. State, 259 Ga. App. 232, 576 S.E.2d 619 (2003).

Although defendant did not point a gun at restaurant employees when defendant took money from a cash register, the employees' testimony that defendant produced a gun and that they did not resist because defendant had a gun was enough to sustain defendant's conviction for armed robbery. Pritchett v. State, 265 Ga. App. 462, 594 S.E.2d 377 (2004).

Sufficient evidence existed to sustain the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41(a) when the victim identified the defendant shortly after the victim's purse was taken from the victim by gunpoint at a payphone, some of the victim's personal belongings were discovered in the defendant's possession, and the defendant led the victim and a police officer to the remainder of the victim's belongings hidden in the woods and the defendant's car. Foster v. State, 267 Ga. App. 363, 599 S.E.2d 309 (2004).

Weapon need not be seen by victim. — Since the purpose of using any weapon or device having the "appearance of such weapon" is to create a reasonable apprehension on the part of the victim that an offensive weapon is being used, it is immaterial whether such apprehension is created by use of the sense of vision or by any other sense, provided that the apprehension is reasonable under the circumstances. Moody v. State, 258 Ga. 818, 375 S.E.2d 30 (1989); Johnson v. State, 195 Ga. App. 56, 392 S.E.2d 280 (1990); Ramey v. State, 206 Ga. App. 308, 425

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S.E.2d 385 (1992); Smith v. State, 247 Ga. App. 173, 543 S.E.2d 434 (2000).

Trial court properly instructed the jury that "the appearance of such weapon", within the meaning of O.C.G.A. § 16-8-41(a), means "any concept that is obtained through the use of any of the senses." Moody v. State, 258 Ga. 818, 375 S.E.2d 30 (1989).

Victim's testimony that the victim believed the robber had a gun, and that the robber told the victim to "do as I say or I'll blow your head off", satisfied the statutory requirement that the robbery had been accomplished "by use of an offensive weapon." Nicholson v. State, 200 Ga. App. 413, 408 S.E.2d 487 (1991).

Presence of an offensive weapon or the appearance of such may be established by circumstantial evidence, and a conviction for armed robbery may be sustained even though the weapon was neither seen nor accurately described by the victim. McCluskey v. State, 211 Ga. App. 205, 438 S.E.2d 679 (1993); Terry v. State, 224 Ga. App. 157, 480 S.E.2d 193 (1996); Mangum v. State, 228 Ga. App. 545, 492 S.E.2d 300 (1997).

When the defendant pointed the defendant's hand, which was covered by a sack, toward the victim and demanded money, such conduct would cause apprehension that the defendant had a gun in any reasonable person. Turner v. State, 237 Ga. App. 642, 516 S.E.2d 343 (1999).

"Appearance" of offensive weapon sufficient. — Defendant's use of an article or device — wrapping defendant's hand in a shirt — which had the appearance of an offensive weapon and defendant's temporary control of store register cash drawer were sufficient evidence to convict on charge of armed robbery. Miller v. State, 223 Ga. App. 453, 477 S.E.2d 878 (1996).

Pretending to have weapon sufficient if victims have reasonable apprehension of weapon. — Despite defendant's assertion that defendant only pretended to have a weapon while robbing a restaurant, the trial court did not err in denying defendant's motions for a directed verdict of acquittal on charges of armed robbery in violation of O.C.G.A. § 16-8-41(a) and possession of a firearm during the commission of a felony, as the victims testified that defendant used something that felt and looked like a gun, and one victim, the night manager, testified that defendant threatened to "blow" that victim's head off if the victim did not open the safe; such testimony sufficiently showed that defendant's actions created a reasonable apprehension on the part of the victims that an offensive weapon was being used. White v. State, 258 Ga. App. 546, 574 S.E.2d 629 (2002).

Defendant's conviction of armed robbery pursuant to O.C.G.A. § 16-8-41(a) was supported by sufficient evidence; defendant admitted that during the robbery defendant used a pipe covered by a sock to make it appear that defendant had a gun, and the evidence authorized a finding that defendant used an article that had the appearance of a gun to persuade the employee to comply with the defendant's demand and that defendant's acts created a reasonable apprehension on the employee's part that defendant was threatening the employee with a gun. Faulkner v. State, 260 Ga. App. 794, 581 S.E.2d 365 (2003).

Lapse of time between use of weapon and robbery. — Evidence was sufficient for armed robbery conviction where the defendant first shot his sister and then, several minutes later, took her money, with the rifle still in his possession; without the shooting, which left the sister in fear of being shot again, defendant's taking of his sister's money could not have been accomplished and the relatively brief passage of time between the shooting and the taking did not sever that connection between the two acts. Lowery v. State, 209 Ga. App. 5, 432 S.E.2d 576 (1993).

When an armed robbery count was broadly drafted so as to include an averment that the offense of armed robbery was accomplished by the taking of specified property both by means of intimidation and by use of an offensive weapon, it needed to have been proven beyond a reasonable doubt that the taking was accomplished by concomitant use of an offensive weapon; accordingly, in the ab-

sence of such a showing, while the circumstances of the taking would have supported a conviction for the lesser included offense of robbery, it would not have supported conviction of the greater offense of armed robbery. Watkins v. State, 207 Ga. App. 766, 430 S.E.2d 105 (1993), overruled on other grounds, West v. Waters, 272 Ga. 591, 533 S.E.2d 88 (2000).

Use of weapon subsequent to taking is insufficient. — Former Code 1933, § 26-1902 (see now O.C.G.A. § 16-8-41) clearly contemplated that an offensive weapon be used as a concomitant to a taking which involves use of actual force or intimidation (constructive force) against another person. It was not sufficient that force was used against a person subsequent to taking, although it may be part of the same "continuing transaction." Hicks v. State, 232 Ga. 393, 207 S.E.2d 30 (1974).

Evidence showing that defendant took a vehicle without displaying or using a hatchet in defendant's possession and that the defendant did not use the weapon to maintain possession was insufficient to sustain the defendant's armed robbery conviction. Nelson v. State, 233 Ga. App. 385, 503 S.E.2d 335 (1998).

Shooting victim. — When it is undisputed that the victim was killed with a handgun, the jury is entitled to infer from the evidence that the defendant, with intent to commit theft, took property of another from the person or the immediate presence of another by use of an offensive weapon, whether the victim was shot before the taking or after the taking. Lipham v. State, 257 Ga. 808, 364 S.E.2d 840, cert. denied, 488 U.S. 873, 109 S. Ct. 191, 102 L. Ed. 2d 160 (1988).

Offensive weapon fruit of armed robbery. — Defendant cannot be convicted of armed robbery where the offensive weapon used to perpetrate the armed robbery is also the only fruit of the armed robbery itself. Rivers v. State, 250 Ga. 288, 298 S.E.2d 10 (1982).

Use of gun upgrades attempted robbery to armed robbery. — While defendant's crime may have begun as attempted robbery by intimidation or attempted robbery by sudden snatching, defendant's use of a gun to effectuate the taking upgraded the offense to armed robbery. McKissic v. State, 178 Ga. App. 23, 341 S.E.2d 903 (1986).

Whether instrument used constitutes a deadly weapon is properly for jury's determination. Meminger v. State, 160 Ga. App. 509, 287 S.E.2d 296 (1981), rev'd on other grounds, 249 Ga. 561, 292 S.E.2d 681 (1982), vacated, 163 Ga. App. 338, 295 S.E.2d 235 (1982).

Threat not part of armed robbery. — Trial court did not err in sentencing the defendant separately on the separate conviction for terroristic threats and armed robbery since the evidence was sufficient to show the robbery was complete, when the money from the cash register was in the defendant's possession before the defendant made the alleged threat to the victim that the defendant would kill the victim if the victim moved. Thus, the threat was not part of the armed robbery, but the evidence was sufficient to show that the threat was made with the purpose of terrorizing the victim. Barnett v. State, 204 Ga. App. 588, 420 S.E.2d 96 (1992).

Proof was insufficient to sustain a conviction for armed robbery, where defendant initially snatched money from a store cash register but did not use a weapon to obtain it, the money was retrieved by the store manager, defendant sought to re-acquire it by using defendant's weapon, the manager refused to yield to defendant's threat, and nothing of value was obtained by use of an offensive weapon. Gatlin v. State, 199 Ga. App. 500, 405 S.E.2d 118 (1991).

Supplying weapon for use. — There was sufficient evidence to support defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41, where there were positive identifications from three robbery victims as well as bystander witnesses, defendant's clothing and gun matched the description of the robber, defendant was seen standing near the robbery getaway car, and the results of defendant's polygraph test supported the finding of guilt. Anderson v. State, 265 Ga. App. 428, 594 S.E.2d 669 (2004).

Evidence supported convictions for armed robbery, possession of a weapon during the commission of a crime, aggra-

Use of Weapon (Cont'd)

vated assault, burglary, aggravated battery, and impersonating an officer because the defendant kicked in the door of a home while shouting that the defendant was a "federal agent," fired a shotgun through a door, shooting off a victim's thumb, inserted the barrel of the shotgun in the same victim's mouth, and demanded money, which the victims turned over, two codefendants identified the defendant as the user of the shotgun, and the defendant's DNA was found on a ski mask recovered from the getaway car and the defendant's fingerprints were found on the car. Garrison v. State, 276 Ga. App. 243, 622 S.E.2d 910 (2005).

Despite the defendant's contention on appeal that the state's evidence was insufficient, specifically, regarding the presence of a gun, given that the state presented sufficient evidence to support the jury's finding of a reasonable apprehension on the part of the victim that an offensive weapon was being used in an armed robbery, when coupled with the defendant's admission to possessing a gun at the time of the robbery, the defendant's armed robbery conviction was upheld; thus, the defendant was not entitled to a directed verdict of acquittal. Fluellen v. State, 284 Ga. App. 584, 644 S.E.2d 486 (2007).

Evidence was sufficient to support a conviction of armed robbery in violation of O.C.G.A. § 16-8-41 when the state presented testimony that a codefendant took property from the immediate presence of the victims by use of an offensive weapon, that the defendant encouraged the codefendant, that the defendant was present during the robbery, and that the defendant shared in the proceeds of the crime. Rasheed v. Smith, No. 06-14108, 2007 U.S. App. LEXIS 6197 (11th Cir. Mar. 14, 2007) (Unpublished).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of armed robbery as the defendant shot the victim twice in the head from behind, took the victim's money and marijuana, and divided the money and shared the marijuana with others. Rosser v. State, 284 Ga. 335, 667 S.E.2d 62 (2008).

Denial of a directed verdict on an armed robbery charge under O.C.G.A. § 16-8-41(a) was appropriate based on the testimony that the defendant brandished a handgun and threatened to kill the victim before taking several of the victim's belongings, including a videocassette recorder; the defendant used a weapon, and what was in the victim's immediate presence could be out of the victim's physical presence if it was under the victim's control and the victim was not too far distant. Wesley v. State, 294 Ga. App. 559, 669 S.E.2d 511 (2008).

Based on the victim's testimony that three individuals were walking together before the robbery occurred, positioned themselves around the victim during the robbery, and walked away together, the evidence supported the defendant's conviction for armed robbery, O.C.G.A. § 16-8-41(a). Whether the defendant was a party to the crime was a question for the jury, which the jury chose to resolve against the defendant. Scott v. State, 297 Ga. App. 577, 677 S.E.2d 755 (2009).

Since the victim was cut and hit by a shotgun during a struggle with defendant in defendant's attempt to obtain money for drugs, the evidence was sufficient to sustain defendant's convictions for armed robbery, aggravated assault, and possession of a firearm during the commission of a crime under O.C.G.A. §§ 16-5-21(a)(2), 16-8-41(a), and 16-11-106(b)(1). Johnson v. State, 305 Ga. App. 838, 700 S.E.2d 726 (2010).

Although under Georgia law, a defendant could not be convicted solely upon the uncorroborated testimony of an accomplice, former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the evidence corroborated some particulars of the accomplice's testimony implicating the codefendants in the charged crimes since all three of the victims from the three separate gas stations provided descriptions of their assailants that generally matched the codefendants and the accomplice, and all three victims also testified that their assailants brandished a handgun and a shotgun, which were indeed the weapons that were found at the scene where the stolen SUV crashed and where the accomplice was arrested. Accordingly, the evi-

dence corroborating the accomplice's testimony was sufficient to authorize the jury's determination that the codefendants were guilty beyond a reasonable doubt as parties to armed robbery, O.C.G.A. § 16-8-41, hijacking a motor vehicle, O.C.G.A. § 16-5-44.1, aggravated assault, O.C.G.A. § 16-5-21, theft by taking, O.C.G.A. § 16-8-2, theft by receiving, O.C.G.A. § 16-8-7, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106. Daniels v. State, 306 Ga. App. 577, 703 S.E.2d 41 (2010).

Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault with a deadly weapon, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon beyond a reasonable doubt, and the trial court properly denied the defendant's motions for directed verdict and new trial because the jury could have determined that a witness's testimony provided corroboration for the codefendant's identification of the defendant; further corroboration for the testimony of the witness and the codefendant was provided by a neighbors' description of the robbery and shooting, by the description of the codefendant's wife of the codefendant's demeanor and behavior that day, and by physical evidence found at the scene. Williamson v. State, 308 Ga. App. 473, 708 S.E.2d 57 (2011).

Evidence was sufficient to support the defendant's conviction for armed robbery, in violation of O.C.G.A. § 16-8-41, when the defendant planned the robbery, drove the robbers to the scene, supplied the weapon, functioned as a lookout, drove the getaway vehicle, and inquired about the proceeds of the crime. Windhom v. State, 315 Ga. App. 855, 729 S.E.2d 25 (2012).

Possession of weapon by accomplice. — In a prosecution for armed robbery, defendant was not entitled to a jury charge on lesser included offenses of theft by taking or robbery by intimidation where robberies were perpetrated by the use of a weapon in the possession of defendant's accomplice. Jones v. State, 233 Ga. App. 362, 504 S.E.2d 259 (1998).

Inconsistent verdicts. — There was no need to reverse the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41 after the jury acquitted the defendant of possession of a firearm in violation of O.C.G.A. § 16-11-123 as Georgia abolished the inconsistent verdict rule with respect to criminal cases. Oliver v. State, 270 Ga. App. 429, 606 S.E.2d 874 (2004).

Robbery by Intimidation

Intimidation involves use of violence or threats to influence conduct or compel consent of another. Shehany v. Lowry, 170 Ga. 70, 152 S.E. 114 (1930) (decided under former Penal Code 1910, § 148).

Intimidation is constructive force. Henderson v. State, 209 Ga. 72, 70 S.E.2d 713 (1952) (decided under former Code 1933, § 26-2501).

Robbery by intimidation is the same as "putting in fear" at common law, and is constructive force, as when one through fear is induced to part with one's property. Rivers v. State, 46 Ga. App. 778, 169 S.E. 260 (1933) (decided under former Penal Code 1910, § 148).

Intimidation consists in putting one in fear in some way. Shehany v. Lowry, 170 Ga. 70, 152 S.E. 114 (1930) (decided under former Penal Code 1910, § 148).

Intimidation is that act by the perpetrator which puts the person robbed in fear sufficient to suspend the free exercise of the person's will or prevent resistance to the taking, and a threat by a perpetrator to inflict harm constitutes the requisite force of intimidation if that threat of harm induces the victim/possessor of property to relinquish possession. Hewitt v. State, 277 Ga. 327, 588 S.E.2d 722 (2003).

Intimidation involves creating apprehension which induces one to part with property for safety of person. Long v. State, 12 Ga. 293 (1852) (decided prior to codification of this principle); Jordan v. State, 135 Ga. 434, 69 S.E. 562 (1910) (decided under former Penal Code 1895, § 151).

There can be no legal consent given in face of intimidation. Shehany v. Lowry, 170 Ga. 70, 152 S.E. 114 (1930) (decided under former Penal Code 1910, § 148).

Robbery by Intimidation (Cont'd)

Threats by word or gestures are the most usual means of intimidation and of themselves are sufficient to imply violence. Edenfield v. State, 41 Ga. App. 252, 152 S.E. 615 (1930) (decided under former Penal Code 1910, § 148).

Robbery by intimidation. — When the defendant during a robbery had defendant's hand in a jacket pocket and pointed at the victim as though the defendant did have a weapon concealed in the pocket so that the victim thought the defendant had one, and that the victim was "scared" the testimony concerning the defendant's gestures and demands was sufficient to establish the element of intimidation. Johnson v. State, 195 Ga. App. 56, 392 S.E.2d 280 (1990).

When the defendant approached the cashier with defendant's hand under the defendant's sweater and demanded money without employment of verbal threats or violence, the evidence was nonetheless sufficient to establish the element of intimidation. Brown v. State, 210 Ga. App. 59, 435 S.E.2d 274 (1993).

Victim's testimony concerning defendant's gestures and demands at the time defendant approached, and stole, defendant's vehicle, was sufficient to establish the element of intimidation. Hogan v. State, 210 Ga. App. 122, 435 S.E.2d 494 (1993).

Evidence was sufficient to support defendant's conviction for robbery by intimidation, as it showed defendant: entered a convenience store; gave the clerk a slip of paper that stated defendant had a gun and wanted money; emphasized that defendant was not playing games and that defendant would shoot the clerk; fled after defendant was given money from the store's register; and was identified by several witnesses as the perpetrator of the crime. Ferguson v. State, 262 Ga. App. 28, 584 S.E.2d 618 (2003).

Robbery by intimidation and false imprisonment. — Because the sequential crimes of false imprisonment and robbery by intimidation were complete and independent of each other, each proven by different facts, the crimes did not merge. Lancaster v. State, 281 Ga. App. 752, 637 S.E.2d 131 (2006).

Evidence sufficient for conviction. — Defendant was properly convicted of criminal intent to commit robbery by intimidation under O.C.G.A. § 16-8-40(a)(2) since the evidence showed that the defendant repeated the request for money, became more aggressive, and banged on the restroom door in order to get an employee out of the bathroom so that the defendant could get money. Brogdon v. State, 262 Ga. App. 673, 586 S.E.2d 344 (2003).

Evidence supported the defendant's robbery by intimidation and false imprisonment convictions and the codefendant's armed robbery and kidnapping with bodily injury convictions as the defendant lured the victim to the defendant's apartment where the codefendant struck the victim in the back of the head and robbed the victim at gunpoint. Smith v. State, 269 Ga. App. 133, 603 S.E.2d 445 (2004).

Offensive weapon not used concomitantly with robbery. — When armed robbery count was broadly drafted so as to include an averment that the offense of armed robbery was accomplished by the taking of specified property both by means of intimidation and by use of an offensive weapon, it needed to have been proven beyond a reasonable doubt that the taking was accomplished by concomitant use of an offensive weapon; accordingly, in the absence of such a showing, while the circumstances of the taking would have supported a conviction for the lesser included offense of robbery, it would not have supported conviction of the greater offense of armed robbery. Watkins v. State, 207 Ga. App. 766, 430 S.E.2d 105 (1993), overruled on other grounds, West v. Waters, 272 Ga. 591, 533 S.E.2d 88 (2000).

Trial court's denial of defendant's motion for acquittal, pursuant to O.C.G.A. § 17-9-1, was proper as there was sufficient evidence to support the defendant's convictions for kidnapping, rape, and robbery by intimidation in violation of O.C.G.A. §§ 16-5-40, 16-6-1, and 16-8-41, respectively, because the victim positively identified the defendant upon the defendant's arrest and at trial, there was similar transaction evidence from another victim who was approached and threatened in the same manner, and there was also corroborative physical evidence; the de-

fendant threatened the victim, who was at a bus stop, with a gun and robbed the victim, forced the victim to a storage area in a garage, and raped the victim. Sims v. State, 275 Ga. App. 836, 621 S.E.2d 869 (2005).

Evidence supported a defendant's conviction for robbery by intimidation, possession of a firearm during the commission of a felony, and aggravated assault with a deadly weapon as: (1) the defendant demanded that the victim give the defendant the victim's purse and then threatened the victim with a gun and told the victim that the defendant would use the gun; (2) feeling that the victim's life was in danger, the victim ran; (3) the defendant chased the victim and snatched the victim's purse; (4) two witnesses chased the defendant to an abandoned house, where the victim's purse was later found; (5) a witness obtained the tag number of the defendant's vehicle and police traced the vehicle to the defendant's mother; even assuming that the pre-trial identification procedures were unduly suggestive, the in-court identifications by a witness and the victim were admissible as the identifications were based on independent recollections. Boatwright v. State, 281 Ga. App. 560, 636 S.E.2d 719 (2006).

From the defendant's words, demeanor, companionship, and conduct before and after an armed robbery, a jury could have concluded beyond a reasonable doubt that the state established the requisite intent; the evidence authorized the jury to find that before an armed robbery, the defendant had planned to take money from a convenience store, the defendant's accomplice went into the store, took the money from the clerk at gunpoint, and then joined the defendant with the money, and that when the cohorts realized moments later that the police suspected the pair of the armed robbery, the defendant disobeyed police commands to stop, acted as the getaway driver in a high speed chase, and then tried to flee the police on foot. Espinosa v. State, 285 Ga. App. 69, 645 S.E.2d 529 (2007), cert. denied, No. S07C1281, 2007 Ga. LEXIS 760 (Ga. 2007).

Jury was authorized to find the defendant guilty of robbery by intimidation. An accomplice's testimony, which included a detailed account of the defendant's participation in both the planning and execution of the crime, was corroborated by the victim, the actions of the defendant and others when police arrived at an apartment, evidence found inside the apartment, the defendant's appearance when the defendant encountered police, and, to a certain extent, another witness's testimony. Clark v. State, 294 Ga. App. 331, 670 S.E.2d 131 (2008).

Evidence that defendant and another person burst into a home after they had lured the victim brandishing an automatic gun and wearing black t-shirts that said "Sheriff," handcuffed the victim, took the victim's money, and forced the victim to write a bill of sale for the victim's motorcycle was sufficient to support convictions for robbery by intimidation, O.C.G.A. § 16-8-41(a), false imprisonment, O.C.G.A. § 16-5-41(a), aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), and impersonating a peace officer, O.C.G.A. § 16-10-23. Powers v. State, 303 Ga. App. 326, 693 S.E.2d 592 (2010).

Sufficient evidence supported the defendant's conviction for armed robbery because despite the defendant's trial testimony claiming a friend took the defendant to pick up pizza while the robbery was in progress, it was for the jury to determine the credibility of the witnesses, and the jury was authorized to disbelieve the alibi defense the defendant proffered. Gordon v. State, 329 Ga. App. 2, 763 S.E.2d 357 (2014).

Included Offenses

Merger with aggravated assault. — Conviction for aggravated assault should have been merged with the defendant's conviction for armed robbery because the convictions both required proof of the same elements. Bradley v. State, 292 Ga. 607, 740 S.E.2d 100 (2013).

No merger of related offenses. — As separate facts were used to prove each crime, the trial court did not err by refusing to merge the offenses of armed robbery, aggravated assault, and possession of a firearm during the commission of the

Included Offenses (Cont'd)

felonies. Blocker v. State, 265 Ga. App. 846, 595 S.E.2d 654 (2004).

Due to the entry of a guilty plea over 20 years before the filing of a motion to correct alleged illegal sentences, the defendant's merger claim was waived, and since the sentences imposed were not void, the trial court lacked subject matter jurisdiction over said motion for correction. Sanders v. State, 282 Ga. App. 834, 640 S.E.2d 353 (2006).

Trial court did not err in failing to merge aggravated battery and armed robbery convictions. The evidence needed to prove each charge was entirely different as one charge demanded evidence that the defendant shot and seriously disfigured the victim, while the other required proof that the defendant took money from the victim at gunpoint. Smashum v. State, 293 Ga. App. 41, 666 S.E.2d 549 (2008), cert. denied, 2008 Ga. LEXIS 952 (Ga. 2008).

Merger with other convictions. — Defendant's aggravated assault convictions were to be merged with armed robbery and kidnapping convictions as the same set of facts were used to prove the offenses. Lenon v. State, 290 Ga. App. 626, 660 S.E.2d 16 (2008).

When a defendant pulled out a gun and demanded money from a cab driver, the offense of criminal attempt armed robbery was complete, and the defendant's subsequent acts, including striking the driver on the head, were not necessary to prove that offense; thus, the attempt offense did not merge with aggravated assault offenses for sentencing purposes. Duncan v. State, 290 Ga. App. 32, 658 S.E.2d 780 (2008).

Defendant's conviction for aggravated assault merged into the defendant's conviction for attempted armed robbery because the relevant aggravated assault provision did not require proof of any fact that was not also required to prove the attempted armed robbery as that offense could have been proved under the indictment in the case. Garland v. State, 311 Ga. App. 7, 714 S.E.2d 707 (2011).

Mutual exclusivity of theft related crimes. — When the defendant was indicted in Fulton County on charges of armed robbery and hijacking of a motor vehicle, but the defendant had been previously convicted in Clayton County of theft by receiving stolen property by retaining the same car on the same day, the defendant's plea in bar and motion to dismiss the Fulton County indictment was improperly denied as the charges in the Fulton County case were mutually exclusive of the defendant's prior conviction for theft by receiving because the theft by receiving conviction contained an implicit and necessary finding that the defendant did not steal the car, and the charges of armed robbery and hijacking a motor vehicle each required proof that the defendant actually took the car. Bonner v. State, 339 Ga. App. 539, 794 S.E.2d 186 (2016).

Robbery by intimidation is a lesser included offense of armed robbery. Griffeth v. State, 154 Ga. App. 643, 269 S.E.2d 501 (1980); Mickle v. State, 165 Ga. App. 206, 300 S.E.2d 210 (1983).

Evidence authorizing conviction of robbery by use of offensive weapon authorizes conviction of robbery by intimidation. Holcomb v. State, 230 Ga. 525, 198 S.E.2d 179 (1973); Brown v. Caldwell, 231 Ga. 677, 203 S.E.2d 542 (1974).

Trial court did not err by charging the jury on the lesser included offense of robbery by intimidation when defendant was only indicted for armed robbery. Mills v. State, 244 Ga. App. 28, 535 S.E.2d 1 (2000).

Trial court properly charged the jury as to the lesser-included offense of robbery by intimidation as O.C.G.A. § 16-8-41 unequivocally provided that robbery by intimidation was a lesser-included offense of the offense of armed robbery; thus, in light of the evidence that the defendant robbed the victim by use of a firearm as an offensive weapon, which would authorize a conviction of armed robbery, the robbery by intimidation jury charge and conviction were authorized. Lancaster v. State, 281 Ga. App. 752, 637 S.E.2d 131 (2006).

Robbery by intimidation did not have to be considered as a lesser included offense in defendant's trial for armed robbery in violation of O.C.G.A. § 16-8-41(a) because, even though defen-

dant denied pointing a gun at the victim while demanding the victim's car, armed robbery only required use of an offensive weapon in committing the robbery and, since defendant did not actually deny having the gun and the victim testified that the victim was persuaded to give up the car because of the gun, there was no evidence that the robbery was committed without the use of a gun. Carter v. State, 257 Ga. App. 620, 571 S.E.2d 831 (2002).

Trial court did not err in refusing to give the jury a lesser included instruction on robbery by intimidation in defendant's armed robbery trial, as the evidence showed the completed offense of armed robbery where defendant displayed a screwdriver during the robbery to a store clerk, and defendant admitted that defendant carried the screwdriver during the robbery. Houston v. State, 267 Ga. App. 383, 599 S.E.2d 325 (2004).

When both robbery victims testified that the defendant wielded a gun during the robbery, and the defendant's accomplice, in a pretrial statement and in letters to the prosecutor, stated that the defendant used a gun to perpetrate the robbery, and when, even at trial, the accomplice did not deny that a gun was used during the robbery, the defendant in a trial for armed robbery was not entitled to a jury charge on the lesser included offense of robbery by intimidation. Jordan v. State, 278 Ga. App. 126, 628 S.E.2d 221 (2006).

Offenses of robbery and armed robbery did not merge as a matter of law, where separate incidents (the simple taking of the pistol and the taking of the other items at gunpoint) involved different actions, different specific objectives or intents, and different victims. Millines v. State, 188 Ga. App. 655, 373 S.E.2d 838 (1988).

Unaccepted offer to reduce armed robbery to robbery did not obligate state to reduce charge. — Because armed robbery was punishable by life imprisonment, it was not a transferable offense, and a trial court was without authority to transfer the armed robbery case from superior court to juvenile court. State v. Harper, 271 Ga. App. 761, 610 S.E.2d 699 (2005).

Theft by taking as lesser offense of armed robbery. — When a state's evidence clearly warranted jury instruction on armed robbery, which was given, and there was no evidence of the lesser offense of theft by taking, there was no error in failing to give the requested jury instruction. Shepherd v. State, 234 Ga. 75, 214 S.E.2d 535 (1975).

It is not error to fail to charge defendant with theft by taking, as lesser offense included in charge of armed robbery or robbery by intimidation, unless evidence authorizes finding of lesser offense. Sanders v. State, 135 Ga. App. 436, 218 S.E.2d 140 (1975).

Evidence showed that the defendant committed robbery either by use of a replica of a handgun or by intimidation and no evidence was presented that intimidation was not used in the robbery; therefore, the defendant was not entitled to a charge on theft by taking as a lesser included offense of armed robbery and robbery by intimidation. Espinoza v. State, 243 Ga. App. 665, 534 S.E.2d 127 (2000).

When the same evidence that was used to prove the armed robbery charges against the defendant was also used to prove the theft by taking charges and the property in question was taken from the victims' possession in the same incident in a store and constituted a single crime, the theft by taking offenses were lesser included offenses of the armed robbery offenses as a matter of fact pursuant to O.C.G.A. § 16-1-6(1) and should have merged into those convictions for sentencing purposes. Phanamixay v. State, 260 Ga. App. 177, 581 S.E.2d 286 (2003).

Because the trial court properly instructed the jury on both the crimes of armed robbery and theft by taking, and expressly stated that in the event that the jury did not believe that the defendant was guilty of armed robbery beyond a reasonable doubt, the jury could convict on the lesser offense of theft by taking, given that the evidence was sufficient to authorize a finding of guilt on the armed robbery charge, the jury was authorized to reject the defendant's claim that the victim knowingly assisted in the planning and perpetration of the crime. Hester v. State, 287 Ga. App. 434, 651 S.E.2d 538 (2007).

Included Offenses (Cont'd)

In a trial for armed robbery under O.C.G.A. § 16-8-41, a charge on the lesser included offense of theft by taking under O.C.G.A. § 16-8-2 was not warranted under circumstances in which the defendant used force to take the victim's purse and then the victim's money; the fact that the purse was not in the victim's hands during the second taking did not preclude an armed robbery conviction. Thomas v. State, 290 Ga. App. 10, 658 S.E.2d 796 (2008).

Because theft by receiving stolen property is not a lesser included offense of armed robbery, a defendant charged with two counts of party to the crime of armed robbery was not entitled to a jury instruction on theft by receiving stolen property. Dean v. State, 292 Ga. App. 695, 665 S.E.2d 406 (2008).

Difference in elements between theft by taking and armed robbery. — Although armed robbery requires proof of the use of an offensive weapon and proof that the property was taken from the presence of a person, whereas theft by taking does not, theft by taking does not require proof of any facts separate from those required for armed robbery. Wells v. State, 294 Ga. App. 277, 668 S.E.2d 881 (2008).

Theft by taking charge did not merge with an armed robbery charge because under O.C.G.A. § 16-8-2 theft by taking requires the intent to deprive the owner of property, while armed robbery is a completely separate offense, which under O.C.G.A. § 16-8-41 is complete once the property is taken. Miller v. State, 174 Ga. App. 42, 329 S.E.2d 252 (1985).

When the armed robbery involved the taking of currency at gunpoint from the immediate possession of a convenience store cashier who was attempting to make a nightly bank deposit, while the theft conviction involved the subsequent taking of the cashier's automobile, the evidence establishing the commission of the one crime is not the same as the evidence which established commission of the other crime, and the defendant's contention that the theft conviction should have merged with the armed robbery conviction is without merit. Miller v. State, 183 Ga. App. 563, 359 S.E.2d 359 (1987).

Crimes of burglary and attempted armed robbery. — Elements and the culpable mental state required of burglary and attempted armed robbery are different; a trial court did not err in refusing to merge defendant's burglary and attempted armed robbery convictions because the facts which proved each crime were different and because neither of those crimes was included in the other. Skaggs-Ferrell v. State, 266 Ga. App. 248, 596 S.E.2d 743 (2004).

Merger of armed robbery and burglary charges was not required because not only are the elements and the culpable mental state required of these crimes different, but the facts which proved each crime were different. Evans v. State, 240 Ga. App. 297, 523 S.E.2d 103 (1999).

Defendant's burglary conviction was upheld on appeal, and not subject to reversal merely because of a jury's acquittal of an armed robbery charge, as: (1) the verdict was inconsistent, not mutually exclusive; and (2) the inconsistent verdict rule was abolished in Georgia two decades ago; furthermore, the rule was not implicated when verdicts of guilty and not guilty were returned. Einglett v. State, 283 Ga. App. 497, 642 S.E.2d 160 (2007).

Armed robbery and hijacking. — Defendant's separate convictions for armed robbery and hijacking a motor vehicle did not violate the prohibitions against double jeopardy as O.C.G.A. § 16-5-44.1(d) provided that hijacking a motor vehicle was a separate offense and did not merge and it therefore superseded the state statutory double jeopardy provision; further, the Georgia Constitution did not prohibit additional punishment for a separate offense that the Georgia legislature had deemed to warrant a separate sanction; the defendant failed to show how the hijacking statute violated the federal double jeopardy clause. Mullins v. State, 280 Ga. App. 689, 634 S.E.2d 850 (2006).

False imprisonment does not merge with armed robbery. — Offense of false imprisonment requires proof of at least one additional fact which the offense of armed robbery does not. Consequently,

under the "required evidence" test, a defendant's false imprisonment conviction did not merge into the defendant's armed robbery conviction. Simpson v. State, 293 Ga. App. 760, 668 S.E.2d 451 (2008).

Counts of possession of a firearm during the commission of a crime and armed robbery did not merge. Baker v. State, 214 Ga. App. 640, 448 S.E.2d 745 (1994).

Trial court not required to instruct jury on lesser included offense over which it lacks venue. — Court of appeals erred in reversing the defendant's conviction for armed robbery because the trial court properly declined to instruct the jury on the lesser included offense of theft by taking since there was no evidence that the included crime was committed in the county in which the defendant was being tried; although the state was unwilling to allow the defendant to waive venue or stipulate that what occurred was a theft by taking that happened entirely in Clayton County, the defendant was free to present evidence and argue to the jury that while the defendant was guilty of committing theft by taking in Clayton County, the defendant was not guilty of armed robbery in DeKalb County. But the defendant could not require the state to agree that the defendant committed theft by taking in Clayton County or require the trial court to instruct the jury on a lesser included offense over which the court lacked venue. State v. Dixon, 286 Ga. 706, 691 S.E.2d 207 (2010).

Simple battery is not a lesser offense of armed robbery. Jackson v. State, 164 Ga. App. 487, 297 S.E.2d 502 (1982).

Offenses of aggravated battery and armed robbery merged as a matter of fact, where the aggravated battery indictment was drawn to charge the same serious bodily harm inflicted by a knife in the course of an armed robbery, and thus the same facts necessary to prove the aggravated battery charge were used upon proving the armed robbery charge. Whitner v. State, 198 Ga. App. 300, 401 S.E.2d 318 (1991).

Offense of aggravated battery and armed robbery did not merge. — Trial court did not err in failing to merge the defendant's aggravated battery conviction into the defendant's armed robbery conviction because the taking of the victim's property was not a fact required to establish the aggravated battery offense, and depriving the victim of a member of the victim's body was not a fact required to establish the armed robbery offense; and, while the aggravated battery and armed robbery were based on the same criminal transaction, aggravated battery, and armed robbery did not simply prohibit different degrees of injury or risk of injury; rather, the two crimes prohibited entirely different categories of injury — depriving the victim of a member of the victim's body versus depriving the victim of property. Epperson v. State, 340 Ga. App. 25, 796 S.E.2d 1 (2016).

No merger with aggravated assault. — Because: (1) evidence presented against the second of two defendants, jointly charged, that the victim was beaten over the head with a pistol showed a completed aggravated assault prior to the armed robbery, and (2) possession of a firearm during the commission of an aggravated assault did not merge with armed robbery, as there was an expressed legislative intent to impose double punishment for conduct which violated both O.C.G.A. § 16-11-106 and other felony statutes, the offenses did not merge. Bunkley v. State, 278 Ga. App. 450, 629 S.E.2d 112 (2006).

Defendant-B's punches to the victim's face upon defendant-A's demand for the victim's property amounted to an assault with attempt to rob, which justified one of defendant-B's convictions for aggravated assault, the formulation of a plan to rob someone at a convenience store with defendant-A and defendant-A's aggravated assault in pointing a gun at the victim constituted a second aggravated assault, and an armed robbery of the victim's property constituted the armed robbery; as each of the three crimes was proven by three different sets of facts, there was no error in the trial court's failure to have merged defendant-B's aggravated assault convictions, in violation of O.C.G.A. § 16-5-21, into the armed robbery conviction, in violation of O.C.G.A. § 16-8-41. Johnson v. State, 279 Ga. App. 182, 630 S.E.2d 778 (2006).

Included Offenses (Cont'd)

Trial court's decision not to merge the conviction of kidnapping, in violation of O.C.G.A. § 16-5-40, with defendant's convictions for aggravated assault and armed robbery, in violation of O.C.G.A. §§ 16-5-21 and 16-8-41, was proper under O.C.G.A. § 16-1-7(a), as the facts that supported the kidnapping were not the same as those that supported the convictions for the other offenses; the kidnapping occurred when defendant forced three store employees into an office, the aggravated assaults occurred when defendant pointed a gun at one employee's head and hit another employee with it, and the armed robbery occurred when defendant took money from the store safe. Hill v. State, 279 Ga. App. 666, 632 S.E.2d 443 (2006).

Because the trial court set aside the defendant's aggravated assault conviction, a claim that the trial court erred in failing to merge the aggravated assault with an armed robbery conviction for sentencing purposes lacked merit. Lawrence v. State, 289 Ga. App. 163, 657 S.E.2d 250 (2008).

As the offense of aggravated assault, O.C.G.A. § 16-5-21(a)(1), required proof of at least one additional fact which the offense of robbery by intimidation, O.C.G.A. § 16-8-41(a), did not, under the "required evidence" test of O.C.G.A. § 16-1-7, a defendant's aggravated assault conviction did not merge into the defendant's robbery by intimidation conviction. Elamin v. State, 293 Ga. App. 591, 667 S.E.2d 439 (2008).

Trial court did not err in failing to merge counts of armed robbery, O.C.G.A. § 16-8-41(a), and aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), because the assault was completed before the armed robbery; the evidence showed that the defendant confronted the victim by entering the room with a pistol and threatening the victim, at which point, the crime of aggravated assault with a deadly weapon was completed. The evidence further showed that after threatening the victim, presumably to prevent the victim from retaliating against the defendant for a prior altercation, the defendant ordered the victim to empty the victim's pockets at gunpoint and took $200 from the victim, which comprised the armed robbery. Ransom v. State, 298 Ga. App. 360, 680 S.E.2d 200 (2009).

As the armed robberies and aggravated assaults the defendant was charged with were committed against the different victims, the crimes did not merge as a matter of law or fact. Verdree v. State, 299 Ga. App. 673, 683 S.E.2d 632 (2009).

Defendant's sentence for armed robbery, O.C.G.A. § 16-8-41(a), and aggravated assault, O.C.G.A. § 16-5-21(a)(2), was not void as a result of the trial court's failure to merge the convictions because the convictions did not merge for sentencing purposes since the crimes did not involve the same conduct; the crime of armed robbery was complete when the defendant entered a restaurant and, with the use of a handgun, demanded and took money from a waitress, and, after completion of the armed robbery, the defendant pushed the gun against the waitress's neck and asked whether the waitress wanted to die, which formed the basis of the aggravated assault conviction. McKenzie v. State, 302 Ga. App. 538, 691 S.E.2d 352 (2010).

Because defendant's conviction under O.C.G.A. § 16-8-41(a) for armed robbery could be sustained based upon defendant's conduct with a shotgun, and because defendant's conviction under O.C.G.A. § 16-5-21(a)(2) for aggravated assault could be sustained based upon defendant's conduct with a knife, pursuant to O.C.G.A. § 16-1-7(a), the two convictions did not merge. Johnson v. State, 305 Ga. App. 838, 700 S.E.2d 726 (2010).

Defendant's convictions for armed robbery and aggravated assault did not merge because each crime required proof of conduct that the other did not; the armed robbery as charged in the indictment required proof of an intent to rob and that the victim's wallet was taken, while the aggravated assaults required proof that the victim's neck was slashed with a sharp weapon. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Trial court was correct not to merge the defendant's convictions for armed robbery and aggravated assault because although

the defendant's conviction for the armed robbery of the victim resulted from a holdup, the conviction for aggravated assault was based on the defendant's forcing the shotgun down the victim's throat later in a bathroom. Thomas v. State, 289 Ga. 877, 717 S.E.2d 187 (2011).

Trial court did not err when the court refused to merge the defendant's aggravated assault and armed robbery convictions because the armed robbery and aggravated assault were separate and distinct acts; the victim's testimony showed that the armed robbery was complete before the commission of the aggravated assault. Brown v. State, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Merger with aggravated assault. — Evidence identifying the defendant as the perpetrator who stole a victim's car and purse at gunpoint, coupled with evidence of the defendant's flight from police, possession of the stolen car, and possession of the revolver used in the crimes was sufficient to support convictions for hijacking a motor vehicle, possession of a firearm during the commission of a felony, armed robbery, and aggravated assault with a deadly weapon; however, the conviction and sentence for aggravated assault merged as a matter of fact into the armed robbery conviction and sentence. Doublette v. State, 278 Ga. App. 746, 629 S.E.2d 602 (2006).

Merger of an aggravated assault count into an armed robbery count was required when the only evidence was that the defendant used a gun to rob the victim. There was not a separate aggravated assault before the robbery began; thus, there having been no additional violence used against the victim, it followed that the evidentiary basis for the aggravated assault conviction was "used up" in proving the armed robbery. Howard v. State, 298 Ga. App. 98, 679 S.E.2d 104 (2009).

Trial court erred in failing to merge aggravated assault, O.C.G.A. § 16-5-21(a)(2), and armed robbery, O.C.G.A. § 16-8-41, counts because the state relied on the same act of assault to establish the defendant's guilt of aggravated assault and armed robbery, and although the state would have been able to indict the defendant for aggravated assault based on conduct separate and distinct from the defendant's act of hitting the victim in the head with a baseball bat, the indictment specifically charged the defendant with the offense of aggravated assault; while armed robbery requires proof of additional facts, like aggravated assault with intent to rob, aggravated assault under § 16-5-21(a)(2) does not require proof of a fact not required to establish armed robbery. Taylor v. State, 304 Ga. App. 395, 696 S.E.2d 686 (2010).

Defendant's aggravated assault convictions merged into the defendant's armed robbery convictions because there was no element of aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), that was not contained in armed robbery, O.C.G.A. § 16-8-41; aggravated assault with a deadly weapon does not require proof of a fact that armed robbery does not, and because the assault requirement of aggravated assault is the equivalent of the "use of an offensive weapon" requirement of armed robbery, the "deadly weapon" requirement of this form of aggravated assault is the equivalent of the "offensive weapon" requirement of armed robbery. Long v. State, 287 Ga. 886, 700 S.E.2d 399 (2010).

Defendant's aggravated assault conviction should have merged into defendant's armed robbery conviction for sentencing purposes because the defendant's use of the defendant's handgun against the victim was the same conduct in both offenses, designed to immobilize the victim while the victim was robbed. The aggravated assault was established by proof of the same or less than all the facts required to establish the commission of the armed robbery. Herrera v. State, 306 Ga. App. 432, 702 S.E.2d 731 (2010).

Plea counsel performed deficiently in failing to argue for the merger of the defendant's convictions and sentences for armed robbery, O.C.G.A. § 16-8-41(a), and aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), because the aggravated assault with a deadly weapon charges did not require proof of a fact that the armed robbery charges did not likewise require, and the defendant's aggravated assault convictions unquestionably merged into the de-

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fendant's armed-robbery convictions; the armed robbery counts in the indictment provided that the defendant unlawfully, with intent to commit theft, did take property from the person of the victim, by use of an offensive weapon, and the aggravated assault counts provided that the defendant did unlawfully make an assault upon the person of the victim with a steel rod, a deadly weapon, an object, which, when used offensively against a person, was likely to or actually did result in serious bodily injury, by beating the victim about the head and face with the steel rod. Murray v. State, 307 Ga. App. 621, 705 S.E.2d 726 (2011).

Trial court's failure to merge the defendant's aggravated assault conviction with the defendant's armed robbery conviction in imposing the sentence was erroneous because there was no element of aggravated assault with a deadly weapon that was not contained in armed robbery; both crimes required proof of an intent to rob because the elements of the defendant's armed robbery charge under O.C.G.A. § 16-8-41(a) included an intent to rob, the use of an offensive weapon, and the taking of property from the person or presence of another, and the elements of the defendant's aggravated assault charge under O.C.G.A. § 16-5-21(a) included an assault upon the victim, an intent to rob, and the use of a deadly weapon. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Because the defendant's convictions for armed robbery and aggravated assault arose from the same act or transaction, the defendant's taking money from the victim at gunpoint, the defendant's aggravated assault conviction against that victim merged with the armed robbery conviction. Thomas v. State, 289 Ga. 877, 717 S.E.2d 187 (2011).

Trial court erred by failing to merge an aggravated assault charge into an armed robbery charge because the victim testified repeatedly that the defendant was in the victim's apartment when the defendant shot the victim and that the victim fired a gun as soon as the victim saw the defendant point a gun at the victim while forcing the defendant's way in; both crimes were complete when the defendant pointed the gun at the victim while simultaneously entering the apartment, and there was no separate aggravated assault before the armed robbery began. Davis v. State, 312 Ga. App. 328, 718 S.E.2d 559 (2011).

Trial court erred in failing to merge the defendant's conviction for aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), into the defendant's conviction for armed robbery conviction, O.C.G.A. § 16-8-41(a), because the act of using an offensive weapon for the purposes of committing an armed robbery was the legal equivalent of assault for the purposes of committing an aggravated assault; it is not determinative under the merger analysis that the desired object of a defendant's armed robbery was something other than that which he or she actually took, but instead, what dictates merger is the fact that both crimes for which the defendant was convicted were predicated upon the same conduct. Hall v. State, 313 Ga. App. 66, 720 S.E.2d 181 (2011).

Trial court erred by failing to merge the defendant's convictions for aggravated assault with a deadly or offensive weapon and armed robbery convictions for sentencing purposes because hitting a victim in the head with a handgun while demanding money were not separate and distinct acts but one uninterrupted criminal transaction. Haynes v. State, 322 Ga. App. 57, 743 S.E.2d 617 (2013).

After the trial court merged the defendant's aggravated assault conviction into the defendant's armed robbery conviction, and then sentenced the defendant for armed robbery and aggravated battery, even if the trial court should have merged the defendant's aggravated battery and aggravated assault convictions, the end result would have been the same as the defendant would have been sentenced for aggravated battery rather than aggravated assault, given that the aggravated assault constituted the included offense; thus, any error by the trial court in failing to merge the defendant's aggravated battery and aggravated assault convictions was harmless and provided no basis for vacating the defendant's sentence.

Epperson v. State, 340 Ga. App. 25, 796 S.E.2d 1 (2016).

Merger of aggravated assault with intent to rob. — Because the assault element of a defendant's aggravated assault with intent to rob conviction under O.C.G.A. § 16-5-21(a) was contained within the "use of an offensive weapon" element of armed robbery under O.C.G.A. § 16-8-41, and both crimes shared the "intent to rob" element, the defendant's aggravated assault conviction merged into the armed robbery conviction. Lucky v. State, 286 Ga. 478, 689 S.E.2d 825 (2010).

Trial court erred in not merging a defendant's aggravated assault with attempt to rob conviction, O.C.G.A. § 16-8-21(a), into the defendant's armed robbery conviction, O.C.G.A. § 16-8-41. The offense of armed robbery contained a requirement, the taking of property, that aggravated assault did not, but aggravated assault with intent to rob did not require proof of a fact which armed robbery did not. Daniels v. State, 310 Ga. App. 541, 713 S.E.2d 689 (2011).

No inconsistent verdict on armed robbery and aggravated assault. — There was no merit to a defendant's argument that a guilty verdict on an aggravated assault charge as to one of the victims was inconsistent with a not guilty verdict on an armed robbery charge as to that victim. The inconsistent verdict rule was abolished; moreover, since the crimes had different elements, the jury could have found that the defendant was guilty of assaulting both victims but robbing only one of the victims. Bethune v. State, 291 Ga. App. 674, 662 S.E.2d 774 (2008).

No merger with murder count. — When a defendant had been convicted of malice murder, felony murder, armed robbery, and other crimes, the trial court did not err by failing to merge the armed robbery counts into the felony murder count predicated on the underlying felony of armed robbery as the felony murder count was vacated by operation of O.C.G.A. § 16-1-7, and the defendant could be sentenced for the felony conviction so long as the felony was not included in the murder as a matter of fact or law; here, the armed robbery was not included in the malice murder charge as a matter of fact or law; evidence showing the defendant's intent to rob the victim was not used in proving the murder, and evidence that the defendant shot the victim was not used to prove the armed robbery. Davis v. State, 281 Ga. 871, 644 S.E.2d 113 (2007).

Defendant's conviction for armed robbery was properly not merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as each offense required proof of an element that the other did not. Culpepper v. State, 289 Ga. 736, 715 S.E.2d 155 (2011).

Count of possession of firearm by convicted felon does not merge with a related armed robbery charge. Smallwood v. State, 166 Ga. App. 247, 304 S.E.2d 95 (1983); McGee v. State, 173 Ga. App. 604, 327 S.E.2d 566 (1985).

Armed robbery is not a lesser included offense of malice murder. Chafin v. State, 246 Ga. 709, 273 S.E.2d 147 (1980).

Armed robbery is not a lesser included offense of malice murder when the defendant was a party to both armed robbery and the codefendant's murder of the victim. Hoerner v. State, 246 Ga. 374, 271 S.E.2d 458 (1980).

When proof of the armed robbery is essential to the conviction for felony murder, the armed robbery is a lesser included offense in the felony murder. Sanborn v. State, 251 Ga. 169, 304 S.E.2d 377 (1983).

Armed robbery and kidnapping are clearly not included offenses as a matter of law. Nor are they included offenses as a matter of fact where the two offenses are based on separate acts. Emmett v. State, 199 Ga. App. 650, 405 S.E.2d 707 (1991), cert. denied, 199 Ga. App. 905, 405 S.E.2d 707 (1991); Jordan v. State, 242 Ga. App. 408, 530 S.E.2d 42 (2000), overruled on other grounds, Shields v. State, 276 Ga. 669, 581 S.E.2d 536 (2003).

Kidnapping was completed when defendant seized the women and forcibly moved them from one location in the store to another, and then defendant committed the armed robbery; accordingly, convictions for both offenses did not amount to two punishments for the same conduct,

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nor was one offense included in the other as a matter of fact. Phillips v. State, 259 Ga. App. 331, 577 S.E.2d 25 (2003).

Since the sentences imposed upon an inmate upon the inmate's convictions for armed robbery and kidnapping were within the statutory guidelines under both O.C.G.A. §§ 16-5-40(b) and 16-8-41(b), they were upheld; further, because armed robbery and kidnapping did not merge, the inmate was properly sentenced separately for those different crimes. Benjamin v. State, 269 Ga. App. 232, 603 S.E.2d 733 (2004).

Armed robbery and aggravated assault with deadly weapon are separate crimes; one is not included in the other and neither prohibits a designated kind of conduct generally while the other prohibits specific instance of such conduct. Roberts v. State, 228 Ga. 298, 185 S.E.2d 385 (1971).

Whether aggravated assault and armed robbery are different crimes. — Aggravated assault and armed robbery are different crimes as a matter of law. Lambert v. State, 157 Ga. App. 275, 277 S.E.2d 66 (1981).

Aggravated assault is not a lesser included offense of armed robbery as a matter of law, and the two offenses rarely merge as a matter of fact. Lowery v. State, 209 Ga. App. 5, 432 S.E.2d 576 (1993).

Aggravated assault and armed robbery are not always different crimes as a matter of fact. Lambert v. State, 157 Ga. App. 275, 277 S.E.2d 66 (1981).

When an indictment alleged that an aggravated assault was committed with a firearm by shooting the victims, and an armed robbery alleged the use of an offensive weapon, the aggravated assault charge was not a lesser included offense of armed robbery as a matter of law, and the two offenses rarely merged as a matter of fact. Silvers v. State, 278 Ga. 45, 597 S.E.2d 373 (2004).

Offense of aggravated assault merged with offense of armed robbery, where the aggravated assault alleged separately in the indictment was the same assault alleged to have been committed in the course of the armed robbery. Cherry v. State, 178 Ga. App. 483, 343 S.E.2d 510 (1986).

Defendant's five convictions of aggravated assault merged with defendant's conviction on five counts of attempted armed robbery, where defendant's act of pointing a pistol at bank employees when defendant announced an intent to rob the bank was the act underlying both the convictions for attempted armed robbery and for aggravated assault. Hambrick v. State, 256 Ga. 148, 344 S.E.2d 639 (1986).

Aggravated assault was included in armed robbery as a matter of fact, where it was not the initial pointing of a pistol at the victim which prompted the victim to open a cash drawer but the subsequent cocking of the weapon by the assailant after the victim told the assailant there was no money and the actual firing of the weapon occurred virtually at the same moment, as the victim was hitting the button to open the drawer. Moreland v. State, 183 Ga. App. 113, 358 S.E.2d 276 (1987).

When the defendant's offense of attempted armed robbery was included in offense of aggravated assault with intent to rob a restaurant manager, only one sentence should have been imposed in connection with the two charges. Redding v. State, 193 Ga. App. 50, 386 S.E.2d 907 (1989).

Aggravated assault count merged into robbery count since the only aggravated assault (committed by the defendant) shown by the evidence was that by which the commission of the robbery was effectuated. Since there was no additional, gratuitous violence employed against the victim, the evidentiary basis for the aggravated assault conviction was "used up" in proving the robbery. Head v. State, 202 Ga. App. 209, 413 S.E.2d 533 (1991).

Where the indictment was inartfully drawn so that the same shooting was used to prove both offenses under the indictment as drawn, the aggravated assault merged with the armed robbery, requiring vacating the conviction for aggravated assault. Lowery v. State, 209 Ga. App. 5, 432 S.E.2d 576 (1993).

Defendant's aggravated assault conviction should have merged with defendant's armed robbery conviction as the two con-

victions were based on the same conduct in sticking a gun to a victim's head with the intent to rob the victim. Kirk v. State, 271 Ga. App. 640, 610 S.E.2d 604 (2005).

Defendants' aggravated assault convictions merged into their armed robbery convictions as simultaneous with showing the gun, defendants made clear that they intended to rob the victims, which they proceeded to do; there was not a separate aggravated assault before the robbery began. Young v. State, 272 Ga. App. 304, 612 S.E.2d 118 (2005).

Defendants' aggravated assault by striking a victim with a gun convictions merged into their armed robbery convictions as the robbery was not complete until the gunman struck the victim with the gun, thereby allowing defendant one to take the victim's money. Young v. State, 272 Ga. App. 304, 612 S.E.2d 118 (2005).

Defendant's ineffective assistance of counsel claim based on counsel's failure to ask at sentencing that defendant's convictions for aggravated assault be merged into the armed robbery convictions was rejected as the convictions were merged at the motion for a new trial hearing. Buchanan v. State, 273 Ga. App. 174, 614 S.E.2d 786 (2005).

Because all of the facts used to prove the offense of aggravated assault with intent to rob were used up in proving the armed robbery, merger was required. Mercer v. State, 289 Ga. App. 606, 658 S.E.2d 173 (2008).

Aggravated assault charge did not merge with an armed robbery charge because separate facts were used to prove each crime and the elements of each crime were separate. Miller v. State, 174 Ga. App. 42, 329 S.E.2d 252 (1985).

Conviction for aggravated assault did not merge with conviction for armed robbery since the evidence showed that the defendant had completed the armed robbery at the time the defendant assaulted the security guard. Loumakis v. State, 179 Ga. App. 294, 346 S.E.2d 373 (1986).

Aggravated assaults did not merge with the robbery of two victims, where the robberies were completed, both victims having been deprived of their property, when they were marched off for another criminal purpose and the aggravated assaults on each victim occurred. Glass v. State, 199 Ga. App. 530, 405 S.E.2d 522 (1991).

Aggravated assault conviction did not merge with armed robbery offenses for sentencing purposes because each crime required proof of an additional fact as the robbery required proof that the defendant took the property of another, which was not required to prove aggravated assault, and assault required proof that the victim was placed in reasonable fear of immediately receiving a violent injury, which armed robbery did not require. Nava v. State, 301 Ga. App. 497, 687 S.E.2d 901 (2009).

Aggravated assault did not merge with kidnapping and armed robbery charges because each count relied on separate facts. Howard v. State, 230 Ga. App. 437, 496 S.E.2d 532 (1998).

Conviction of aggravated assault and armed robbery constitutional. — There was no violation of defendant's protection from double jeopardy in defendant's having been convicted of and punished for both the aggravated assault and armed robbery of the victim when the indictment charged armed robbery with the specific intent to commit a theft and the two acts were in fact separate though in close succession. Taylor v. State, 177 Ga. App. 624, 340 S.E.2d 263 (1986).

Aggravated assault is not included in attempted armed robbery as a matter of law, although these two offenses may as a matter of fact merge if the same facts are used to prove both offenses. However, when the underlying facts show that one crime was completed prior to the second crime, so that the crimes are separate as a matter of law, there is no merger. Gaither v. Cannida, 258 Ga. 557, 372 S.E.2d 429 (1988).

Convictions and sentences for both armed robbery and aggravated assault were proper since each offense charged was clearly supported by its own set of facts. Millines v. State, 188 Ga. App. 655, 373 S.E.2d 838 (1988).

Robbery by force and armed robbery. — There was no merger of robbery by force and armed robbery when the evidence showed that the theft of the

Included Offenses (Cont'd)

victim's pistol was accomplished by force and, subsequently, the defendant used the pistol to strike the victim's head and shoulders prior to stealing her pocketbook. Denson v. State, 212 Ga. App. 883, 443 S.E.2d 300 (1994).

Conviction for attempt to commit armed robbery did not merge with conviction for armed robbery since, although both offenses occurred at the same place and at the same time and under the same circumstances, the object of the offenses was different and the victims were different. Loumakis v. State, 179 Ga. App. 294, 346 S.E.2d 373 (1986).

Possession of firearm conviction did not merge with attempted armed robbery conviction. — Possession of a firearm during the commission of a felony did not merge with an attempted armed robbery conviction because the crime of possession of a firearm is considered to be a separate offense under O.C.G.A. § 16-11-106(b) and (e). McKinney v. State, 274 Ga. App. 32, 619 S.E.2d 299 (2005).

When uncontradicted evidence shows completion of greater offense, charge on robbery by force not required. Jordan v. State, 239 Ga. 526, 238 S.E.2d 69 (1977).

When all the evidence proved the greater offense of armed robbery, the trial court did not err in failing to charge on the lesser included offense of robbery by intimidation. Mallory v. State, 166 Ga. App. 812, 305 S.E.2d 656 (1983).

When the evidence showed clearly an armed robbery by use of an offensive weapon, and there was no evidence of robbery by intimidation or theft by taking, a charge on those lesser offenses was not required. Echols v. State, 172 Ga. App. 431, 323 S.E.2d 289 (1984).

Trial court did not err in denying the defendant's request to charge on robbery by force as a lesser included offense of armed robbery since the person from whom the bank deposit was taken testified that the defendant was armed with a silver colored, stainless steel revolver. Regardless of whether a gun was ever recovered by law enforcement officers or placed in evidence, the evidence proved the greater offense or none at all. Coker v. State, 207 Ga. App. 482, 428 S.E.2d 578 (1993).

Even if defendant decided to take victim's money only after twice shooting the victim, the jury was authorized to find that the offense of murder was committed while defendant was engaged in the commission of the offense of armed robbery. Davis v. State, 255 Ga. 588, 340 S.E.2d 862, cert. denied, 479 U.S. 871, 107 S. Ct. 243, 93 L. Ed. 2d 168 (1986).

Acquittal of lesser crime bars conviction on greater. State v. Rowe, 138 Ga. App. 904, 228 S.E.2d 3 (1976), overruled on other grounds, Cleary v. State, 258 Ga. 203, 366 S.E.2d 677 (1988).

Application

Theft of automobile may constitute armed robbery. — While theft of an automobile may be committed without committing armed robbery, theft of an automobile may constitute armed robbery. Roberts v. State, 228 Ga. 298, 185 S.E.2d 385 (1971); Ferguson v. State, 221 Ga. App. 415, 471 S.E.2d 528 (1996).

Force or intimidation essential to robbery must either precede or be contemporaneous with taking rather than subsequent to taking. Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975), cert. denied, 428 U.S. 910, 96 S. Ct. 3222, 49 L. Ed. 2d 1218 (1976), execution of death sentence stayed pending action on rehearing petition, 497 U.S. 1048, 111 S. Ct. 11, 111 L. Ed. 2d 826 (1990).

In order to establish armed robbery a showing is required that the defendant took property by force and that the force was exerted prior to or contemporaneous with the taking. Lobosco v. Thomas, 928 F.2d 1054 (11th Cir. 1991).

Evidence was sufficient to sustain defendant's convictions as a party to the offenses of armed robbery, kidnapping, false imprisonment, burglary, and aggravated assault with a deadly weapon, in violation of O.C.G.A. §§ 16-5-21, 16-5-40, 16-5-41, 16-7-1, and 16-8-41, because: (1) defendant received information from the defendant's love interest, about the victims' house, the location of safes, where money was located, and about the alarm system; (2) the day after the home inva-

sion the love interest saw defendant and defendant showed the love interest a stack of cash, and defendant told the love interest it might be the victim's money; and (3) an FBI informant met with defendant and defendant told the informant that defendant had been shorted money from the robbery, and that defendant got the layout of the house from the love interest. Pope v. State, 266 Ga. App. 658, 598 S.E.2d 48 (2004).

Evidence was sufficient to convict defendant of two counts of armed robbery, in violation of O.C.G.A. § 16-8-41(a), because, in the second robbery: (1) defendant robbed the second bank using a replica of a bomb; (2) there were identifications by the victim, the driver of the car, and the driver's companion; (3) there were fingerprints linking defendant to the get-away car and the materials used to assemble the fake bomb; and (4) there was the driver's testimony, and because, in the first robbery, although the evidence was not as strong, a reasonable jury could have found that defendant also robbed the first bank using a replica bomb based on defendant's identification as the individual who entered another bank, the similarities between that individual and the first bank robber, and the shoes worn by defendant at the time of defendant's arrest. Jones v. State, 266 Ga. App. 679, 598 S.E.2d 65 (2004).

Evidence which showed that a victim died from a gunshot wound to the chest, that police found the victim's property on defendant when defendant was arrested, and that witnesses heard the shots and saw defendant running away from the scene of the shooting was sufficient to sustain defendant's convictions for malice murder, armed robbery, and possession of a firearm during the commission of a crime, and the trial court did not err when it gave the jury an Allen charge during defendant's trial or because it did not instruct the jury on involuntary manslaughter as a lesser included offense. Johnson v. State, 278 Ga. 136, 598 S.E.2d 502 (2004).

Because the defendant was identified by the victim as the robber and none of the proffered testimony related to an immediate threat, it was highly unlikely that the defendant was misidentified; consequently, because the trial court properly excluded defendant's coercion defense, counsel was not ineffective for failing to raise that defense. Treadwell v. State, 272 Ga. App. 508, 613 S.E.2d 3 (2005).

Because the victim was present at the time the victim's shotgun was being stolen in a nearby room, the force essential to an armed robbery under O.C.G.A. § 16-8-41(a) was contemporaneous with the taking. McCoon v. State, 294 Ga. App. 490, 669 S.E.2d 466 (2008).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of aggravated assault, armed robbery, and attempted armed robbery because during the confrontation, the defendant stated to one of the victims that the defendant had shot a person the day before; shooting the victims when the defendant was frustrated in the robbery attempts was consistent with the defendant's behavior toward the other victims. Lewis v. State, 291 Ga. 273, 731 S.E.2d 51 (2012).

Gun lying in front of the defendant, coupled with threats, satisfies armed robbery elements. Store clerk's observation of the gun lying on a counter in front of the defendant, coupled with the defendant's threats to "blow her brains out" if the clerk failed to give the defendant money, satisfied elements of armed robbery even though the clerk did not see the gun in the defendant's hands. Doby v. State, 173 Ga. App. 348, 326 S.E.2d 506 (1985).

Value of property taken is irrelevant to offense of armed robbery. — Offense of armed robbery is committed merely by armed taking of "property of another," regardless of whether the property's value is great or small. Maxey v. State, 159 Ga. App. 503, 284 S.E.2d 23 (1981).

Evidence was sufficient to convict the defendant of armed robbery because the defendant's testimony affirmed that the front-seat passenger pulled a gun on the victim, but never addressed whether or not money was taken; O.C.G.A. § 16-8-41(a) presents no requirement of proof of value. Cook v. State, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Application (Cont'd)

Copy of defendant's fingerprint card properly admitted. — Trial court did not err in admitting a copy of the defendant's fingerprint card, pursuant to O.C.G.A. §§ 24-3-14 and 24-5-26 (see now O.C.G.A. §§ 24-8-803 and 24-10-1003), despite the defendant's claim that the testifying witness lacked personal knowledge with regard to the circumstances or time of the creation or transmission of the same as the card itself showed that it was created and transmitted at the time of the defendant's arrest, and was handled in the gathering agency's regular and routine course of business. Tubbs v. State, 283 Ga. App. 578, 642 S.E.2d 205 (2007).

Failure to recover stolen money doesn't mean not guilty. — Testimony of two witnesses that the defendant took the money of one witness at gunpoint was sufficient to support the defendant's conviction for armed robbery, despite the defendant's argument that the conviction should not stand because no money was recovered from either the defendant or the scene of the crime. Singleton v. State, 259 Ga. App. 184, 577 S.E.2d 6 (2003).

Failure to state in indictment value of goods stolen. — Failure to include particular value of stolen goods in indictment offered no obstacle to defendant preparing a defense; it did not prejudice defendant nor establish a fatal variance where ample proof of amount, type, and ownership of such property was introduced by state. Stephens v. State, 239 Ga. 446, 238 S.E.2d 29 (1977).

When the defendant shoots the victim immediately before taking the victim's personal belongings, the victim's actions fall within the scope of O.C.G.A. § 16-8-41. Brown v. State, 251 Ga. 598, 308 S.E.2d 182 (1983).

Death of victim from force used does not prevent offense from being a robbery. — That victim died from force used either immediately, or subsequent to taking, does not make the offense any less a robbery. Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975), cert. denied, 428 U.S. 910, 96 S. Ct. 3222, 49 L. Ed. 2d 1218 (1976), execution of death sentence stayed pending action on rehearing petition, 497 U.S. 1048, 111 S. Ct. 11, 111 L. Ed. 2d 826 (1990).

Conviction for armed robbery was authorized even though the property was taken from the victim only after the victim had been killed. Francis v. State, 266 Ga. 69, 463 S.E.2d 859 (1995).

Snatching property while using offensive weapon constitutes armed robbery. — Fact that accused and accomplices gained possession of article taken from victim by snatching same from the victim's possession does not operate to reduce offense to robbery by intimidation or robbery by sudden snatching where at time snatching took place, victim and the victim's companion were under restraint of offensive weapons. Geter v. State, 226 Ga. 236, 173 S.E.2d 680 (1970).

Armed robbery does not require armed escape. — When the defendant was in escape phase of crime, which is as essential to execution of armed robbery as theft itself because purpose of armed robbery is to get away with contraband, it makes no difference whether the appellant was armed or not during the appellant's escape as an armed robbery does not by implication require an armed escape; therefore, the armed robbery was not abandoned. Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981); Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82 (2002).

Coercion defense rejected. — When the defendant, on appeal, conceded to being present and participating in the armed robbery and the assault that occurred along with the robbery, but contended (as defendant did at trial) that the defendant was not a voluntary participant in the crimes but acted only out of fear for the defendant's own life through the coercion of other participants in the crimes, it was held that the jury was presented sufficient admissible evidence to establish to the satisfaction of a rational trier of fact that guilt was proven beyond a reasonable doubt. August v. State, 180 Ga. App. 510, 349 S.E.2d 532 (1986).

There was sufficient evidence to support a defendant's conviction for armed robbery and the trial court properly denied the defendant's motion for a new trial since the state disproved the defendant's coercion defense that the defendant was forced to participate in the robbery of a restaurant because the defendant's cohorts had threatened to take the defendant's children away as the defendant never drove away from the scene of the crime while waiting outside of the restaurant, the defendant actually entered the restaurant during the crime, and the defendant never indicated a need for protection for the children once apprehended. Engrisch v. State, 293 Ga. App. 810, 668 S.E.2d 319 (2008).

Codefendants trial should have been severed. — When the defendant testified that the codefendant conceived of the robbery without the defendant's knowledge or participation and that only the codefendant was armed, the defendant did acknowledge pretending to have a gun and giving orders to the store occupants, the defendant's own testimony was sufficient to authorize a conviction for armed robbery and aggravated assault, and insufficient to support a defense of coercion. House v. State, 203 Ga. App. 55, 416 S.E.2d 108, cert. denied, 203 Ga. App. 906, 416 S.E.2d 108 (1992).

Evidence was sufficient to support defendant's convictions for armed robbery, aggravated assault, and possession of a firearm during the commission of the felonies because the only evidence of coercion came from defendant personally. To disprove the coercion defense, the victim testified that defendant did not appear nervous, that the robbery occurred very quickly, with no "fumbling" or "bumbling" on defendant's part, and that defendant commented that defendant was robbing the victim because defendant needed a place to stay. Blocker v. State, 265 Ga. App. 846, 595 S.E.2d 654 (2004).

Sufficient evidence supported convictions arising from the defendant's participation in a robbery which resulted in the death of a store clerk since, knowing that the cousin was going to commit a robbery, the defendant voluntarily went with the cousin, saw that the cousin had a gun, agreed to "stand over" the scene, and joined the cousin in using the victim's credit cards afterwards; contrary to the defendant's assertions, testimony showed that the defendant was not intimidated by the cousin. Scott v. State, 280 Ga. 466, 629 S.E.2d 211 (2006).

In a bench trial for armed robbery and aggravated assault, the evidence authorized the trial court to conclude that the state had sufficiently disproved the defendant's defense that the defendant had been coerced by one of the defendant's companions into committing the crimes; the defendant had not mentioned coercion in either of the defendant's two statements to police, one in which the defendant had admitted to committing the crimes, and it was not until trial that the defendant claimed coercion. Edwards v. State, 285 Ga. App. 227, 645 S.E.2d 699 (2007).

Trial court erred in denying a codefendant's motion to sever the trial from the defendant's trial because the codefendant was not allowed to introduce the exculpatory portions of the statements that explained the excerpted admissions introduced by the state, which supported the codefendant's antagonistic defense that the codefendant was present at the robberies due to coercion by the defendant. To avoid potential Bruton issues, the state introduced only those portions of the codefendant's 9-1-1 calls or custodial statements made establishing that the codefendant was at the scene of two robberies, that the codefendant's vehicles were used, and that the codefendant sent police to a motel room to investigate the robberies, but refused the additional portions of the statements that tended to support the codefendant's defense that the codefendant was coerced into participating in the crimes. Bowe v. State, 288 Ga. App. 376, 654 S.E.2d 196 (2007), cert. dismissed, sub. nom., State v. Baker, No. S08C0548, 2008 Ga. LEXIS 318 (Ga. 2008).

Codefendant's testimony implicating defendant sufficiently corroborated. — With regard to a defendant's convictions for robbery, burglary, and other related crimes, the testimony of a codefendant that implicated the defendant was sufficiently corroborated by

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other testimony and evidence at trial. Burton v. State, 293 Ga. App. 822, 668 S.E.2d 306 (2008).

Evidence was sufficient to support the defendant's convictions for armed robbery, burglary, aggravated assault, criminal attempt to commit armed robbery, criminal attempt to commit burglary, and sexual battery because there was at least slight evidence from sources extraneous to a coconspirator as to the defendant's identity and participation in a home invasion and robbery; the coconspirator testified that the coconspirator attended a meeting to plan the robbery and that the meeting occurred at the apartment where the defendant resided, and extraneous evidence connected the defendant to at least two home invasions that employed the same modus operandi. Martinez v. State, 306 Ga. App. 512, 702 S.E.2d 747 (2010).

Evidence was sufficient to support the defendant's convictions of armed robbery under O.C.G.A. § 16-8-41(a), aggravated battery under O.C.G.A. § 16-5-24(a), aggravated assault under O.C.G.A. § 16-5-21(a), burglary under O.C.G.A. § 16-7-1(a)(2), possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b), and conspiracy to possess cocaine under O.C.G.A. §§ 16-4-8 and 16-13-30(a) as a conspirator because, while the uncorroborated testimony of one accomplice was insufficient under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the evidence sufficed to sustain the defendant's conviction when an additional accomplice provided testimony to corroborate that of the first accomplice. Both codefendants testified that the defendant was present from the robbery's inception through the robbery's execution, that the defendant was aware of the conspiracy to obtain the victim's money and cocaine by armed robbery, and that the defendant willingly participated in the crimes and shared the criminal intent of those who committed the crimes inside the victim's residence by supplying the defendant's car and acting as a get-away driver. Watson v. State, 308 Ga. App. 871, 708 S.E.2d 703 (2011).

Codefendant's testimony constituted direct evidence that the defendant intentionally aided and abetted the codefendants in committing the crimes of armed robbery and aggravated assault and intentionally advised, encouraged, and counseled them to commit the crimes, and there was sufficient corroboration of the codefendant's testimony, including a recorded telephone call between the defendant and a second codefendant, the defendant's own testimony at trial, and the defendant's statements to law enforcement. Stallings v. State, 343 Ga. App. 135, 806 S.E.2d 613 (2017).

Accomplice testimony sufficiently corroborated in robbery trial. — Trial court did not err by denying the defendant's motion for a new trial based on the defendant's contention that the evidence was insufficient to corroborate the accomplice testimony implicating the defendant in the robbery because the testimony of the victim identified the defendant as the perpetrator and was sufficient corroboration of the accomplice's testimony. Vann v. State, 322 Ga. App. 148, 742 S.E.2d 767 (2013).

Statement that person from whom property was taken was real owner's agent. — In indictment for robbery, ownership of property taken may be laid in person having actual lawful possession of the property, although the person may be holding the property merely as agent of another; and it is not necessary to set forth in indictment fact that person in whom ownership is laid is holding the property merely as agent of real owner. Cline v. State, 153 Ga. App. 576, 266 S.E.2d 266 (1980).

Variance between indictment and charge. — Trial court charge that one commits armed robbery by use of an offensive weapon or any replica was not error where the defendant was indicted for armed robbery by use of a pistol. Booker v. State, 164 Ga. App. 176, 296 S.E.2d 752 (1982).

Variances between property descriptions will not be fatal at trial when armed taking is proved. Maxey v. State, 159 Ga. App. 503, 284 S.E.2d 23 (1981).

No variance as to weapon. — When the indictment charged that the crime was committed by use of "an offensive

weapon, to-wit: a gun," and the proof showed that the gun was but a starter's pistol which could not fire live rounds, since armed robbery can be committed with a real weapon or with a toy or replica having the appearance of a real weapon, the indictment put the defendant on notice definitely of the charge against the defendant and protected the defendant from further prosecution for the same offense, and there was no fatal variance. Hamilton v. State, 180 Ga. App. 197, 348 S.E.2d 735 (1986).

There was no fatal variance between the indictment that alleged that the defendant committed armed robbery by use of a pellet pistol and evidence that showed that the weapon used was a BB gun. Jones v. State, 312 Ga. App. 15, 717 S.E.2d 526 (2011).

Sufficiency of indictment for carjacking. — Indictment alleging that defendants "with the intent to commit a theft, did take automobile by use of a knife, an offensive weapon" alleged all the essential elements of armed robbery. Campbell v. State, 223 Ga. App. 484, 477 S.E.2d 905 (1996).

Variance in indictment as to year of stolen vehicle not fatal. — When the indictment charged the taking of "one 1976 Ford LN 700 truck, bearing Georgia Registration Plate PJ 1343," whereas the truck was a 1977 model, the variance was not fatal as being one which misinformed or misled the defendant to defendant's prejudice or leaves the defendant subject to subsequent prosecution for the same offense. Graves v. State, 180 Ga. App. 446, 349 S.E.2d 519 (1986).

There was no fatal variance where the indictment alleged that the victim's driver's license was taken, although it was actually the victim's Georgia identification card which was taken, where the proof of defendant's actions, that is, the manner of gaining the misdescribed document, did not vary from the charge. Glass v. State, 199 Ga. App. 530, 405 S.E.2d 522 (1991).

Defendant's conviction for armed robbery was affirmed as the evidence that the defendant agreed to commit the robbery and to share the proceeds and that the defendant held the knife and acted as a "lookout" as a co-conspirator took money from the occupants at gunpoint did not fatally vary from the indictment, which alleged that the defendant committed an armed robbery by taking property from the immediate presence of the victims, by use of a knife. Brown v. State, 281 Ga. App. 523, 636 S.E.2d 709 (2006), cert. denied, No. S07C0168, 2007 Ga. LEXIS 99 (Ga. 2007).

Defendant's convictions were upheld on appeal because a variance in the indictment and the proof at trial was not fatal: (1) the names subject to the alleged variance in fact referred to the same person; and (2) the testimony of a codefendant, when combined with the defendant's post-arrest admissions, sufficiently proved the defendant's commission of an armed robbery and possession of a firearm during the commission of a crime as a party to the crimes. Brown v. State, 289 Ga. App. 421, 657 S.E.2d 322 (2008).

In an armed robbery case, there was no fatal variance between the indictment, which described a stolen weapon as a .25 caliber handgun, and the evidence, which showed that the weapon was a .45 caliber pistol; there was no fatal variance between pleading and proof when one weapon was charged in the indictment and a weapon of a similar nature capable of inflicting the same character of injury was shown by the evidence, and it did not appear that the defendant was misled or prejudiced by the distinction between the caliber of the weapon as alleged and proved. Wilson v. State, 291 Ga. App. 69, 661 S.E.2d 221 (2008).

Severance not required. — Trial court did not abuse the court's discretion in denying the defendant's motion to sever two offenses as: (1) the two armed robberies occurred within a short time, were of hotels in the same county, and had hotel clerks as victims; (2) both victims gave the same general description of the robber and the robber's disguise; and (3) there was nothing complex about the two robberies and either crime could have been introduced at a trial of the other, which minimized any prejudice from the joint trial. Dailey v. State, 271 Ga. App. 492, 610 S.E.2d 126 (2005).

Trial counsel's defense strategy in fail-

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ing to move for severance of the defendant's armed robbery trial from that of a codefendant did not amount to the ineffective assistance of counsel as such was reasonable, even if it wasn't successful, given that: (1) the jury was unlikely to confuse the evidence applicable to either defendants; (2) the defenses were not mutually antagonistic; and (3) the defendant might have actually benefitted from being able to point to the codefendant as being the controlling figure in the robberies. Thus, denial of the motion for severance was not erroneous. Lee v. State, 281 Ga. App. 479, 636 S.E.2d 547 (2006).

Attempted armed robbery conviction was upheld on appeal as severance from a separate charge of armed robbery was not required, given that the two crimes were part of a series of connected acts, committed within a short period of time, in the same area, with the same weapon, and involved a similar modus operandi. Fields v. State, 283 Ga. App. 208, 641 S.E.2d 218 (2007).

As two armed robberies were committed within five days of each other, were perpetrated against the same chain stores in the same city, and the same method—a ruse about needing to use the bathroom—was used to distract store employees in both robberies, the defendant's motion to sever the offenses was properly denied. Savage v. State, 298 Ga. App. 350, 679 S.E.2d 734 (2009).

Trial court did not abuse the court's discretion by denying the respective motions to sever filed by two of three defendants convicted of armed robbery as antagonism between the defendants was not enough to require a severance and the defendants failed to demonstrate how the defendants were harmed by the failure to sever. Mathis v. State, No. A09A0215; No. A09A0308, 2009 Ga. App. LEXIS 586 (May 20, 2009).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever armed robbery offenses because the three robberies took place in a limited geographical area within four weeks of each other, each involved a man approaching a lone pedestrian during the daytime, pointing a revolver at the victim, and demanding that the victim throw the victim's money and property on the ground, and then fleeing on foot; the modus operandi of the robberies was strikingly similar, allowing the trial court the discretion to deny the motion to sever, and the evidence was far from complex and posed no significant risk of jury confusion. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Theft and robberies not connected by "common scheme or plan". — Even though all the crimes were alleged to have been perpetrated by members of the same family, a sibling acting individually as to the theft by taking and jointly with the sibling's brother as to armed robberies, severance was warranted since the three crimes were not part of a common scheme or plan and there was no viable "common scheme or plan" connecting the theft by taking with the armed robberies. Hayes v. State, 182 Ga. App. 26, 354 S.E.2d 655 (1987).

Factual basis sufficient for guilty plea. — Evidence that the defendants entered a restaurant, ordered the victim to lie on the floor and sing at gun point, and took money from the store provided a sufficient factual basis to support the defendants' guilty pleas to armed robbery. Bess v. State, 235 Ga. App. 372, 508 S.E.2d 664 (1998).

Sufficient factual basis was established for a defendant's guilty plea to armed robbery, kidnapping, and possession of a firearm during the commission of a crime when the prosecutor stated that the defendant and an accomplice entered the victims' apartment, forced the victims into rooms at gunpoint, tied the victims up, and stole some items; the prosecutor also noted that much of the crime had been recorded by a 9-1-1 operator; defense counsel stated that counsel had discussed the facts with the defendant; and the defendant conceded guilt. Therefore, it was not necessary that the indictment be read into the record. Leary v. State, 291 Ga. App. 754, 662 S.E.2d 733 (2008).

Evidence of subsequent arrest admitted. — Evidence of the defendant's subsequent arrest on other charges while

driving the same vehicle defendant had been driving on the night of the robbery and of the seizure from that vehicle of a pistol which was similar in appearance to the one alleged to have been used by defendant during the robbery was clearly relevant in that it connected defendant both to the vehicle and to the weapon. Where evidence is otherwise relevant and material to the issues being tried, it is not rendered inadmissible merely because it may incidentally place the defendant's character in issue. Worthy v. State, 180 Ga. App. 506, 349 S.E.2d 529 (1986).

Tracking dog evidence properly admitted. — When one defendant contended that the testimony concerning the use of a tracking dog should not have been admitted because the evidence failed to establish that the dog was upon a track which the circumstances indicate to have been made by the accused, this contention was without merit, as the Dodge Colt automobile was identified as the get-away car, and there was evidence that the two defendants had left a trailer in it shortly before the robbery occurred, the other defendant was positively identified as the gunman, and there was testimony that the accused had returned to the trailer after the robbery with a "handful of money," and the track dog led the officers directly to this trailer from the automobile, the circumstances clearly support the inference that the track followed by the dog had been made by the accused. Murray v. State, 180 Ga. App. 493, 349 S.E.2d 490 (1986).

Circumstantial evidence sufficient. — Jury is entitled to reject defendant's statement as to intent to rob victim in favor of circumstantial evidence to the contrary. Young v. State, 251 Ga. 153, 303 S.E.2d 431 (1983).

Evidence was sufficient to convict the defendant of malice murder under O.C.G.A. § 16-5-1 and armed robbery under O.C.G.A. § 16-8-41 despite the defendant's alibi; the jury was permitted to reject the alibi testimony, and the jury could have found that the circumstantial evidence, which included the defendant's fingerprints and footprints at the scene and a car that defendant was known to drive at the scene, was sufficient to exclude every reasonable hypothesis save that of the defendant's guilt. Daniels v. State, 281 Ga. 226, 637 S.E.2d 403 (2006).

Fact that one of the victims was told that the first defendant had a gun, believed such, became frightened as a result, and hurriedly gave the first defendant the cash demanded, amounted to sufficient circumstantial evidence from which the jury could find that the victim reasonably believed an offensive weapon was being used in the robbery; hence, the evidence was sufficient to sustain the armed robbery convictions of both defendants and uphold the denial of their motion for a new trial on this ground. Richard v. State, 287 Ga. App. 399, 651 S.E.2d 514 (2007).

Circumstantial evidence that a defendant was found walking not far from the scene of a robbery, with money in similar denominations to that which was stolen, clothing (including ski gloves) as described by the victim, and a gun, was sufficient to support the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41(a). Rankin v. State, 309 Ga. App. 817, 711 S.E.2d 377 (2011).

Evidence of the circumstances was sufficient to establish the defendant's identity as the perpetrator and the defendant's guilt of armed robbery, O.C.G.A. § 16-8-41, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106, because the defendant matched the description of the perpetrator given by both a convenience store clerk and another store employee; when the defendant was apprehended, an officer recovered next to the defendant's person the contraband and instrumentalities used in the commission of the robbery. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Sufficient circumstantial evidence supported the defendant's armed robbery conviction because the evidence showed the defendant actively aided and abetted the defendant's codefendant by: (1) driving the codefendant to a crime scene; (2) waiting during the crimes with an intent to use the defendant's car as a getaway car; (3) fleeing the scene with the codefendant; (4) waiting while the codefendant broke into a house; (5) fleeing the house with the

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codefendant; and (6) having a gunshot wound. Jones v. State, 315 Ga. App. 427, 727 S.E.2d 216 (2012).

Evidence was sufficient to support convictions for armed robbery and possession of a firearm during the commission of a crime, as the state presented the requisite corroboration to the codefendant's testimony; the getaway driver's testimony about the height of the defendant and the codefendant was consistent with the gas station clerk's comparison of their heights, and there was evidence that the defendant, who had no job, was spending significant amounts of money on cars and expensive clothing. Harrell v. State, 322 Ga. App. 115, 744 S.E.2d 105 (2013).

Remark in closing argument not error. — Trial court did not err, in an armed robbery trial, in overruling an objection to the state's closing argument remark about the defendant's prior arrests because the arrests had been mentioned during the impeachment of the defendant's character witness. Moye v. State, 277 Ga. App. 262, 626 S.E.2d 234 (2006).

Money found in defendant's possession was within "immediate presence." — Evidence authorized the jury to find that the money found in defendant's personal possessions in the apartment from which defendant leaped was within the defendant's "immediate presence" within the meaning of O.C.G.A. § 16-8-41(a). Booker v. State, 242 Ga. App. 80, 528 S.E.2d 849 (2000).

Circumstantial evidence held sufficient for conviction. — When the defendant contended the only evidence against the defendant was defendant's extra-judicial statement and since there was no evidence of intent and no evidence that a weapon was involved or that a theft occurred, the defendant's conviction could not stand. But it was established that the victim was murdered by means of gunshot wounds to the chest and abdomen, and that one of the victim's two billfolds was taken, this was sufficient to establish the corpus delicti, i.e., that an armed robbery occurred, and the fact that the defendant discussed robbing the victim prior to the murder and robbery, together with evidence that the defendant needed a large amount of money for a court appearance three days after the offenses were committed, was circumstantial evidence of the defendant's intent to rob the victim of the victim's money, so the evidence was sufficient to convict defendant of armed robbery. Nation v. State, 180 Ga. App. 460, 349 S.E.2d 479 (1986).

Trial court properly denied defendant's motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, because there was sufficient evidence to support defendant's conviction of armed robbery in violation of O.C.G.A. § 16-8-41; defendant and two others waited at a vacant house for a pizza delivery person, and upon defendant's arrival, defendant held up a revolver and demanded the pizza. Oliver v. State, 270 Ga. App. 429, 606 S.E.2d 874 (2004).

Sufficient circumstantial evidence excluded every reasonable hypothesis of innocence in the armed robbery in violation of O.C.G.A. § 16-8-41 and hijacking a motor vehicle in violation of O.C.G.A. § 16-5-44.1 case; after the victim's car was stolen, the defendant used the victim's cell phone, a search of the defendant's residence uncovered the victim's and the victim's spouse's keys, and prints in the car matched the defendant's prints. Huff v. State, 281 Ga. App. 573, 636 S.E.2d 738 (2006).

Sufficient evidence supported the defendant's convictions for armed robbery, hijacking a motor vehicle, and two counts of possession of a firearm because the evidence showed that the defendant was identified by the victim, the defendant was arrested about an hour and a half after the crimes occurred in the Lincoln Town car used during the commission of the crimes, which the defendant admitted belonged to the defendant, and the cell phone that the victim had reported stolen was found in the car in addition to guns matching the victim's description of the weapons used. Hinton v. State, 321 Ga. App. 445, 740 S.E.2d 394 (2013).

There was sufficient evidence to support the defendant's conviction for armed robbery, O.C.G.A. § 16-8-41, based on the state showing that a victim was forcibly

detained in a bathroom while various property was taken by the defendant and codefendants, with some being retrieved from the get-away car and it did not matter whose property was taken. Avila v. State, 322 Ga. App. 225, 744 S.E.2d 405 (2013).

Circumstantial evidence held insufficient for conviction. — When circumstantial evidence failed to establish whether the defendant first took property and then killed the victim and ransacked the house, or first killed the victim and then took the property and ransacked the house, the evidence was insufficient to meet the standard of former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6) and, moreover, was insufficient for a rational trier of fact to have found the defendant guilty of armed robbery beyond a reasonable doubt. Miles v. State, 261 Ga. 232, 403 S.E.2d 794 (1991).

Defendant's armed robbery conviction had to be overturned because the evidence failed to establish that the victim's debit card was taken with force before or contemporaneous with the taking, and the evidence failed to establish whether the defendant first took the debit card and then killed the victim or whether the defendant killed the victim and then took the debit card; the evidence incriminating the defendant of armed robbery was wholly circumstantial, and both scenarios were equally reasonable. Johnson v. State, 288 Ga. 771, 707 S.E.2d 92 (2011).

Evidence was insufficient to support the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41(a) because the evidence supported two equally reasonable hypotheses, which did not meet the standard of former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6); there was no direct evidence regarding where the victim was when the defendant entered the victim's kitchen, and there was no evidence, like signs of forced entry, from which the jury could have reasonably inferred that the victim heard and confronted the defendant before the defendant could take anything or that the victim usually kept the victim's wallet on the victim's person or in the victim's bedroom, which could support an inference that the defendant had to confront the victim before taking the wallet. Fox v. State, 289 Ga. 34, 709 S.E.2d 202 (2011).

Several counts of the defendant's robbery and burglary convictions were reversed as was one count of criminal attempt to commit armed robbery because the finding of the proceeds of some of the robberies at an apartment did not show that the defendant was in possession of the property taken and no witness testified connecting the defendant with some of the home invasions; thus, the evidence did not exclude the reasonable possibility that the defendant did not participate in some of the crimes. Cisneros v. State, 334 Ga. App. 659, 780 S.E.2d 360 (2015), aff'd, 792 S.E.2d 326 (Ga. 2016).

Evidence of offensive weapon. — When a defendant contends that an offensive weapon was not used to take the victim's property as required under O.C.G.A. § 16-8-41 but two employees of a restaurant testified that the defendant pointed a gun at the employees while the defendant removed the contents of the cash register, this evidence was sufficient to enable a rational trier of fact to find the defendant guilty of armed robbery beyond a reasonable doubt. Roberts v. State, 186 Ga. App. 824, 368 S.E.2d 522 (1988).

Victim testified that when the defendant approached with the defendant's hand under a T-shirt, the victim was able to see silver metal which looked like a gun through a hole in the defendant's T-shirt and that the defendant told the victim "not to touch nothing or I'll shoot," this testimony is sufficient evidence of the defendant's employment of "an offensive weapon . . . or device having the appearance of such weapon." Mincey v. State, 186 Ga. App. 839, 368 S.E.2d 796 (1988).

Circumstantial evidence authorized a finding that defendant used a gun to commit a robbery; wife testified they owned a .44 magnum and that defendant showed her the note he was going to give to the teller saying he had a .44 magnum and teller testified the note said he had a .44 magnum and would shoot her and she never doubted whether he had a gun even though she never saw one. Keller v. State, 231 Ga. App. 546, 499 S.E.2d 713 (1998).

Evidence was sufficient to support defendant's conviction for armed robbery

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where a cashier testified to defendant's manifestation of an object that could have been a weapon and to multiple threats by defendant to shoot the cashier if the cashier did not give defendant money. Martin v. State, 260 Ga. App. 1, 578 S.E.2d 584 (2003).

When defendant used a stick to take a victim's property from the victim's person, testimony about the size and shape of the stick allowed the jury to find it was used as an offensive weapon which, when used offensively, was likely to result in serious bodily harm or injury, supporting defendant's armed robbery conviction. Hernandez v. State, 274 Ga. App. 390, 617 S.E.2d 630 (2005).

There was sufficient evidence to support defendant's conviction for armed robbery, despite the victim testifying to not personally seeing the gun used by the defendant as four other witnesses all saw the defendant bearing the gun; the defendant told the victim that the defendant had a gun and would shoot the victim if the victim did not comply with the defendant's demands; and the other victim saw the gun in either the defendant's hands or a compatriot's hands during the encounter. Jennings v. State, 292 Ga. App. 149, 664 S.E.2d 248 (2008).

Force sufficient to establish armed robbery was shown by evidence that the defendant forced the victim to surrender her purse by pointing a gun at her chest. Cole v. State, 232 Ga. App. 795, 502 S.E.2d 742 (1998).

Evidence that defendant and a cohort approached a man and a woman and demanded, at gun point, money and jewelry, and that the woman threw down her cosmetic case and ran away, supported defendant's conviction of armed robbery as to the woman and her cosmetic case even though defendant received loot other than what was demanded and even though defendant did not touch the cosmetic case. Robinson v. State, 255 Ga. App. 138, 564 S.E.2d 543 (2002).

Acquittal of possession of a knife during the commission of a crime did not compel acquittal on the charge of armed robbery because the jury was free to compromise on the verdict. Oliver v. State, 232 Ga. App. 816, 503 S.E.2d 28 (1998).

Directed verdict of acquittal not required. — Defendant was not entitled to a directed verdict of acquittal on an armed robbery charge when the defendant first held a knife to the victim and took the victim's purse, then, following a struggle, used the knife and a pair of shears against the victim just moments before taking money from the victim's purse; the fact that the victim managed to get the knife out of the defendant's hand during the fight that occurred before the second taking did not inure to the defendant's benefit. Thomas v. State, 290 Ga. App. 10, 658 S.E.2d 796 (2008).

Testimony regarding observation of video surveillance recording not hearsay. — Trial court did not abuse the court's discretion in allowing a store manager to testify regarding the manager's observation of the store's video-surveillance-system recording, which showed the defendant just before the defendant entered the store, because the testimony was not hearsay since it did not ask the jury to assume the truth of out-of-court statements made by others, and instead the value of the testimony rested on the store manager's own veracity and competence; the store manager did not testify about what another person said or wrote outside of court, but rather, the store manager testified as to the manager's personal observations of the defendant's conduct that appeared on the video-surveillance-system recording. McClain v. State, 311 Ga. App. 750, 716 S.E.2d 829 (2011).

Evidence sufficient for purposes of juvenile delinquency adjudication. — Juvenile court, as factfinder, had sufficient circumstantial and direct evidence to support its adjudication of defendant, a juvenile, as a delinquent for acts which, if committed by an adult, would have constituted two counts of armed robbery and one count of obstruction of a law enforcement officer, in violation of O.C.G.A. §§ 16-8-41(a) and 16-10-24; two women were robbed at knifepoint and had their purses taken, and the description of the perpetrator, including the clothing that he

wore, matched that of the juvenile, who was found three blocks from where the incident occurred and who attempted to flee when ordered to stop by police. In the Interest of R.J.S., 277 Ga. App. 74, 625 S.E.2d 485 (2005).

There was sufficient evidence to support two juveniles' adjudications of delinquency for the offenses of armed robbery, aggravated assault, and possession of a firearm during the commission of a crime based on the victim identifying the juveniles and the evidence that one of the juveniles used a gun to intimidate the victim into handing over the cash from the register of a gas station, shot the victim in the face causing severe injuries, and possessed a firearm during the commission of the crimes. In the Interest of R. S., 295 Ga. App. 772, 673 S.E.2d 280 (2009).

Evidence that a juvenile hit a victim with a gun, held the victim in a choke hold, demanded the victim's money, and then took keys, some change, and a few novelty coins from the victim's pockets was sufficient to adjudicate the juvenile as delinquent for commission of acts that would have constituted armed robbery in violation of O.C.G.A. § 16-8-41. In the Interest of M.D.P., 301 Ga. App. 153, 687 S.E.2d 178 (2009).

Conspiracy to commit armed robbery sufficient. — Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder, conspiracy to commit armed robbery, and possession of a firearm during the commission of a crime because the defendant's claim that pursuant to O.C.G.A. § 16-4-9, the defendant renounced and abandoned the conspiracy and that a co-conspirator fatally shot the victims was contradicted by the physical evidence at trial; shell casings from two guns were found at the murder scene and in positions indicating that there were two weapons fired by different individuals. Bailey v. State, 291 Ga. 144, 728 S.E.2d 214 (2012).

State did not have to prove the defendant had knowledge of the weapon to be convicted of felony murder, aggravated assault with a deadly weapon, armed robbery, hijacking a motor vehicle, possession of a firearm during a felony, conspiracy to commit armed robbery, and conspiracy to commit hijacking a motor vehicle. The evidence was sufficient to authorize a rational jury to find that the defendant conspired to rob the victims and murder was a reasonably foreseeable consequence of the conspiracy. Hicks v. State, 295 Ga. 268, 759 S.E.2d 509 (2014).

Driver who remained in vehicle convicted of armed robbery. — Evidence that the defendant drove the car and remained there while the defendant's boyfriend took the victim's backpack at gunpoint was sufficient to support the defendant's conviction for armed robbery. Teele v. State, 733 S.E.2d 395, No. A12A1649, 2012 Ga. App. LEXIS 857 (2012).

Evidence sufficient to sustain conviction for armed robbery. — See Scott v. State, 166 Ga. App. 240, 304 S.E.2d 89 (1983); Fredericks v. State, 172 Ga. App. 379, 323 S.E.2d 265 (1984); Moore v. State, 176 Ga. App. 882, 339 S.E.2d 271 (1985); Davis v. State, 255 Ga. 588, 340 S.E.2d 862 (1986); Lewis v. State, 255 Ga. 681, 341 S.E.2d 434 (1986); Byrd v. State, 255 Ga. 674, 341 S.E.2d 453 (1986); Johnson v. State, 255 Ga. 703, 342 S.E.2d 312 (1986); Cain v. State, 178 Ga. App. 247, 342 S.E.2d 742 (1986); Boswell v. State, 178 Ga. App. 250, 342 S.E.2d 744 (1986); King v. State, 178 Ga. App. 343, 343 S.E.2d 401 (1986); Bradley v. State, 178 Ga. App. 894, 344 S.E.2d 772 (1986); Munn v. State, 179 Ga. App. 357, 346 S.E.2d 128 (1986); Loumakis v. State, 179 Ga. App. 294, 346 S.E.2d 373 (1986); Hamilton v. State, 180 Ga. App. 197, 348 S.E.2d 735 (1986); Jackson v. State, 180 Ga. App. 270, 349 S.E.2d 20 (1986); Ford v. State, 256 Ga. 375, 349 S.E.2d 361 (1986); Barnes v. State, 256 Ga. 370, 349 S.E.2d 387 (1986); Murray v. State, 180 Ga. App. 493, 349 S.E.2d 490 (1986); Worthy v. State, 180 Ga. App. 506, 349 S.E.2d 529 (1986); Eady v. State, 182 Ga. App. 293, 355 S.E.2d 778 (1987); Bradford v. State, 182 Ga. App. 337, 355 S.E.2d 735 (1987); Thompson v. State, 257 Ga. 386, 359 S.E.2d 664 (1987); Williams v. State, 184 Ga. App. 480, 361 S.E.2d 713 (1987); Rigsby v. State, 184 Ga. App. 330, 361 S.E.2d 694 (1987); Thompson v. State, 186 Ga. App. 421, 367 S.E.2d 586 (1988); Johnson v. State, 186 Ga. App. 801, 368

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S.E.2d 562 (1988); Bennett v. State, 186 Ga. App. 832, 368 S.E.2d 789 (1988); Mincey v. State, 186 Ga. App. 839, 368 S.E.2d 796 (1988); Hamm v. State, 187 Ga. App. 318, 370 S.E.2d 158 (1988); Webb v. State, 187 Ga. App. 348, 370 S.E.2d 204 (1988); McKenzie v. State, 187 Ga. App. 840, 371 S.E.2d 869 (1988), cert. denied, 187 Ga. App. 907, 371 S.E.2d 869 (1988); Morgan v. State, 191 Ga. App. 226, 381 S.E.2d 402 (1989); Larkin v. State, 191 Ga. App. 269, 381 S.E.2d 421 (1989); Roundtree v. State, 192 Ga. App. 803, 386 S.E.2d 548 (1989); Glover v. State, 192 Ga. App. 798, 386 S.E.2d 699 (1989); Gordon v. State, 193 Ga. App. 94, 387 S.E.2d 40 (1989); Spivey v. State, 193 Ga. App. 127, 386 S.E.2d 868 (1989), cert. denied, 193 Ga. App. 911, 386 S.E.2d 868 (1989); Scott v. State, 193 Ga. App. 577, 388 S.E.2d 416 (1989); Pledger v. State, 193 Ga. App. 588, 388 S.E.2d 425 (1989); Sharp v. State, 196 Ga. App. 848, 397 S.E.2d 186 (1990); Pope v. State, 201 Ga. App. 537, 411 S.E.2d 557 (1991); Hargrove v. State, 202 Ga. App. 854, 415 S.E.2d 708 (1992); Stowers v. State, 205 Ga. App. 518, 422 S.E.2d 870 (1992), cert. denied, 205 Ga. App. 901, 422 S.E.2d 870 (1992); Vick v. State, 211 Ga. App. 735, 440 S.E.2d 508 (1994); Ellis v. State, 211 Ga. App. 605, 440 S.E.2d 235 (1994); Gee v. State, 212 Ga. App. 422, 442 S.E.2d 290 (1994); Harris v. State, 218 Ga. App. 472, 462 S.E.2d 425 (1995); Kinsey v. State, 219 Ga. App. 204, 464 S.E.2d 648 (1995); McRae v. State, 221 Ga. App. 414, 471 S.E.2d 532 (1996); Brown v. State, 222 Ga. App. 648, 475 S.E.2d 688 (1996); Igle v. State, 223 Ga. App. 498, 478 S.E.2d 622 (1996); Tanksley v. State, 226 Ga. App. 505, 487 S.E.2d 98 (1997); McGhee v. State, 229 Ga. App. 10, 492 S.E.2d 904 (1997); Abrams v. State, 229 Ga. App. 152, 493 S.E.2d 561 (1997); Woods v. State, 269 Ga. 60, 495 S.E.2d 282 (1998); Horne v. State, 231 Ga. App. 864, 501 S.E.2d 47 (1998); Oliver v. State, 232 Ga. App. 816, 503 S.E.2d 28 (1998); Anderson v. State, 238 Ga. App. 866, 519 S.E.2d 463 (1999); King v. State, 238 Ga. App. 575, 519 S.E.2d 500 (1999); Montijo v. State, 238 Ga. App. 696, 520 S.E.2d 24 (1999); Gould v. State, 239 Ga. App. 312, 521 S.E.2d 365 (1999); Shelley v. State, 239 Ga. App. 841, 521 S.E.2d 855 (1999), overruled on other grounds, Miller v. State, 285 Ga. 285, 676 S.E.2d 173 (2009); Hardy v. State, 240 Ga. App. 115, 522 S.E.2d 704 (1999); Gilbert v. State, 241 Ga. App. 57, 526 S.E.2d 88 (1999); Sims v. State, 242 Ga. App. 460, 530 S.E.2d 212 (2000); Willingham v. State, 242 Ga. App. 472, 530 S.E.2d 224 (2000); Espinoza v. State, 243 Ga. App. 665, 534 S.E.2d 127 (2000); Cox v. State, 243 Ga. App. 790, 534 S.E.2d 464 (2000); Brinson v. State, 244 Ga. App. 40, 537 S.E.2d 370 (2000); Solomon v. State, 244 Ga. App. 289, 534 S.E.2d 915 (2000); Parker v. State, 244 Ga. App. 419, 535 S.E.2d 795 (2000); Hemidi v. State, 245 Ga. App. 417, 537 S.E.2d 804 (2000); Cockrell v. State, 248 Ga. App. 359, 545 S.E.2d 600 (2001); Young v. State, 245 Ga. App. 684, 538 S.E.2d 760 (2000); King v. State, 246 Ga. App. 100, 539 S.E.2d 614 (2000); Anderson v. State, 246 Ga. App. 189, 539 S.E.2d 879 (2000); Meyers v. State, 249 Ga. App. 248, 547 S.E.2d 781 (2001); Lewis v. State, 249 Ga. App. 488, 548 S.E.2d 457 (2001); Hill v. State, 276 Ga. 220, 576 S.E.2d 886 (2003); Jackson v. State, 259 Ga. App. 727, 578 S.E.2d 298 (2003); Duckett v. State, 259 Ga. App. 814, 578 S.E.2d 524 (2003); Chinn v. State, 276 Ga. 387, 578 S.E.2d 856 (2003); Ross v. State, 264 Ga. App. 830, 592 S.E.2d 479 (2003); Justice v. State, 263 Ga. App. 858, 589 S.E.2d 624 (2003); Rust v. State, 264 Ga. App. 893, 592 S.E.2d 525 (2003); LaCount v. State, 265 Ga. App. 352, 593 S.E.2d 885 (2004); Dorsey v. State, 265 Ga. App. 597, 595 S.E.2d 106 (2004).

When a defendant, in the defendant's statement to police and the defendant's testimony at trial, admitted that after striking the victim and knocking the victim to the floor, the defendant bound and gagged the victim (who was still conscious), went through the victim's pockets, and took all of the victim's money, the evidence was sufficient to authorize a conviction of armed robbery as it was clearly a taking of property from the person of another by use of an offensive weapon. Thomas v. State, 174 Ga. App. 560, 330 S.E.2d 777 (1985).

Evidence that about an hour before armed robbery and burglary occurred the

defendant was seen sitting in a vehicle near the scene of the crime, the assailant broke into the victim's home and took cash and a Cadillac, the victim identified the defendant as the assailant, and the Cadillac was found on the property where the defendant lived was sufficient to convince a rational trier of fact of guilt of the defendant beyond a reasonable doubt. Johnson v. State, 176 Ga. App. 378, 336 S.E.2d 257 (1985).

When the victim testified the defendant approached her pointing a shotgun, threatened to kill her, took her purse and a baby bag, and left, the evidence is sufficient for a rational trier of fact to find the essential elements of the offense beyond a reasonable doubt. Robinson v. State, 180 Ga. App. 248, 348 S.E.2d 761 (1986).

When the evidence showed that the defendant both held the victim at gunpoint while in a motel room and took possession of the victim's wallet and car keys after they had been removed from the victim's person, the evidence was sufficient to authorize a rational trier of fact to find the defendant guilty of armed robbery and kidnapping beyond a reasonable doubt. Spencer v. State, 180 Ga. App. 498, 349 S.E.2d 513 (1986).

Evidence was amply sufficient to authorize a reasonable trier of fact to rationally find therefrom proof of guilt beyond a reasonable doubt, both as to the direct commission of the crime of armed robbery by defendant and as to the intentional aiding and abetting of it under O.C.G.A. § 16-2-20. Graves v. State, 180 Ga. App. 446, 349 S.E.2d 519 (1986).

Testimony from the codefendants that the defendant actively participated in planning in implementation of the robbery, corroborated by testimony from a victim that the victim was sure the defendant was the woman who kissed the victim and later came into the house with the codefendants was sufficient to support the defendant's conviction for armed robbery. Porter v. State, 341 Ga. App. 632, 802 S.E.2d 259 (2017).

Evidence that the defendant admitted to police that the defendant had stolen items from the apartment and evidence that the defendant was in possession of a handgun and held the victim at gunpoint was sufficient to support the conviction for armed robbery. Taylor v. State, 344 Ga. App. 122, 809 S.E.2d 76 (2017).

Evidence was sufficient to convict the defendants of two counts of armed robbery because the first defendant was in possession of a firearm when the first defendant entered the pizzeria; and the first defendant used that weapon to demand cash from one employee and the cell phone of a second employee, both of which were then taken; and because the second defendant was a party to those offenses as the second defendant directed the getaway driver to purchase the Halloween mask that was used during the robbery; the second defendant participated in demanding money from the employees and took the cell phone of one of the employees; and the second defendant admitted to the driver moments later that the defendants had robbed the pizzeria. Hughes v. State, 345 Ga. App. 107, No. A17A1414, 2018 Ga. App. LEXIS 179 (2018).

Admission to stabbing but not theft. — There was ample evidence to find defendant guilty of armed robbery beyond a reasonable doubt where defendant admitting having stabbed the victim but did not admit taking a bag containing cash and mail from the victim. Jester v. State, 204 Ga. App. 665, 420 S.E.2d 357 (1992).

Theft from immediate presence. — Evidence was sufficient to show a theft from the immediate presence of the victims, and was sufficient to sustain the defendant's conviction for armed robbery where the evidence showed the victims were not present when the car was stolen because the victims were forced to flee into the woods after the defendant fired shots and wounded the victim. Heard v. State, 204 Ga. App. 757, 420 S.E.2d 639 (1992).

There was sufficient evidence to find the defendant guilty of armed robbery beyond a reasonable doubt since the defendant admitted to being present while a third person accosted the victim and robbed the victim at gunpoint in a parking lot and further conceded that when instructed by that third person to pick up the money the victim had thrown down, the victim did so. Dowdy v. State, 209 Ga. App. 95, 432 S.E.2d 827 (1993).

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There was sufficient evidence to convict defendant of armed robbery where police stopped vehicle that matched description of vehicle given by victim that victim saw robber leave in, defendant was only occupant of the car wearing a sweat shirt as described by victim and victim's purse and gun were found in the car. Ross v. State, 231 Ga. App. 506, 499 S.E.2d 351 (1998).

Voice identification testimony, along with circumstantial evidence showing invaders were familiar with the internal operations and layout of the store, allowed the jury to reach the conclusion defendant was guilty of armed robbery, aggravated assault and possession of a firearm during the commission of a felony. Whitehead v. State, 232 Ga. App. 140, 499 S.E.2d 922 (1998).

Armed robbery of vehicle following murder when can't find keys to car. — Evidence was sufficient to sustain conviction for armed robbery where the defendant shot and killed the victim after a heated argument, and defendant and codefendants took the victim's car after they could not find the keys to their vehicle. Hudson v. State, 234 Ga. App. 895, 508 S.E.2d 682 (1998).

Evidence was sufficient to sustain defendant's convictions for armed robbery and kidnapping since defendant grabbed the store clerk by the arm at gunpoint, forced the clerk behind the check out counter, emptied the store's cash register, took money from the safe, forced the clerk into a storeroom located at the rear of the store, and then, after the clerk escaped, chased the clerk with a vehicle. Duncan v. State, 253 Ga. App. 239, 558 S.E.2d 783 (2002).

Defendant's possession of a recently stolen vehicle within minutes of its hijacking; defendant's flight from the police when they attempted to stop the vehicle; the presence of a gun, which did not belong to the victim, in the victim's vehicle after defendant's arrest; and the victim's positive identification of defendant at the arrest scene not long after the hijacking, was sufficient evidence to support defendant's convictions of armed robbery in violation of O.C.G.A. § 16-8-41(a), and hijacking a motor vehicle in violation of O.C.G.A. § 16-5-44.1(b). Lane v. State, 255 Ga. App. 274, 564 S.E.2d 857 (2002).

Since the victim had just pulled into the parking lot of the victim's employer when the defendant pointed a gun at the victim and demanded the victim's wallet, the defendant's confession to the crime, the defendant's presence near the crime scene, and the defendant's possession of the victim's credit card were evidence of guilt and therefore sufficient to support the defendant's armed robbery conviction under O.C.G.A. § 16-8-41(a). Parks v. State, 257 Ga. App. 25, 570 S.E.2d 350 (2002).

Armed robbery of pizza delivery person. — Evidence was more than sufficient to support the defendant's conviction of the armed robbery of a pizza delivery person when five accomplices testified that the defendant was involved, at least one testified that the defendant called for the pizza to be delivered, all five testified that they saw the defendant with a bat, two testified that they saw the defendant strike the victim with the bat and flee with a second accomplice who had the pizza, and the victim testified that two individuals ran away with the pizza after the victim was struck with a bat; each accomplice's testimony corroborated the testimony of the other accomplices and was further corroborated by the victim's testimony. Mullins v. State, 257 Ga. App. 40, 570 S.E.2d 357 (2002).

Evidence was sufficient to support the defendant's convictions of armed robbery in violation of O.C.G.A. § 16-8-41(a) and possession of a firearm during the commission of a robbery since the victim testified that the defendant robbed the victim of a wallet and car keys at gunpoint, the state introduced similar transaction evidence, and one of defendant's fellow inmates testified that the defendant bragged to the fellow inmate that the defendant had indeed robbed the victim. Cordy v. State, 257 Ga. App. 726, 572 S.E.2d 73 (2002).

Armed robbery of pizza delivery person. — Evidence that the defendant approached the victim from behind and struck the victim after the victim received cash in payment for delivering pizza and

that the defendant attempted to use an automotive water pump to hit the victim was sufficient to support the defendant's convictions for aggravated assault and criminal attempt to commit armed robbery. Simmons v. State, 342 Ga. App. 853, 805 S.E.2d 615 (2017).

Fear of victim. — There was sufficient evidence to convict the defendant of armed robbery under O.C.G.A. § 16-8-41(a), although the victim testified at trial that the victim did not fear the defendant when the defendant held a knife and asked for money; the jury was permitted to believe the officer's testimony that the victim told the officer previously that the victim was afraid. Young v. State, 258 Ga. App. 238, 573 S.E.2d 487 (2002).

Armed robbery conviction was upheld, despite defendant's contention that defendant could only be found guilty of no more than a theft by taking, because defendant participated in the crime upon the codefendant's representation that the victim was among those who planned such events and was an active participant therein; an accomplice's testimony to the contrary, corroborated by the victim, thus supported the state's theory. Turner v. State, 258 Ga. App. 867, 575 S.E.2d 727 (2002).

Armed robbery at restaurant drive-in window. — Eyewitness testimony that the defendant approached the drive-in window of a restaurant on two separate occasions, that the defendant took money from the restaurant cash register on each occasion, and that the defendant was able to do so by displaying a handgun on each occasion was sufficient to show beyond a reasonable doubt that the defendant was guilty of committing two armed robberies. Hurst v. State, 260 Ga. App. 708, 580 S.E.2d 666 (2003).

Evidence was sufficient to support the defendant's convictions of two counts of armed robbery, two counts of theft by taking, three counts of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2), three counts of simple battery, three counts of kidnapping, and two counts of possessing a firearm during the commission of a crime since: (1) there was evidence that the defendant entered a store, placed a knife to the neck of one of the three victims, forced that victim to the back of the store, aided another assailant who was armed with a gun to bind the victims and drag the victims to the back of the store, and stole money and other items from two of the victims; (2) the defendant confessed to the crimes during interviews with law enforcement officials; and (3) the defendant's confessions were corroborated by the testimony of one of the victims who, despite earlier being unable to identify the robbers, ultimately identified the defendant as one of the robbers. The corroborating victim's initial inability to identify the defendant posed an issue of credibility for the jury's resolution and did not require reversal. Phanamixay v. State, 260 Ga. App. 177, 581 S.E.2d 286 (2003).

Armed robbery at ATM. — Evidence was sufficient to find defendant guilty of armed robbery, kidnapping, and possession of a firearm during the commission of a felony, where defendant directed victim at gunpoint to walk toward a cash machine that could be used with the cash card in the victim's wallet, and where both the victim and a bystander had opportunities to view defendant. Wade v. State, 261 Ga. App. 587, 583 S.E.2d 251 (2003).

Acting as "decoy" sufficient for armed robbery conviction. — Evidence that defendant was sent into a pawn shop as a "decoy" to lure the victim from behind the counter where a weapon was kept, that the armed codefendants entered the shop right after that, that defendant was allowed to leave the shop during the armed robbery without any interference from the armed men, that defendant did not notify the authorities or render aid to the victim while the robbery was in progress, and that defendant was present at the wooded location where the stolen items were discovered immediately after the robbery was sufficient to support defendant's armed robbery conviction. Mason v. State, 262 Ga. App. 383, 585 S.E.2d 673 (2003).

When the defendant confessed to robbing a store, but denied using a handgun, but the store cashier identified the defendant as the robber and reaffirmed that the defendant used a gun, a videotape showed the robbery with the defendant as the

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robber, the defendant's footprints matched those at the scene, the defendant's grandparent said that the defendant owned the gun found nearby which was missing from the grandparent's home at the time of the robbery, and the defendant was living with the grandparent at the time of the robbery, the evidence was sufficient to sustain an armed robbery conviction. Fuller v. State, 262 Ga. App. 656, 586 S.E.2d 359 (2003).

Armed robbery of taxi cab. — After the defendant took a cab driver's fare money, a gold coin, and the cab and was apprehended after a chase, the evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of armed robbery, hijacking a motor vehicle, and obstruction of a police officer. Frazier v. State, 263 Ga. App. 12, 587 S.E.2d 173 (2003).

Even without taking into account the other evidence admitted, the victim's testimony that the defendant took money from the victim at gunpoint was sufficient to support the defendant's armed robbery and possession of a firearm during the commission of a crime convictions. Cecil v. State, 263 Ga. App. 48, 587 S.E.2d 197 (2003).

When the defendant participated in a carjacking, drove the victim's car from the scene of a murder, asked the defendant's love interest to lie about the defendant's whereabouts, and lied repeatedly to the police about what happened, a jury was free to conclude that the defendant participated in an armed robbery and kidnapping as an accomplice under O.C.G.A. §§ 16-2-20(a), 16-5-40(a), and 16-8-41(a); thus, the trial court did not err in denying a directed verdict. Owens v. State, 263 Ga. App. 478, 588 S.E.2d 265 (2003).

Evidence that the defendant held a pistol on the victim while the victim's jacket, wallet, and paycheck stub were taken was sufficient to support the defendant's conviction of armed robbery of the victim. Conaway v. State, 277 Ga. 422, 589 S.E.2d 108 (2003).

When the victim alleged the defendant robbed and raped the victim at knifepoint, identified the defendant from a photo lineup and at trial, DNA on the victim's clothes matched that of the defendant, the defendant testified the defendant had consensual sex with the victim for money, and the detective who first interviewed the defendant testified that the defendant never told the detective that the defendant had consensual sex, the evidence was sufficient to convict the defendant of rape, kidnapping, and armed robbery. Munn v. State, 263 Ga. App. 821, 589 S.E.2d 596 (2003).

Evidence supported finding the defendant guilty under O.C.G.A. § 16-8-41 since the defendant's conviction was not based solely on fingerprints as the fingerprint evidence was corroborated by the additional evidence that the defendant's appearance was virtually an identical match of the victim's physical description of the robber and that the defendant was found wearing pants similar to those worn by the robber; the defendant offered no explanation of how the defendant's fingerprints came to be on the note used during the robbery. Filix v. State, 264 Ga. App. 580, 591 S.E.2d 468 (2003).

Evidence that the defendant, a convicted felon, accompanied the victim to a store with the codefendant; shot the victim in the head with a handgun that the defendant had in defendant's possession; thereby, causing a wound in which the victim lost one eye; and along with the codefendant took all the victim's money was sufficient to support the defendant's conviction for armed robbery. Furthermore, the evidence of the codefendant's participation in the robbery was sufficient to sustain the codefendant's conviction for armed robbery. Drummer v. State, 264 Ga. App. 617, 591 S.E.2d 481 (2003).

When the defendant robbed the victims at gunpoint with two accomplices, the testimony of one accomplice that the defendant was involved in the robbery was sufficient to corroborate testimony to the same effect from the defendant's other accomplice and sustain the defendant's convictions for armed robbery and aggravated assault under O.C.G.A. §§ 16-5-21 and 16-8-41. Gallimore v. State, 264 Ga. App. 629, 591 S.E.2d 485 (2003).

Evidence was sufficient to support the defendant's conviction for armed robbery

after: (1) the defendant affirmatively lied by denying that the defendant knew one accomplice in the defendant's initial statement to the police; (2) the defendant was driving the getaway car when the car was stopped by the police; and (3) the defendant was in possession of the handgun used in the armed robbery and the money stolen in the armed robbery. The sufficiency of the corroboration of the accomplice's testimony that the defendant participated in the planning of the robbery as required under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) was a matter for the jury to determine. Clemons v. State, 265 Ga. App. 825, 595 S.E.2d 530 (2004).

Eyewitness testimony placing the defendant at the scene in conjunction with physical evidence found in the defendant's room, including the victim's car keys and clothing that the defendant was described as wearing at the time of the second robbery, was sufficient for a rational trier of fact to have concluded that the defendant was guilty beyond a reasonable doubt of the armed robberies. Johnson v. State, 265 Ga. App. 777, 595 S.E.2d 625 (2004).

Evidence was sufficient to support the defendant's armed robbery conviction even though the victim could not identify the defendant since the defendant admitted taking the victim's black jacket and disclosed the jacket's location, the victim's personal papers were found in the defendant's apartment, the victim identified the pistol found in the defendant's car as similar to the gun used against the victim, and when the defendant abducted another victim, the defendant used a black jacket to cover the victim's face. Thompson v. State, 266 Ga. App. 29, 596 S.E.2d 205 (2004).

Evidence that the defendant, wielding a gun, barged into the victim's hotel room, demanded money, pistol whipped the victim, and took the victim's wallet, sufficed to sustain the victim's convictions for armed robbery, possession of a firearm during the commission of a felony, and burglary. Bay v. State, 266 Ga. App. 91, 596 S.E.2d 229 (2004).

Evidence that the defendants entered the victim's apartment, took the victim by the hands and demanded money, shoved a gun into the victim's side and removed the victim's ring, watch, and money, and then forced the victim into a closet blocked with a heavy table with instructions not to come out until the defendants had left was sufficient to support convictions for false imprisonment, armed robbery, burglary, and possession of a firearm during the commission of a felony. Pinson v. State, 266 Ga. App. 254, 596 S.E.2d 734 (2004).

Evidence of the defendant's voluntary and willing participation in the crimes, through providing the use of defendant's car to transport the other three named in the indictment to and from the scene and waiting in the vehicle while two of them committed aggravated assault, burglary, murder, and aggravated robbery, supported the defendant's convictions for the crimes as a coconspirator. Silvers v. State, 278 Ga. 45, 597 S.E.2d 373 (2004).

Evidence was sufficient to support the defendant's convictions on two counts of felony murder, predicated on the underlying felony of aggravated assault, one count of armed robbery, and two counts of possession of a firearm in the commission of a crime as the evidence showed that the defendant brandished a handgun and forced the two victims to give the defendant money and that the defendant then fatally shot the victims after one victim argued with other people the defendant was with regarding the purity of a drug purchase the one victim had just made. Harden v. State, 278 Ga. 40, 597 S.E.2d 380 (2004).

Evidence was sufficient to support the defendant's armed robbery conviction for the theft of a victim's wallet and another victim's sunglasses by gunpoint under O.C.G.A. § 16-8-41(a) including: (1) testimony as to the gunman's size; (2) testimony that the car's rims were found at the defendant's home; (3) testimony that a victim's cell phone made calls to the defendant's home; (4) an accomplice's reference to the gunman as "B"; and (5) similar transaction evidence of another carjacking, involving a car of the make and color as a car used in the hijacking of the victims' car; the victim whose sunglasses were stolen did not have to testify to show that the sunglasses were taken by force as

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another victim testified that the gunman pointed a gun at the victim's head and removed the sunglasses. Mullins v. State, 267 Ga. App. 393, 599 S.E.2d 340 (2004).

Armed robbery of convenience store. — Sufficient evidence existed to support the defendant's conviction for armed robbery of a gas station convenience store, in violation of O.C.G.A. § 16-8-41(a), since the testimony of the clerk indicated that the clerk had seen the defendant in the store many times before, the defendant took cigarettes and attempted to only pay for one pack, and the defendant beat the clerk with a baseball bat and took money. The fact that the clerk ran to save the clerk's life did not prevent the crime from having been committed. Lester v. State, 267 Ga. App. 795, 600 S.E.2d 787 (2004).

Defendant's conviction for armed robbery, in violation of O.C.G.A. § 16-8-41(a), was supported by sufficient evidence as the defendant and two other people, with their faces covered and while wielding a gun and a box cutter, entered a convenience store, made the two employees sit on the floor, and took the employees' jewelry as well as other property and cash; although the defendant claimed that the defendant participated under duress because the defendant was threatened at gunpoint, it was up to the jury to determine the believability of a claim, and the defendant was found to have participated in the crime as an aider and abettor under O.C.G.A. § 16-2-20(b)(3). Spradley v. State, 276 Ga. App. 842, 625 S.E.2d 106 (2005).

Evidence was sufficient to support the defendant's armed robbery conviction since: (1) the victim testified that within days of the armed robbery, the victim saw the second gunman and learned the gunman's identity; (2) the victim identified the defendant from a photo array; (3) at trial, the victim expressed certainty that the defendant was the second robber; and (4) the victim also identified the small pistol found inside a nearby residence as the one used by the defendant during the crime. Lee v. State, 267 Ga. App. 834, 600 S.E.2d 825 (2004).

Defendant's conviction for armed robbery, based upon the defendant and an accomplice robbing a store at gunpoint, was affirmed because the evidence was sufficient to support the conviction as latent fingerprints, which belonged to the defendant, that were found in the car used in the armed robbery sufficiently corroborated the testimony of the accomplice who identified the defendant as the driver of the car before the accomplice recanted the accomplice's custodial statement at trial. Brown v. State, 268 Ga. App. 24, 601 S.E.2d 405 (2004).

Defendant's armed robbery conviction was upheld on appeal, despite defendant's claims: (1) that the evidence presented by the state was insufficient as sufficient evidence was, in fact, received through the victim's testimony about being robbed at gun point by the defendant while the victim was working inside the convenience store as the victim knew defendant as a customer for two years, and the victim's positive identification of defendant, both after the arrest and during trial, was more than sufficient to support the armed robbery charge; and (2) of ineffective assistance of counsel since defendant failed to show that counsel inadequately prepared for trial, and defendant's failure to be up front with counsel deprived defendant of an opportunity to effectively cross-examine a witness, and counsel's decision not to file a suppression motion was part of counsel's trial strategy, and thus was not to be second-guessed on appeal. Johnson v. State, 272 Ga. App. 881, 614 S.E.2d 128 (2005).

There was sufficient evidence to support defendants' convictions for armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), burglary, O.C.G.A. § 16-7-1(a), and possession of a firearm during the commission of certain crimes, O.C.G.A. § 16-11-106(b)(2), because evidence was seen in one of the defendant's vehicles during a traffic stop, defendants were identified from the videotape of the stop, and the shotgun used by the assailant in the home invasion was found in one of the defendant's homes. Dunbar v. State, 273 Ga. App. 29, 614 S.E.2d 472 (2005).

Evidence was sufficient to allow a ratio-

nal finder of fact to convict defendant of kidnapping, three counts of armed robbery, and two firearms offenses beyond a reasonable doubt because defendant committed the crimes at a restaurant where defendant was a regular customer, so the victims were able to identify defendant to police, a neutral witness saw defendant hurrying away from the direction of the restaurant right after the time of the robbery, and, when defendant was arrested, new clothes and receipts dated after the robbery were discovered. Strahan v. State, 273 Ga. App. 116, 614 S.E.2d 227 (2005).

Defendant's convictions for armed robbery, possession of a firearm during the commission of a crime, robbery by intimidation, and criminal damage to property in the second degree were supported by sufficient evidence because, inter alia, defendant's brother let defendant and two others into a restaurant after hours, defendant pointed a gun at the brother's co-worker, and then beat on a safe and pried open the cash registers looking for money; all four co-conspirators involved, including defendant, gave statements to police implicating themselves and their codefendants, and a bill was introduced showing that repair of the safe damaged during the robbery attempt cost $1,000.00. Polite v. State, 273 Ga. App. 235, 614 S.E.2d 849 (2005).

Evidence supported defendant's conviction for armed robbery as a participant as the security camera recorded defendant near the safe with codefendant standing beside the defendant; a clerk testified that the clerk could hear the beeps of the safe buttons being pressed while the clerk was in the back of the store and the trial court could conclude that defendant was entering the code. Hall v. State, 274 Ga. App. 842, 619 S.E.2d 344 (2005).

There was sufficient evidence to support a defendant's convictions of malice murder, armed robbery, kidnapping, third-degree arson, burglary, and possession of a firearm during the commission of a crime when the evidence showed that the defendant made the defendant's accomplice shoot a convenience store clerk after the defendant forced the clerk at gunpoint into a wooded area, took money from a cash register in the store, and started a fire in the store. The accomplice's testimony was sufficiently corroborated by the defendant's admission that the defendant owned the shotgun that was used in the shooting, the defendant's admission that the defendant had given the shotgun to the accomplice, the testimony of a third person that the accomplice had given the third person the shotgun after the robbery, and the fact that shotgun shells found in the defendant's home matched shells taken from the clerk's body. Judkins v. State, 282 Ga. 580, 652 S.E.2d 537 (2007).

There was sufficient evidence to support a defendant's convictions of malice murder, felony murder, armed robbery, aggravated assault, attempted burglary, and possession of a firearm by a convicted felon; in addition to testimony by a codefendant and eyewitness testimony by the victim's spouse, the victim's blood was on the defendant's clothes, the defendant had the victim's keys, and the knife used to kill the victim and a pistol were discovered near the site of the defendant's arrest in some woods near the scene of the crime. Walker v. State, 282 Ga. 774, 653 S.E.2d 439 (2007), cert. denied, 129 S. Ct. 481, 172 L.Ed.2d 344 (2008), overruled on other grounds, No. S10P1859, 2011 Ga. LEXIS 267 (Ga. 2011).

Given the defendant's confession, the victim's identification of the defendant as the person who robbed the victim, testimony by the victim and others that the robber had a gun, and testimony that the defendant was not at the nightclub where the defendant claimed to be, the jury was authorized to find the defendant guilty of armed robbery and aggravated assault in violation of O.C.G.A. §§ 16-5-21 and 16-8-41. Burns v. State, 288 Ga. App. 507, 654 S.E.2d 405 (2007).

Evidence that the defendant took money from a convenience-store clerk while brandishing a knife was sufficient to allow a rational trier of fact to conclude that the defendant was guilty of armed robbery beyond a reasonable doubt and it was of no merit that the indictment alleged that the money belonged to the convenience store as opposed to an individual. Johnson v. State, 293 Ga. App. 32, 666 S.E.2d 452 (2008).

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Evidence was sufficient to convict the defendant of armed robbery in violation of O.C.G.A. § 16-8-41(a); the testimony of the victim, that the victim was robbed at gunpoint, corroborated by the testimony of three codefendants linking the defendant to the crime, supported the defendant's identification as the robber and contradicted the defendant's argument that no evidence showed the defendant was the suspect. Roberts v. State, 293 Ga. App. 348, 667 S.E.2d 138 (2008).

With regard to a defendant's conviction for armed robbery, there was sufficient evidence to support the conviction based on the victim's identification of the defendant, the defendant's admission that the defendant was one of three persons who exited a car at the crime scene, and the discovery of the victim's personal belongings at the home the defendant and the other perpetrators had retreated to. The issue of whether the defendant was armed or not was within the jury's province to resolve. Morris v. State, 293 Ga. App. 354, 667 S.E.2d 145 (2008).

There was sufficient evidence to support a defendant's convictions of armed robbery, aggravated assault, burglary, false imprisonment, and possession of a firearm during the commission of a felony when the state showed that the defendant intentionally aided and abetted a home invasion in which the home was burglarized and the homeowner's teenage child was detained and robbed by use of a handgun. Even in the absence of evidence sufficient to show that the defendant directly committed the charged offenses, there was sufficient evidence that the defendant was a party to the offenses in that the defendant and a person armed with a gun loaded a truck with property stolen from the home during the two-hour home invasion, the defendant was present speaking with the armed person during the home invasion, and the defendant confirmed that the child was home alone. Whitley v. State, 293 Ga. App. 605, 667 S.E.2d 447 (2008).

Evidence that the defendant, who was brandishing a handgun, and the defendant's sibling entered a victim's home demanding money, and that the victim, after being shot, gave cash to the sibling was sufficient to convict the defendant of armed robbery in violation of O.C.G.A. § 16-8-41. Serchion v. State, 293 Ga. App. 629, 667 S.E.2d 624 (2008).

Victim's testimony that the defendant kicked in the door of the victim's residence, entered, pointed a shotgun at the victim, and threatened to shoot the victim if the victim did not give the defendant money was sufficient in itself to support the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41(a). Reed v. State, 293 Ga. App. 479, 668 S.E.2d 1 (2008).

Since the evidence established the defendant shot three men and took money from one of them, and two of the men survived and identified the defendant as the shooter, the evidence was sufficient to convict the defendant of armed robbery. Abdullah v. State, 284 Ga. 399, 667 S.E.2d 584 (2008).

Two intruders entered a house through a window, threatened the occupants with handguns, and stole items from the house. As circumstantial evidence established that the defendant drove the get-away vehicle, the defendant was properly convicted as a party to armed robbery. Olds v. State, 293 Ga. App. 884, 668 S.E.2d 485 (2008).

Evidence was sufficient to convict a defendant of armed robbery since the testimony of a 14-year-old accomplice was corroborated by testimony from a clerk in the store that was robbed by the defendant and others, and the state presented physical evidence—clothing worn by the robbers—that linked the defendant to the robbery. Sellers v. State, 294 Ga. App. 536, 669 S.E.2d 544 (2008).

Evidence was sufficient to support the defendant's conviction for armed robbery after a convenience store clerk was robbed at gunpoint by a perpetrator who was wearing a nylon stocking over the perpetrator's head because: (1) the clerk recognized the defendant as the perpetrator by the defendant's voice and physical build when the defendant returned to the store three days later as a customer; (2) the clerk later identified defendant as the perpetrator in a picture lineup; and (3) the

state presented the testimony of an expert polygraph examiner, who stated that defendant showed deception to questions concerning the armed robbery. Jones v. State, 309 Ga. App. 886, 714 S.E.2d 590 (2011).

Because the defendant admitted entry into a home, the defendant's statement to a witness, and the victim's in-court identification of the defendant supported the defendant's conviction of armed robbery and burglary under O.C.G.A. §§ 16-7-1(a) and 16-8-41(a), the jury could find that a conspiracy existed without regard to a coconspirator's statements under former O.C.G.A. § 24-3-5 (see now O.C.G.A. § 24-8-801 et seq.). Lewis v. State, 311 Ga. App. 54, 714 S.E.2d 732 (2011).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, felony murder while in the commission of armed robbery, armed robbery, and conspiracy to violate the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., through a violation of O.C.G.A. § 16-13-30(j)(1), because: (1) the defendant and another buyer met with the victim and another seller where the defendant and the other buyer inspected marijuana which the victim and the other seller had for sale; (2) after some discussion about price, the victim told the defendant what the price was and that the defendant could take it or leave it; (3) the defendant said that the defendant would take it, pulled a gun from the defendant's waistband, and fatally shot the victim; and (4) there was conflicting testimony as to whether the defendant took the marijuana and ran away with the marijuana after shooting the victim. Darville v. State, 289 Ga. 698, 715 S.E.2d 110 (2011).

Defendant's convictions for armed robbery, aggravated assault, and malice murder were based on sufficient evidence when a victim in an apartment next to the defendant's was fatally stabbed multiple times, there was physical evidence that tied the defendant to the criminal incident, and the defendant confessed to committing the crimes. Culpepper v. State, 289 Ga. 736, 715 S.E.2d 155 (2011).

Trial court had sufficient evidence to convict a defendant of armed robbery and possession of a firearm during the commission of a crime as a party to those crimes by aiding and abetting, pursuant to O.C.G.A. § 16-2-20, given evidence that the defendant helped plan the robberies of two game rooms, drove the getaway vehicle, and participated in the division of the proceeds. Norman v. State, 311 Ga. App. 721, 716 S.E.2d 805 (2011).

Evidence was sufficient to support the defendant's conviction for armed robbery, under O.C.G.A. § 16-8-41(a), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told them what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. Donald v. State, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Evidence was sufficient to authorize the defendant's convictions for hijacking a motor vehicle, in violation of O.C.G.A. § 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant's involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence presented was that: (1) when two people walked past the victim's parked vehicle, one of the people held a knife to the victim's stomach and ordered the victim to

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give the person the victim's wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver's seat and the defendant, who had stood nearby during the incident, got into the passenger seat; (3) the victim identified the defendant as the person who got into the passenger seat; (4) the people drove away, but were apprehended; (5) the victim's wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the defendant wanted to leave the area because there was a warrant for the defendant's arrest. Harrelson v. State, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Defendant's forcible removal of a victim's pajama top from the victim's body at gunpoint, and the fact that the top was found with other stolen items at the home of the defendant's accomplice was sufficient evidence to convict the defendant of armed robbery. Williams v. State, 295 Ga. App. 9, 670 S.E.2d 828 (2008).

While a defendant was assaulting and raping a victim at gunpoint, the defendant's accomplice was robbing the residence. As the defendant was legally responsible for the acts of the accomplice under O.C.G.A. § 16-2-20, the evidence was sufficient to convict the defendant of armed robbery. Williams v. State, 295 Ga. App. 9, 670 S.E.2d 828 (2008).

Evidence was sufficient to support a defendant's conviction for armed robbery when: (1) a codefendant testified that the defendant assisted in the robbery; (2) a store clerk testified that after the robbery, the defendant asked the clerk which way the codefendant went, and went in the same direction; (3) a videotape showed the defendant's actions during the robbery; and (4) the defendant and the codefendant were discovered in the getaway car with the robbery proceeds in the defendant's pocket. Dinkins v. State, 295 Ga. App. 289, 671 S.E.2d 299 (2008).

Testimony by two victims that the defendant grabbed a purse from one of them and pointed a gun at both of them, and testimony from an eyewitness that the defendant fled from the police was sufficient to support the defendant's convictions for armed robbery and aggravated assault. Wallace v. State, 295 Ga. App. 452, 671 S.E.2d 911 (2009).

In an armed robbery prosecution, as the victim identified the defendant as the driver of a car and the codefendant as the passenger who robbed the victim at gunpoint, and the pistol used in the robbery was found in the car's locked glove compartment, to which only the defendant had the key, the evidence was sufficient to establish that the defendant aided and abetted the codefendant in the robbery under O.C.G.A. § 16-2-20, and sufficiently corroborated the codefendant's accomplice testimony under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8). Bailey v. State, 295 Ga. App. 480, 672 S.E.2d 450 (2009).

Following evidence was sufficient to convict the defendant of armed robbery: (1) two armed persons robbed a sandwich shop; (2) shortly thereafter, a witness saw the defendant and two others dividing cash among themselves, and heard one of them state they had just robbed the shop; and (3) shop employees, the other witness, and the defendant's accomplice all identified the defendant as one of the robbers. Bihlear v. State, 295 Ga. App. 486, 672 S.E.2d 459 (2009).

Trial court did not err by denying a defendant's motion for a new trial with regard to the defendant's convictions for armed robbery and possession of a firearm based on the trial court erroneously admitting the testimony of a witness, who was a long-time acquaintance of the co-indictee that the co-indictee had bragged about committing the robbery with the defendant as, although the state failed to establish a prima facie case of conspiracy, the admission was harmless in view of the victims' consistent eyewitness testimony implicating the defendant in the robbery and the defendant's admission of the intention to rob the store. Fisher v. State, 295 Ga. App. 501, 672 S.E.2d 476 (2009).

Evidence supported convictions of malice murder, felony murder, armed robbery, and other crimes. An informant told police that the defendant bragged about one of the robberies; the informant correctly identified the manner in which the rob-

bery was committed, the types of items stolen, and the getaway car; police found the getaway car, which had been captured on surveillance tape, at the defendant's apartment complex; the car was registered to one of the defendant's parents; a search of the defendant's apartment turned up clothing and a bag matching that of the robbers and drug paraphernalia stolen during the robberies; and the defendant's DNA matched that found on broken glass at one of the crime scenes. Williams v. State, 284 Ga. 849, 672 S.E.2d 619 (2009).

There was sufficient evidence to support a defendant's convictions on two counts of armed robbery based on both victims' identification of the defendant; the defendant being found in a nearby location to the truck stop where the attacks occurred walking rapidly away; and the defendant being found with exactly the amount of cash taken from one victim. Burden v. State, 296 Ga. App. 441, 674 S.E.2d 668 (2009).

Sufficient evidence was presented to convict a defendant of armed robbery based on the identification of the defendant by the victims of the first robbery and the defendant's admission to committing a second, similar robbery. Robinson v. State, 297 Ga. App. 43, 676 S.E.2d 770 (2009).

Sufficient evidence supported a defendant's convictions for armed robbery under O.C.G.A. § 16-8-41(a) as a knife was found at the scene and the defendant made a statement to the victim that the defendant also had a gun; the victim also made a positive identification of the defendant at a one-on-one showup. Crawford v. State, 297 Ga. App. 187, 676 S.E.2d 843 (2009).

Sufficient evidence was presented to convict a defendant of armed robbery based on evidence that the defendant and a codefendant approached the victims' rental car and brandished guns; while pistol whipping the victims and robbing the victims of the victims' property, the defendant's gun went off and fatally wounded the first victim; and a gun matching the caliber of bullet recovered from the first victim during the autopsy was found during the execution of a search warrant at a hotel where the defendant had visited a guest on three occasions. Watkins v. State, 285 Ga. 107, 674 S.E.2d 275 (2009).

Victim "throwing" money at armed robbery defendant. — Victim's testimony showed that the defendant and the codefendant acted in concert to demand money from the victim at gunpoint and that the victim "threw" $15.00 at the codefendant; at that point, the armed robbery was completed and sufficient evidence supported the armed robbery conviction. Daniel v. State, 271 Ga. App. 539, 610 S.E.2d 90 (2005).

Sufficient evidence supported the defendant's convictions of armed robbery, burglary, possession of a firearm during the commission of a crime, and three counts of kidnapping arising from an incident in which the defendant and a companion robbed the victim at gunpoint, then forced the victim and the victim's children into their house and tied the victim up with duct tape; the victim identified the defendant from a photo line-up, the defendant's fingerprints were found at the scene, a store video showed the defendant buying the duct tape which was used, and the store manager identified the defendant as the buyer of the duct tape. Brownlee v. State, 271 Ga. App. 475, 610 S.E.2d 118 (2005).

Evidence was sufficient to support the defendant's conviction for armed robbery because the defendant told the victim that the defendant forgot the defendant's wallet, left a store, returned, showed the victim the handle of a gun, the victim ran, and the defendant took the goods. Garrett v. State, 271 Ga. App. 646, 610 S.E.2d 595 (2005).

Robbery of coin bag. — Evidence supported the defendant's armed robbery conviction as the defendant picked up a coin bag from a table, twice pointed a gun at the victim's neck, ordered the victim to kneel, demanded the victim's wallet and keys, and left with the coin bag and the victim's keys. Kirk v. State, 271 Ga. App. 640, 610 S.E.2d 604 (2005).

Evidence was sufficient to support the first defendant and the second defendant's convictions for murder, kidnapping, armed robbery, and burglary, as the evi-

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dence showed that they were involved in a scheme to rob someone who they believed to be selling large amounts of marijuana from the apartment, that they burst into the apartment brandishing guns, that one of the defendants fatally shot the person, and that the other defendant forced two people present to lie on the ground and divulge the location of a safe in the apartment that held money and marijuana. Howard v. State, 279 Ga. 166, 611 S.E.2d 3 (2005).

Although defendant's firearm was used by an accomplice with defendant's consent during the course of robbery, the threatened use of that firearm and the fatal use of defendant's shotgun was sufficient to convict defendant of armed robbery; moreover, evidence that defendant pointed the shotgun at the victim during the robbery established defendant's guilt as a party to armed robbery. Weldon v. State, 279 Ga. 185, 611 S.E.2d 36 (2005).

Armed robbery of DVDs. — Evidence supported defendant's conviction for armed robbery as the robbery was completed as defendant approached the clerk with DVDs in hand just before the codefendant held the clerk at gunpoint; DVDs were later seen near the store where defendant and codefendant were apprehended, barefoot; police also found a handgun, a roll of red duct tape similar to the one used to restrain the clerk, and two pairs of shoes. Hall v. State, 274 Ga. App. 842, 619 S.E.2d 344 (2005).

Evidence that defendant took money from the one victim, beat the victim while doing so, that defendant was armed at the time, that defendant had the victim removed from defendant's house by the codefendant's so that the one victim could be murdered elsewhere, and that the second victim was removed from defendant's house by another codefendant, all after the one victim and the second victim were suspected of plotting to rob defendant, who was selling illegal drugs from defendant's home, was sufficient to support defendant's convictions for malice murder, kidnapping, armed robbery, and being in possession of a firearm during the commission of a felony. Mason v. State, 279 Ga. 636, 619 S.E.2d 621 (2005).

Evidence supported defendant's conviction for armed robbery, attempted armed robbery, burglary, and one firearms offense because: (1) defendant confessed to the crimes; (2) a companion wore distinctive shoes that matched those of an armed robber; (3) two dust-free ski masks, similar to those worn by the armed robbers, were found in defendant's very dusty utility closet; and (4) a small red car was parked near a restaurant that was robbed, officers stopped defendant two hours later, and defendant drove the same car to the police station when defendant came for voluntary questioning. Ray v. State, 273 Ga. App. 656, 615 S.E.2d 812 (2005).

Evidence was sufficient to support the defendant's convictions for armed robbery, in violation of O.C.G.A. § 16-8-41, and possession of a knife during the commission of a crime, because the defendant entered a convenience store, the defendant approached the cashier and demanded the money, and the defendant then pointed a knife at the cashier and again demanded the money; the defendant was identified by the cashier, items of the perpetrator's clothing were seen on the defendant and then found near where the defendant was arrested, and the knife was discarded in close proximity to where the defendant was found. Todd v. State, 275 Ga. App. 459, 620 S.E.2d 666 (2005).

Evidence was sufficient to support the defendant's convictions of burglary, armed robbery, and malice murder, in violation of O.C.G.A. §§ 16-7-1(a), 16-8-41, and 16-5-1, respectively, because the defendant and a friend decided to rob the victim and they entered the apartment unlawfully with that intent, they stabbed and bludgeoned the victim, and they took a lock-box and left; although the evidence as to whether the defendant was let into the apartment by the victim willingly was conflicting, forced entry was not an element of burglary and accordingly, resolution of that fact did not change the sufficiency of the evidence for the burglary conviction. Redwine v. State, 280 Ga. 58, 623 S.E.2d 485 (2005).

Armed robbery of a club. — Evidence was sufficient to support the convictions of murder, armed robbery, aggravated assault, burglary, and a statutory violation,

all in violation of O.C.G.A. §§ 16-5-1, 16-8-41, 16-5-21, 16-7-1, and 16-11-106, respectively, when the defendant and the codefendant went to a club with the intention of robbing someone, met the victim and drove the victim back to the victim's home, beat and fatally stabbed the victim, and upon leaving the victim's apartment, took some of the victim's belongings. Willoughby v. State, 280 Ga. 176, 626 S.E.2d 112 (2006).

Armed robbery of police investigator. — Police investigator's testimony that the defendant held a three-inch knife to the investigator's throat amply supported a conviction under O.C.G.A. § 16-8-41; the testimony of a single witness may be sufficient to establish a fact pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8). Wallace v. State, 277 Ga. App. 280, 626 S.E.2d 229 (2006).

Circumstantial evidence sufficient for conviction. — Armed robbery convictions were supported by sufficient circumstantial evidence since: (1) the defendant acted as the "getaway" driver for the two codefendants, and thus, was a party to the crimes; (2) the trial court properly substituted the court's charge for the defendant's requested charge because the court's charge included pattern charges on parties to a crime, knowledge, mere presence at the scene of a crime, and mere association with others committing a crime, and substantially covered the same legal principles as the requested charge; and (3) the trial counsel's strategy did not amount to ineffective assistance of counsel. Buruca v. State, 278 Ga. App. 650, 629 S.E.2d 438 (2006).

Evidence that the defendant and others approached two separate victims while the defendant brandished a shotgun, that the defendant threatened the victims with the gun, and that the defendant and the compatriots stole both of the victims' cars, sufficed to sustain convictions of two counts of hijacking a motor vehicle, two counts of armed robbery, two counts of aggravated assault with a deadly weapon, and two counts of possession of a firearm during the commission of a felony; the jury was free to disbelieve the defendant's testimony that the defendant was coerced into threatening the victims at gunpoint and participating in the car thefts. Martinez v. State, 278 Ga. App. 500, 629 S.E.2d 485 (2006).

As the state presented direct, and not circumstantial, evidence from the victims supporting the jury's finding of guilt, when this testimony was coupled with that from the police officers involved, substantial and sufficient evidence supported a conviction for armed robbery and related offenses; the fact that the defendant offered another explanation for the defendant's presence at the scene did not render the other evidence insufficient or circumstantial. Bakyayita v. State, 278 Ga. App. 624, 629 S.E.2d 539 (2006).

Armed robbery conviction was supported by sufficient evidence which showed that both victims identified the defendant as one of the persons who robbed the victims at gunpoint, that, shortly after the robberies, police located the defendant near the crime scene wearing clothes matching the description given by the victims, and that, although the defendant presented evidence that the defendant was at work until 10:00 P.M. on the night of the robberies, the work supervisor admitted to not seeing the defendant that night. Sorrells v. State, 279 Ga. App. 18, 630 S.E.2d 171 (2006).

Defendant's convictions of murder, felony murder, armed robbery, burglary, possession of a firearm during the commission of an armed robbery, and possession of a firearm during the commission of a burglary were supported by sufficient evidence that, the day before the three murder victims were found shot in the head, the defendant borrowed the defendant's sibling's car to visit one of the victims, who owed the defendant money, the defendant admitted going to the victims' home twice on the day of the murders, but stated that the victims were not home during either visit, neighbors heard gunshots around the home at approximately 7:30 P.M., near the last time that the two younger victims were heard from, and again at 10:00 P.M. that evening, when the older victim returned home for the day, a number of items stolen from the victims' home at the time of the murders were subsequently found in a dumpster next to a storage locker the defendant shared with a love

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interest, the items were contained in plastic bags that had the defendant's fingerprints on them, and the plastic bags came from a roll of trash bags found in the trunk of the car which the defendant borrowed on the day of the murders. Griffin v. State, 280 Ga. 683, 631 S.E.2d 671 (2006).

Armed robbery at ATM. — Pictures of a defendant withdrawing money from a victim's ATM account and evidence that the defendant repeatedly asked the victim for the PIN number for the victim's ATM card, held a knife to the victim's neck, cut the cord used to tie the victim, and had cash, an ATM receipt, and the victim's car keys when the defendant was arrested were sufficient to support the defendant's convictions for armed robbery, two counts of aggravated assault, kidnapping with bodily injury, and two counts of possessing a knife during the commission of a crime. Wright v. State, 282 Ga. App. 649, 639 S.E.2d 581 (2006).

When the victim was killed during the theft of the victim's vehicle, the evidence was sufficient for a jury to convict the defendant of felony murder, aggravated assault, and armed robbery; the defendant told others where the vehicle was, then stripped the vehicle; a call had been placed from the victim's cell phone to the house of one of the defendant's grandparents; police had found some of the victim's belongings at the home of the defendant's cousin; and a witness and two cousins of the defendant had stated that the defendant had admitted shooting the victim. Paige v. State, 281 Ga. 504, 639 S.E.2d 478 (2007).

Evidence was sufficient to sustain a defendant's convictions for a total of 20 counts of armed robbery, possessing a firearm during the commission of a crime, terroristic threats and acts, kidnapping, and aggravated assault arising out of four separate robberies because the victims' testimony, the physical evidence, and one victim's identification of the defendant as the robber provided sufficient corroboration of the testimony of the defendant's accomplice. Metoyer v. State, 282 Ga. App. 810, 640 S.E.2d 345 (2006).

There existed sufficient evidence to uphold the defendant's convictions for armed robbery and possession of a firearm during the commission of a felony because the evidence established that the victim, an airline pilot, was robbed at gunpoint at approximately 4 A.M., with the perpetrator taking the victim's luggage and fleeing in a Ford Ranger pickup truck and that, within two to three minutes after calling 9-1-1, an officer stopped the speeding Ford Ranger and apprehended the defendant, who was wearing clothing as described by the victim and the luggage was found in the back of the pickup truck. Feaster v. State, 283 Ga. App. 417, 641 S.E.2d 635 (2007).

Defendant's convictions of malice murder, armed robbery, and possession of a firearm during the commission of a felony were supported by the evidence, which included use of the murder weapon during a later robbery by the defendant's accomplices, a video that provided a corroborating account of the shooting, and the defendant's spontaneous inculpatory statements while being transported from Maryland to Georgia. Stokes v. State, 281 Ga. 825, 642 S.E.2d 82 (2007).

Armed robbery to steal drugs. — As the evidence provided by the state at defendants' criminal trial demonstrated that based on information from defendant-B regarding a large quantity of marijuana possessed by a victim, defendant-A and another man forcibly entered the victim's residence while defendant-A was armed, pushed the victim to the ground, demanded to know where the marijuana was, and a physical struggle resulted, the evidence supported defendants' convictions for burglary, armed robbery, and aggravated assault; defendant-B was convicted as a party to the crimes under O.C.G.A. § 16-2-20(4). Garland v. State, 283 Ga. App. 622, 642 S.E.2d 320 (2007), rev'd on other grounds, 282 Ga. 201, 657 S.E.2d 842 (2008).

Evidence supported the defendant's convictions for felony murder predicated on armed robbery, armed robbery, and aggravated assault because the evidence showed that the defendant and the codefendant, after discussing the idea of stealing marijuana and whatever cash the victim had on the victim, arranged to meet

with the victim to buy marijuana from the victim. When the victim got into the back seat of the defendant's vehicle and pulled out a bag of marijuana, the codefendant drew a gun and shot the victim, fatally wounding the victim. Herbert v. State, 288 Ga. 843, 708 S.E.2d 260 (2011).

Evidence supported the defendant's convictions for malice murder, felony murder, criminal attempt to commit armed robbery, armed robbery, aggravated assault, and possession of a firearm during the commission of a crime because: (1) the defendant participated in the armed robbery of three people, including the shooting victim, who were sitting in a car on a neighborhood street; (2) during the encounter, the co-indictee fatally shot the victim in the head with a shot gun; (3) one of the two other people in the car testified that, after the shooting, the defendant, with the defendant's hand in the defendant's pocket simulating that the defendant had a gun, took money and drugs from the witness; (4) the co-indictee also took money from the other person; and (5) the defendant and the co-indictee then fled the scene. Gilyard v. State, 288 Ga. 800, 708 S.E.2d 329 (2011).

Court rejected the defendant's argument that the evidence was insufficient to support the defendant's conviction of armed robbery under O.C.G.A. § 16-8-41(a) because the evidence failed to show that anything of value was taken from the victim's person or immediate presence by use of a deadly weapon; contrary to the defendant's argument, the evidence established that one of the defendant's accomplices forced the victim at gunpoint through the victim's home and into the back bedroom closet during which time the robber demanded money and the contents of a box, that the victim struggled with the armed robber, that the victim's blood was found on the closet floor, and that the robber took a bag of cash and cocaine from the victim's closet. Watson v. State, 308 Ga. App. 871, 708 S.E.2d 703 (2011).

Defendant's convictions for kidnapping, hijacking a motor vehicle, armed robbery, possession of a firearm during the commission of a felony, carrying a concealed weapon, and possession of a weapon on school property were authorized because pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the victim's testimony alone established the essential elements of the offenses. Lester v. State, 309 Ga. App. 1, 710 S.E.2d 161 (2011).

Evidence that the defendant owned a firearm, gunshots were heard in the area of the shooting, the fatal attack occurred after a drug deal which the defendant was brokering for the victim went bad, the victim obtained a large sum of money to accomplish the drug buy, and the defendant or one of the defendant's cohorts was seen retrieving a bag of money. Brown v. State, 291 Ga. 892, 734 S.E.2d 23 (2012).

Testimony of the female victim and the accomplice that the defendant held a pistol on both victims and demanded and took cash from the male victim, along with the DNA evidence on the floor at the scene of the rape, was sufficient for the jury to find that the defendant was guilty of kidnapping with bodily injury (by rape) and rape against a female victim, and kidnapping and armed robbery against a male victim. Brinkley v. State, 320 Ga. App. 275, 739 S.E.2d 703 (2013).

Sufficient evidence existed to support the defendant's convictions for aiding and abetting armed robbery, burglary, aggravated assault, and false imprisonment based on the evidence that the defendant was a party to the crimes, including evidence that the defendant drove the codefendants to the house just before the crimes were committed; that the defendant was in the vehicle when plans to commit the crimes were discussed; that the defendant waited in the victim's driveway when the codefendants entered the front door of the house, wearing masks and carrying guns; and that the defendant drove the perpetrators away from the scene after the crimes were committed—speeding, driving erratically, and not stopping when the police, with sirens and lights activated, began following the vehicle. Simon v. State, 320 Ga. App. 15, 739 S.E.2d 34 (2013).

Defendant's convictions for armed robbery and aggravated assault were supported by sufficient evidence in that, even absent fingerprint evidence, there was the identifications of two eyewitnesses as well

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as a bottle bearing the store's logo and the amount of cash and same denomination reported stolen found on the defendant's person. Hamlin v. State, 320 Ga. App. 29, 739 S.E.2d 46 (2013).

Victim's testimony that the defendant approached the victim, thrust a gun about six inches from the victim's face, took the victim's cell phone and keys, and told the victim to "get out of here", while waving a gun, was sufficient to support the defendant's convictions for armed robbery, possession of a firearm during the commission of a crime, aggravated assault, and theft by taking. Wright v. State, 319 Ga. App. 723, 738 S.E.2d 310 (2013).

Evidence that the defendant kicked in a door and entered an occupied apartment with others, the defendant provided the guns used, the defendant placed a gun to one victim's head, a victim's wallet and key were taken, and marijuana, digital scales, and a device used to grind marijuana were found at the defendant's house was sufficient to support the defendant's convictions for four counts of aggravated assault, three counts of false imprisonment, and one count each of armed robbery, burglary, possession of marijuana with intent to distribute, and possession of a firearm during the commission of a felony. Thompson v. State, 320 Ga. App. 150, 739 S.E.2d 434 (2013).

Armed robbery of change machine. — Evidence supported the defendant's convictions of malice murder, felony murder, armed robbery, aggravated assault, and possession of a firearm during the commission of a felony when the defendant had gone to the victim's laundromat and waited until the victim opened a change machine, pointed a gun at the victim's head and ordered the victim to put the money in a bag, told the victim, "Hell, yeah, I'll kill you," and shot the victim multiple times; eyewitnesses, including two who knew the defendant, had identified the defendant as the perpetrator. Cooper v. State, 281 Ga. 760, 642 S.E.2d 817 (2007).

Evidence supported the defendant's convictions of malice murder, two counts of felony murder, kidnapping with bodily injury, two counts of armed robbery, and aggravated battery since: the defendant had been seen fleeing the victim's home in a car registered to the defendant; the defendant told the defendant's spouse to discard the defendant's bloody clothing; the defendant sought treatment at a hospital after being shot during the crimes; and the defendant had initiated conversations in which the defendant described the actions of the defendant's companions in discarding guns used in the crimes and offered to reveal the names of the companions in exchange for not being charged with murder. Davis v. State, 281 Ga. 871, 644 S.E.2d 113 (2007).

Evidence was sufficient to sustain the defendant's convictions of armed robbery and of possessing a firearm during the commission of a crime when: (1) the defendant's codefendants testified that the defendant participated in the armed robberies of which the defendant was convicted; (2) one victim identified the defendant as the victim's assailant; (3) two victims identified a gun that was recovered from the vehicle of the defendant's girlfriend as the gun used to rob the victims; (4) a victim's purse was recovered from the residence where the defendant was arrested; and (5) police found a sweatshirt and a ski mask in the girlfriend's car that matched a victim's description of the items worn by one robber. Cartledge v. State, 285 Ga. App. 145, 645 S.E.2d 633 (2007).

Given that the testimony of the defendant's codefendants was sufficient to support convictions on four counts of armed robbery and four counts of possessing a firearm during the commission of a crime, the convictions were not subject to reversal. Cartledge v. State, 285 Ga. App. 145, 645 S.E.2d 633 (2007).

There was sufficient evidence to support the defendant's convictions of malice murder, felony murder, two counts of armed robbery, and aggravated assault when the defendant shot and killed the first victim while the victim was making a night deposit at a bank and robbed the second victim, a bartender, at gunpoint a month later; the defendant and an accomplice fully confessed to both crimes, the confession to the bank crime was corroborated

by a bank surveillance tape showing the murder in progress, and a bouncer witnessed the robbery of the bartender and grappled with the defendant at the scene. Simmons v. State, 282 Ga. 183, 646 S.E.2d 55 (2007).

Evidence supported the defendant's convictions of two counts of malice murder, armed robbery, and possession of cocaine after: a driver carrying a gun and a bag ran out of a car that had been dragging the body of the car's owner and that had another dead victim in the passenger seat; bags of cocaine were on the lap of the victim in the passenger seat; one victim had been shot with a .44 caliber weapon; a canine unit located a .44 caliber revolver, cash, a man's clothes with cocaine in them, and a shoulder bag in the woods into which the driver had fled; the defendant came out of the woods wearing only underwear; and the defendant admitted to shooting the victims. Preston v. State, 282 Ga. 210, 647 S.E.2d 260 (2007).

There was sufficient evidence supporting the defendant's convictions of armed robbery, burglary, possession of a firearm during the commission of a felony, and criminal trespass; the evidence included a custodial statement in which the defendant admitted participating in the crimes and testimony by a witness as to the preparations for the robbery, the clothing worn by the defendant and by the accomplice, and the defendant's disposal of a gun. Medlin v. State, 285 Ga. App. 709, 647 S.E.2d 392 (2007).

Because: (1) the trial court did not err in admitting certain identification evidence alleged to be hearsay as testimony relative to the identification was not offered for the truth of the matter asserted; (2) the defendant's requested instruction was not tailored to the facts and was potentially confusing; and (3) the defendant's character was not placed in issue, convictions of armed robbery, hijacking a motor vehicle, and obstruction were all upheld. Jennings v. State, 285 Ga. App. 774, 648 S.E.2d 105 (2007), cert. denied, No. S07C1576, 2007 Ga. LEXIS 667 (Ga. 2007).

Because the state presented sufficient evidence supporting the convictions entered against the first two defendants, a letter one of the defendants wrote was admissible against all as a statement of a coconspirator, no error resulted from the admission of a red baseball bat, and the first defendant's trial counsel was not ineffective, the first defendant's convictions of armed robbery and possession of a firearm during the commission of a felony and the second defendants' convictions of the lesser included offense of robbery were upheld on appeal. Williamson v. State, 285 Ga. App. 779, 648 S.E.2d 118 (2007).

Armed robbery of taxi cab. — In a case where four persons riding in a stolen car robbed a cab driver at gunpoint, the evidence was sufficient to sustain the defendant's convictions as a party to the crimes of armed robbery and possession of a weapon during the commission of a crime; the defendant led a detective to the gun the defendant possessed and admitted being in the stolen vehicle on the date in question, and a witness testified that the witness saw the defendant holding a gun and approaching the cab driver. Jones v. State, 285 Ga. App. 866, 648 S.E.2d 183 (2007).

Sufficient evidence existed to support the defendant's conviction for armed robbery in a case where the defendant and the defendant's accomplices used a weapon to forcibly keep the victim away from the victim's property, including the victim's wallet, while the property was being taken. Allen v. State, 286 Ga. App. 82, 648 S.E.2d 677 (2007).

Because contradictions and uncertainties in the testimony did not render the evidence against the defendant insufficient but were ultimately for the jury to decide, and the victim's testimony that the gun used to commit the crime was not actually pointed at the victim did not mean that the intruders, including the defendant, did not commit an armed robbery, the evidence presented, which authorized the jury to find that the defendant participated in the committed crimes, was sufficient to support the defendant's armed robbery conviction. Sheely v. State, 287 Ga. App. 92, 650 S.E.2d 762 (2007).

Toy pistol. — Because the defendant's display of a gun handle created a reasonable apprehension on the part of the vic-

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tim that the defendant intended on using an offensive weapon to cause that victim to comply with a demand for money, sufficient evidence supported the defendant's armed robbery conviction; moreover, the fact that the offensive weapon might have ultimately been proven to only be a toy gun was inconsequential. Price v. State, 289 Ga. App. 763, 658 S.E.2d 382 (2008).

Evidence supported the defendant's convictions for malice murder, felony murder, aggravated assault, armed robbery, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime. The four victims were found dead in two hotel rooms from gunshot wounds to the back of their heads; identification documents belonging to the four victims were found in the defendant's car; there was expert testimony that the defendant's gun had been used to kill the victims; the defendant's baseball cap contained one victim's deoxyribonucleic acid; there was evidence that the defendant and two friends used three victims' tickets to attend a football game after the victims were murdered; the defendant was identified as being in an elevator with one victim; the defendant was seen leaving the hotel with one victim's cooler; and a duffle bag belonging to one victim was in the defendant's car when the defendant was arrested on weapons charges. Dawson v. State, 283 Ga. 315, 658 S.E.2d 755 (2008), cert. denied, 129 S. Ct. 169, 172 L.Ed.2d 122 (2008).

There was sufficient evidence to support convictions of armed robbery and of possessing a firearm during the commission of a felony. Both of the defendant's codefendants testified as to the defendant's participation in the events in question, which was sufficient evidence to find the defendant guilty; furthermore, the codefendants' testimony was corroborated by that of the victims. Hill v. State, 290 Ga. App. 140, 658 S.E.2d 863 (2008), cert. denied, 129 S. Ct. 405, 172 L.Ed.2d 287 (2008).

Evidence was sufficient to support convictions of malice murder, armed robbery, and aggravated assault when the defendant demanded that the victim "break bread", hit the victim three times with a metal flashlight, and rummaged through the victim's pockets after the victim refused, hit the victim again after the victim refused to turn over a ring, and then took the ring. Gibson v. State, 283 Ga. 377, 659 S.E.2d 372 (2008).

Evidence was sufficient to support the defendant's convictions of armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and kidnapping under O.C.G.A. §§ 16-5-21, 16-5-40, 16-8-41, and 16-11-106 as: (1) a robber ordered two store employees at gunpoint to give the robber money, then ordered the employees to go into a back room; (2) the employees described the robber and the robber's vehicle in detail; (3) the employees positively identified the defendant as the robber 15 to 20 minutes after the crime following a pursuit during which the defendant fled from police first in the defendant's vehicle, then on foot; and (4) the defendant had $281 in a pocket at the time of arrest. Lenon v. State, 290 Ga. App. 626, 660 S.E.2d 16 (2008).

Armed robbery of a cell phone. — Evidence was sufficient to support armed robbery conviction when the victim testified that the defendant took the victim's cell phone while the defendant pointed a gun at the victim and threatened to shoot the victim; under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), testimony of a single witness was generally sufficient to establish a fact. Burden v. State, 290 Ga. App. 734, 660 S.E.2d 481 (2008).

Evidence was sufficient to enable the jury to find beyond a reasonable doubt that the defendant was guilty of armed robbery because the evidence fully authorized the jury to find that the defendant borrowed the cell phone of one of the victims, intending never to return the phone due to the defendant's concern that the phone could be used to connect the defendant to the victims' murders; nothing in O.C.G.A. § 16-8-41(a) limits a conviction for armed robbery to the particular item a defendant originally intended to take by means of the use of an offensive weapon. Vergara v. State, 287 Ga. 194, 695 S.E.2d 215 (2010).

Evidence was sufficient to enable the jury to find the defendant guilty beyond a reasonable doubt of armed robbery in violation of O.C.G.A. § 16-8-41 because although the defendant did not actually use a weapon, the defendant's accomplice's use of a weapon could be attributed to the defendant because under O.C.G.A. § 16-2-20, one who intentionally aided or abetted the commission of a crime by another was a party to the crime and equally guilty with the principal; the defendant aided and abetted the accomplice by telling the accomplice to pull into an apartment complex after they saw the potential victims, giving the accomplice the defendant's gun, and then taking the victims' wallets from the victims while the accomplice pointed the gun at the victims. Barber v. State, 304 Ga. App. 453, 696 S.E.2d 433 (2010).

Evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that the defendant committed three armed robberies because there was evidence that items were taken from at least three men by use of a gun; there was evidence that the items were taken from the men or "them," as well as evidence that there were four men in the immediate area at the time. Ward v. State, 304 Ga. App. 517, 696 S.E.2d 471 (2010).

Combined direct and circumstantial evidence was more than sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt of armed robbery, kidnapping, and possession of a firearm during the commission of a crime because at trial, the employees, a manager, and a customer of the two finance companies that were robbed testified to the events and identified defendant as the perpetrator of the respective robberies, and the state presented evidence that the six eyewitnesses previously identified the defendant in a lineup as the perpetrator; the state introduced into evidence fictitious loan applications that were associated with the two robberies and testimony from the landlord, a human resources director, and the county detectives linking defendant to information contained in those applications, and the state also introduced into evidence the handgun, clothing items, and sticky note seized during the search of defendant's residence. Walker v. State, 305 Ga. App. 607, 699 S.E.2d 902 (2010).

Because defendant admitted to police that defendant had planned the robbery that led to the victim's death, defendant was a willing participant in the robbery and shooting; consequently, the evidence was sufficient to find defendant guilty of felony murder, armed robbery, and possession of a firearm during the commission of a crime. Branchfield v. State, 287 Ga. 869, 700 S.E.2d 576 (2010).

Evidence was sufficient to allow the jury to find all defendants guilty of armed robbery beyond a reasonable doubt because the victim testified that one of the defendants had a knife during the attack and that all three defendants struck and kicked the victim while taking the victim's necklaces and money. Cruz v. State, 305 Ga. App. 805, 700 S.E.2d 631 (2010).

Testimony of an accomplice that the defendant was with the others during the robbery of the first victim and ran off and ate pizza with everyone afterward and the testimony of the second victim identifying the defendant at trial as the man the second victim spoke to about selling a Blackberry while an accomplice put a gun to the second victim's neck, searched the second victim's pockets, and took the second victim's Blackberry and wallet, was sufficient to support the defendant's convictions for armed robbery and possession of a firearm during the commission of a felony. Fuller v. State, 320 Ga. App. 620, 740 S.E.2d 346 (2013).

Evidence that the victims were robbed by individuals driving a Honda Civic who were armed with a gun; that the defendant admitted to distracting the victims while the other participants robbed the victims; that the defendant was wearing a plaid shirt when arrested, like the first victim testified one assailant was wearing; that the defendant and the other participants ran from the Civic shortly after an officer attempted to stop the car for driving without headlights; and that the first victim's purse and the second victim's checkbook were found in the Civic, from which the defendant was seen exiting and fleeing was sufficient to support the defendant's conviction for armed

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robbery. Lindsey v. State, 321 Ga. App. 808, 743 S.E.2d 481 (2013).

Evidence that the defendant and an accomplice were both tied to robberies just before and just after the robberies of the second and third victims, an officer observed the defendant and the accomplices exit a car registered to the defendant's mother shortly after the robberies, and items stolen from the second and third victims were found in that car, was sufficient to support the defendant's convictions for the second and third robberies. Wickerson v. State, 321 Ga. App. 844, 743 S.E.2d 509 (2013).

Evidence that the defendant was found in the laundry room of the home that was the subject of the home invasion; police found masks, gloves, money, a gun, and some of the victim's jewelry in or near the laundry room; and the defendant's DNA was found on one of masks recovered supported the defendant's convictions for armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of a crime. Rudison v. State, 322 Ga. App. 248, 744 S.E.2d 444 (2013).

Evidence that the victim identified the defendant as the robber with a gun and to whom the victim was forced to give money and a recording from a device the victim wore where a male was saying to get out of the car before he shot someone in the face was sufficient to support the defendant's conviction for armed robbery. Biggins v. State, 322 Ga. App. 286, 744 S.E.2d 811 (2013).

Sufficient evidence supported the defendant's convictions for armed robbery, false imprisonment, kidnapping, and aggravated assault based on the state showing that the defendant held the four boys at gunpoint, forced the boys into the pool to restrict their ability to flee, and stole two cell phones and money from the boys before fleeing. Smith v. State, 342 Ga. App. 656, 805 S.E.2d 251 (2017).

Length of time of possession of stolen goods. — When the victim complied with the defendant's demand by taking off three of the victim's rings, but then refused to comply with the defendant's demand that the victim remove the rest, the evidence supported a conviction of armed robbery. The jury was entitled to find that the defendant obtained physical possession of the three rings in response to the first demand; it was irrelevant how long the defendant retained possession of those rings. Brown v. State, 297 Ga. App. 631, 678 S.E.2d 101 (2009).

Evidence supported the defendant's convictions of armed robbery, kidnapping, possession of a firearm during the commission of a crime, and financial transaction card fraud. Shortly after a man called the store where the victim worked to see if the store was open, a masked man with a gun came into the store, ordered the victim to the back, and then robbed the store and took the victim's credit cards; soon afterward that same morning, the defendant bought sneakers with the victim's credit card; the clerk who sold the defendant the sneakers identified the defendant at trial and in a photographic lineup and testified that the clerk knew the defendant because the defendant was a regular customer; and the defendant's cell phone records showed that just before the robbery, the defendant called the victim's store and blocked the defendant's number. Anderson v. State, 297 Ga. App. 733, 678 S.E.2d 498 (2009), aff'd, 287 Ga. 159, 695 S.E.2d 26 (Ga. 2010).

Evidence was sufficient for the jury to find the defendant guilty of armed robbery. The evidence, including testimony from the victim and an accomplice witness, indicated that the defendant and a third accomplice put a gun to the victim's head and demanded that the victim give the perpetrators the victim's money and that the perpetrators, while carrying a gun, accompanied the victim to a check-cashing store and to automatic teller machines so that the victim could get money. Varner v. State, 297 Ga. App. 799, 678 S.E.2d 515 (2009).

Evidence that the defendant pulled a gun on the victim, hit the victim in the face and the head with the gun, and snatched the victim's necklace from the victim's neck and carried the necklace 30 yards away before dropping the necklace was sufficient to support the defendant's conviction for armed robbery. Harris v.

State, 334 Ga. App. 299, 779 S.E.2d 83 (2015).

Testimony from a victim that one of the three gunmen pointed a gun at the armed robbery victim and took money from the victim was sufficient to support the first defendant's conviction for armed robbery. Ray v. State, 338 Ga. App. 822, 792 S.E.2d 421 (2016).

While the victim could not identify the gunman, the combined testimony of the other witnesses was sufficient to enable a rational jury to find the defendant guilty beyond a reasonable doubt as the perpetrator of the charged crimes, including armed robbery and aggravated battery, and to exclude every reasonable hypothesis except that of the defendant's guilt. Epperson v. State, 340 Ga. App. 25, 796 S.E.2d 1 (2016).

Inferring guilt of armed robbery by conduct before, during, and after crime. — Convictions of felony murder, O.C.G.A. § 16-5-1, and armed robbery, O.C.G.A. § 16-8-41, were supported by sufficient evidence because, inter alia, the defendant acted as a lookout and deterred two potential customers while a codefendant entered the victim's restaurant, shot the victim to death, robbed the cash register, and stole the victim's wallet; after the shooting, the defendant and the codefendant fled the scene together and went to a friend's apartment, where the defendant changed the defendant's shirt to disguise the defendant's identity. Proof of the defendant's direct commission of the crimes was not required because the jury could infer the defendant's participation from conduct before, during, and after the crime. Washington v. State, 285 Ga. 541, 678 S.E.2d 900 (2009).

Restaurant was robbed, the restaurant's manager was fatally shot, and the manager's car was stolen. As the defendant's accomplice, the defendant's cellmate, and an officer testified that the defendant admitted committing the murder, the evidence was sufficient to convict the defendant of malice murder, armed robbery, and theft by taking. Patterson v. State, 285 Ga. 597, 679 S.E.2d 716 (2009), cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010).

Evidence that the defendant committed an armed robbery was not based solely on the uncorroborated testimony of the defendant's accomplice. A store employee corroborated the accomplice's testimony, and items similar to those taken during the robbery, as well as items taken during a later robbery, were recovered from the defendant's car, which was occupied by the defendant and the accomplice. Savage v. State, 298 Ga. App. 350, 679 S.E.2d 734 (2009).

Evidence was sufficient to convict the defendant of armed robbery, kidnapping, aggravated assault, and possession of a firearm during the commission of a felony as a party under O.C.G.A. § 16-2-20(b)(3). It was undisputed that the defendant's sibling committed the acts in question, and the evidence showed that the defendant drove with the sibling to the place the sibling planned to rob, waited for the sibling at the sibling's instructions until the sibling returned with the fruits of the crime and the weapon, and then tried to drive away. McGordon v. State, 298 Ga. App. 161, 679 S.E.2d 743 (2009).

Sufficient evidence supported the defendant's convictions for armed robbery and possession of a firearm during the commission of a felony, in violation of O.C.G.A. §§ 16-8-41(a) and 16-11-106(b)(1), as a victim who was robbed at gunpoint by two assailants identified the defendant as one of the assailants; the victim had been walking on a college campus when the two assailants approached, held a gun on the victim, and searched the victim's backpack before fleeing with the victim's wallet. Ware v. State, 298 Ga. App. 232, 679 S.E.2d 797 (2009).

Evidence was sufficient to support the defendant's convictions of armed robbery because three other participants in the robbery testified and confirmed that the defendant planned and participated in the robbery and shared in the money taken from the victims; further, the defendant gave a statement to an officer in which the defendant admitted to being at the scene at the time of the crime, but alleged the defendant was only there to sell drugs to the other participants in the armed robbery and was unaware that the others intended to commit a robbery. Brown v. State, 298 Ga. App. 226, 679 S.E.2d 808 (2009).

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Sufficient evidence supported the defendant's armed robbery and aggravated assault convictions because the victim recognized the defendant as one of the men who, while armed with a gun, pushed their way into the victim's home, pushed the victim down, and demanded money when a mask the defendant was wearing fell down; the victim also identified the defendant from earlier occasions when the defendant was visiting the victim's neighborhood. Dubose v. State, 298 Ga. App. 335, 680 S.E.2d 193 (2009).

Evidence was sufficient to convict the defendant of armed robbery and kidnapping as a store clerk testified that the defendant, brandishing a knife, ordered the clerk to open the cash register; that the defendant took money from the register; that the defendant forced the clerk into a bathroom, blocked the door with boxes, and fled. Further, both the clerk and a customer identified the defendant from a photo lineup and at trial. Hill v. State, 298 Ga. App. 677, 680 S.E.2d 702 (2009).

Evidence was sufficient to support convictions for aggravated assault, aggravated battery, armed robbery, and kidnapping. The victims' in-court identifications of the defendant and the codefendant were buttressed by the evidence that a cell phone in their possession matched that taken from the victims, that a car of the type used by the robbers contained guns similar to those used in the robbery, and the fact that the codefendant had a key to that car. Wright v. State, 300 Ga. App. 32, 684 S.E.2d 102 (2009).

Evidence adduced was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of felony murder, armed robbery, and aggravated assault for attacking six people in a home because one of the victims stated that the victim saw the defendant in the doorway after shots had been fired; whether the deal a codefendant made with the state rendered the codefendant's testimony biased to a degree that left the codefendant less creditworthy was a determination to be made by the jury. Mikell v. State, 286 Ga. 434, 689 S.E.2d 286, overruled on other grounds, 287 Ga. 338, 698 S.E.2d 301 (2010).

Evidence was sufficient to support the jury's verdict of armed robbery against victim one because the victim testified that the robbers took $47 from the victim's pocket and that a restaurant bank bag contained both the money for the day and the checks for the day; the jury chose to believe the victim's testimony. Smith v. State, 302 Ga. App. 222, 690 S.E.2d 867 (2010).

Armed robbery by 16 year old defendant. — Since an armed robbery was completed when control of the money in a cash register was ceded to defendant and the other four robbers, the facts were sufficient to indict defendant, who was 16 years old, for armed robbery under O.C.G.A. § 16-8-41(a); therefore, the superior court lacked authority under O.C.G.A. § 15-11-28(b)(2)(B) to transfer the case to a juvenile court. Gutierrez v. State, 306 Ga. App. 371, 702 S.E.2d 642 (2010).

Defendant's armed robbery conviction was upheld based on the defendant's accomplice's testimony that the defendant pointed a shotgun at a resident during a robbery and evidence that a shotgun and items taken during the robbery were found in the defendant's bedroom. Mays v. State, 306 Ga. App. 507, 703 S.E.2d 21 (2010).

Evidence at trial was sufficient to support the defendant's convictions for two counts of armed robbery, in violation of O.C.G.A. § 16-8-41(a), and one count of theft by receiving stolen property, in violation of O.C.G.A. § 16-8-7(a), because the evidence showed that the defendant admitted to being present at the scene of the armed robberies, a victim identified the defendant in court as the person who robbed the victim at gunpoint, several items belonging to the victims were found in the defendant's home, the defendant and the defendant's girlfriend owned vehicles similar to those used in the robberies, and each victim testified that the robber worked in cooperation with an accomplice. Baker v. State, 307 Ga. App. 884, 706 S.E.2d 214 (2011), cert. denied, No. S11C0940, 2011 Ga. LEXIS 517 (Ga. 2011).

Evidence was sufficient to support the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41 and possession of a firearm during the commission of a felony in violation of O.C.G.A. § 16-11-106(b)(1) because even though the defendant was found near a car similar to that involved in the robbery, with a shotgun similar to that used in the attack, and the defendant admitted being present at the scene of the robbery, the victim's testimony alone was sufficient to authorize the jury's verdict of guilty beyond a reasonable doubt pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8). Law v. State, 308 Ga. App. 76, 706 S.E.2d 604 (2011).

Evidence from the victim and two eyewitnesses to the armed robbery of the night manager of a shoe store was sufficient to support the defendants' convictions for armed robbery in violation of O.C.G.A. § 16-8-41, along with DNA evidence and the amount of cash recovered from one of the defendants. Flint v. State, 308 Ga. App. 532, 707 S.E.2d 498 (2011).

Because there was independent evidence sufficient to corroborate the testimony given by a codefendant, the cumulative evidence was sufficient for a rational trier of fact to find the defendant guilty of armed robbery; accordingly, counsel's failure to request a charge on accomplice testimony did not constitute deficient performance. Harris v. State, 308 Ga. App. 456, 707 S.E.2d 878 (2011).

Armed robbery of pedestrian. — Evidence was sufficient for the jury to find the defendant guilty beyond a reasonable doubt of using a handgun to rob each of the victims because on three separate occasions within a three week period, the defendant used a revolver to rob a solitary pedestrian during daylight hours, all in the same part of the city, and at trial, each of the victims identified the defendant as the person who robbed them; after arresting the defendant, officers inventoried the contents of the defendant's vehicle and found a loaded .38 caliber revolver and a cell phone, and an officer determined that the cell phone belonged to the third victim. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Evidence was sufficient to convict a defendant of armed robbery based on the victim's testimony that the defendant and the defendant's codefendant approached the victim, asked for cigarettes, pulled a gun on the victim and stuck a gun in the victim's stomach, then relieved the victim of the victim's cigarettes and the victim's wallet with $300 that the victim had just been paid. Scruggs v. State, 309 Ga. App. 569, 711 S.E.2d 86 (2011).

Conviction for felony shoplifting appropriate. — Evidence that a defendant concealed a designer handbag and four wallets under a shopping bag and started to leave a department store, and that the defendant then, seeing a security guard had been alerted, concealed the items under a clothing rack, was sufficient to convict the defendant of felony shoplifting in violation of O.C.G.A. § 16-8-14(a)(1). Tyner v. State, 313 Ga. App. 557, 722 S.E.2d 177 (2012).

Single witness can support robbery conviction. — Evidence was sufficient to sustain the defendant's convictions for armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b), because the victim testified about the assault and identified the defendant as the person who committed the assault; the competent testimony of even a single witness can be enough to sustain a conviction. Brown v. State, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Conviction when serving as lookout and benefitting from proceeds of crime. — Evidence was sufficient to support the defendant's conviction for armed robbery because the phone and cash register taken from the immediate presence of the victim was the property of another in that the property belonged to the phone business of the victim's family. Jackson v. State, 314 Ga. App. 806, 726 S.E.2d 63 (2012).

Sufficient evidence showed the defendant committed armed robbery, under O.C.G.A. § 16-8-41(a), because the defendant accompanied a codefendant to a crime scene, acted as a lookout, and shared in the proceeds. Campbell v. State, 314 Ga. App. 299, 724 S.E.2d 24 (2012).

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Evidence was sufficient to support the defendant's conviction for armed robbery because an accomplice testified to committing a series of armed robberies and that the defendant had participated by selecting the stores to rob, supplying the gun, acting as the getaway driver, and receiving part of the stolen money; law enforcement officers testified that the accomplice implicated the defendant during an interrogation, and officers found items of clothing matching those worn by the armed robber in the defendant's hotel room. Williams v. State, 314 Ga. App. 840, 726 S.E.2d 66 (2012).

As the first defendant aided and abetted in effecting a plan to steal the victim's car, and as the second defendant took the victim's money, the evidence was sufficient to convict both of them of armed robbery, hijacking a motor vehicle, and possession of a firearm during the commission of a crime under O.C.G.A. §§ 16-5-44.1, 16-8-41(a), 16-11-106. Copeny v. State, 316 Ga. App. 347, 729 S.E.2d 487 (2012).

Evidence was sufficient to sustain convictions for armed robbery and possession of a firearm during the commission of a felony when the evidence showed that the defendant either directly committed or was a party to the armed robberies of both victims at a rest area. A custodian present at the scene identified the defendant as one of the perpetrators who had participated in the crimes, and the defendant's flight from the rest area, flight from the officers, act of driving the getaway car, and possession of one victim's driver's license and clothing items linked the defendant to the crimes. Bryson v. State, 316 Ga. App. 512, 729 S.E.2d 631 (2012).

Sufficient evidence supported the defendant's armed robbery conviction, despite the defendant's claim that the defendant took nothing from the victim and did not point a weapon at the victim, because: (1) it was undisputed that the crime occurred; and (2) whether the defendant or the defendant's accomplice pointed the gun and took the property, the defendant could be convicted through the defendant's role as a party under O.C.G.A. § 16-2-21. Bush v. State, 317 Ga. App. 439, 731 S.E.2d 121 (2012).

Sufficient asportation to meet statutory criteria. — Evidence was sufficient to support the count of armed robbery of the victim whose purse and money were returned, as the purse was forcibly taken, by use of a gun, while the victim was immobilized, and complete dominion of the property was transferred from the victim to the robbers, which was sufficient asportation to meet the statutory criteria. Holder v. State, 319 Ga. App. 239, 736 S.E.2d 449 (2012).

Evidence was sufficient to support the defendant's convictions for armed robbery and aggravated assault when, in addition to accomplice testimony implicating the defendant, the descriptions of the defendant's clothing at the time of offenses offered by the accomplice and one of the victims were the same, and the driver of the vehicle the defendant left the area in testified that on the day of the robbery, the driver drove the defendant and the accomplice to an area near the location of the offenses, left the car and upon the driver's return the defendant and the accomplice were gone, another passenger told the driver to meet the defendant and the accomplice at a gas station across from the scene of the offenses, and the defendant and the accomplice returned to the car at the gas station with a box full of change. Love v. State, 318 Ga. App. 387, 734 S.E.2d 95 (2012).

State's physical evidence, including the victim's blood on the defendant's shirt, the defendant's unexplained possession of the victim's truck, watch, and other personal property, and the fact that the defendant was seen near the victim's residence and farm not long before the crimes were committed, supported the defendant's convictions for malice murder and armed robbery. Blevins v. State, 291 Ga. 814, 733 S.E.2d 744 (2012).

Parents had authority to consent to searches resulting in conviction for armed robbery. — With regard to the defendant's convictions for armed robbery and possession of a gun during a crime, the trial court properly denied the defendant's motions to suppress the evidence found in the defendant's bedroom and in

the vehicle that the defendant operated as the defendant's parents had authority to give consent to the police to search the defendant's unlocked bedroom since the defendant did not pay rent and was only home for the summer from college. As to the vehicle, the parents asked the police to locate their vehicle and the police properly seized the vehicle, impounded the vehicle, and obtained a search warrant; thus, the rifle used during the robberies that was found in the trunk of the vehicle was not the product of an illegal search. Warner v. State, 299 Ga. App. 56, 681 S.E.2d 624 (2009), cert. denied, No. S09C1952, 2010 Ga. LEXIS 35 (Ga. 2010).

Evidence sufficient to support conviction of criminal attempt to commit armed robbery. — See Walker v. State, 193 Ga. App. 446, 388 S.E.2d 44 (1989); Jackson v. State, 247 Ga. App. 273, 543 S.E.2d 770 (2000).

Evidence including testimony as to the gang's criminal activities, corroborating the defendant's participation in the armed robberies; the defendant's admission to participating in two murders; and a gun the defendant used in the attempted armed robbery of the first victim was sufficient to support the defendant's convictions for criminal street gang activity, criminal attempt to commit armed robbery, two counts of aggravated assault, and possession of a firearm during the commission of a felony. Morris v. State, 322 Ga. App. 682, 746 S.E.2d 162 (2013).

Evidence that men ultimately identified as the defendant and the codefendant broke into the victims' home, held all three victims at gunpoint while demanding drugs and money, and began loading electronics and other valuables from the home into the victims' vehicle before fleeing the premises was sufficient to support the defendant's three attempted armed robbery convictions. Issa v. State, 340 Ga. App. 327, 796 S.E.2d 725 (2017).

Evidence sufficient for criminal attempt to commit armed robbery. — Since the victim testified that while threatening the victim with a loaded gun and after telling the victim that defendant wouldn't hesitate to kill the victim, defendant asked, "do you got any money in here?", the evidence provided a sufficient basis for the jury's determination that defendant was guilty of criminal attempt to commit armed robbery. Green v. State, 249 Ga. App. 546, 547 S.E.2d 569 (2001).

Evidence was sufficient to support defendant's conviction of criminal attempt to commit armed robbery because defendant surreptitiously watched others at a fast food restaurant, wore a mask, and drew a BB handgun that resembled a semi-automatic weapon when defendant was confronted by a police officer. New v. State, 270 Ga. App. 341, 606 S.E.2d 865 (2004).

Evidence was sufficient to convict the defendant of criminal attempt to commit armed robbery, even though the defendant never said the defendant was going to rob a store or demanded money, as the jury was authorized to find that, having spent all of the defendant's money, the defendant took the substantial step of entering the store with a knife with the intent to commit robbery. Boyd v. State, 284 Ga. 46, 663 S.E.2d 218 (2008).

Conviction for aider and abettor. — See Vincent v. State, 210 Ga. App. 6, 435 S.E.2d 222 (1993), aff'd, 264 Ga. 234, 442 S.E.2d 748 (1994).

Parties to crime. — Despite the defendant's claim of innocence, convictions for armed robbery and two counts of aggravated assault were upheld on appeal, given sufficient evidence showing that the defendant waited at the scene of the robbery and then assisted the codefendants in an attempted escape; hence, the defendant was not entitled to a directed verdict of acquittal and the state was not required to exclude every reasonable hypothesis except guilt as required by former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6). Jordan v. State, 281 Ga. App. 419, 636 S.E.2d 151 (2006).

Given the testimony provided by both the codefendant and the codefendant's former wife, to whom the defendant admitted to firing the fatal shots killing the victim, which netted the victim's cellular phone and pager and evidence describing how the defendant participated in the events that happened before, during, and after the commission of the crimes, sufficient evidence was presented to uphold the defendant's convictions for felony mur-

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der and armed robbery as a party to the crimes. Pruitt v. State, 282 Ga. 30, 644 S.E.2d 837 (2007).

Evidence that a defendant discussed robbing a store, drove two robbers there, drove the getaway car evasively while being chased by police, fled after crashing the car, and took a share of the stolen money was sufficient to convict the defendant of armed robbery as a party under O.C.G.A. § 16-2-20(a). Dorsey v. State, 297 Ga. App. 268, 676 S.E.2d 890 (2009).

Rational trier of fact could have found beyond a reasonable doubt that the evidence was sufficient to establish that the defendant was guilty of aggravated assault, possession of a firearm during the commission of a felony, hijacking a motor vehicle, and armed robbery because there was ample evidence, based upon the defendant's actions and presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than "merely present" during the commission of the crimes and was a party to the crimes pursuant to O.C.G.A. § 16-2-20; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and during the incident, the defendant did not say or do anything to intervene. Cook v. State, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Evidence authorized the jury to exclude every reasonable hypothesis other than that the defendant was a party to the crime of armed robbery, O.C.G.A. § 16-8-41(a), because at trial, the victim identified the defendant as matching the description of one of the men who attacked the victim, and the defendant admitted to being with the codefendant on the night of the offense. Kirkland v. State, 315 Ga. App. 143, 726 S.E.2d 644 (2012).

Evidence that the defendant drove to the robbery scene, supplied the weapon, functioned as the lookout, and drove the getaway vehicle was sufficient to show that the defendant was a party to an armed robbery. Windhom v. State, 326 Ga. App. 212, 756 S.E.2d 296 (2014).

Evidence was sufficient to convict the defendant of armed robbery and aggravated assault with a deadly weapon as a party to the crimes because a codefendant pointed a gun at the victim's side and demanded money; the codefendant told the defendant that they were going to kill the victim; the codefendant took the victim's cell phone, ordered the victim to disrobe, and raped the victim in the front seat of the car; during the rape, the victim could not escape from the car as the defendant was standing in front of the driver's door; and, after the victim transferred the victim's number to a new cell phone, the victim received calls for the defendant. Carter v. State, 339 Ga. App. 140, 793 S.E.2d 459 (2016).

Corroborating accomplice testimony sufficient to support conviction. — Because defendant's four accomplices in commission of multiple armed robberies and aggravated assaults corroborated each other as to the defendant's participation in the crimes, convictions on those offenses were upheld on appeal. Hawkins v. State, 290 Ga. App. 686, 660 S.E.2d 474 (2008).

Evidence was sufficient for a rational trier of fact to find that the defendant participated in an armed robbery because an accomplice's testimony, which implicated the defendant as a party to the crimes, was sufficiently corroborated by the testimony and evidence at trial when the testimony of a second accomplice regarding the circumstances surrounding the planned robbery, the defendant's participation in the planning of the robbery, and the party's actions before and after the robbery sufficiently corroborated the first accomplice's testimony; the first accomplice's testimony was further corroborated by the victims' descriptions of the events surrounding the robbery, and the police chief testified at trial that police found two sets of shoe prints at the scene of the robbery, but only one set where the second accomplice waited with the car, which also corroborated the accomplice's testimony about what happened after the robbery. Smith v. State, 302 Ga. App. 222, 690 S.E.2d 867 (2010).

There was sufficient corroboration of the defendant as a perpetrator of the principal crime, and, ultimately, sufficient

evidence to support the defendant's convictions for armed robbery, aggravated assault, false imprisonment, possession of a firearm during the commission of a felony, and burglary because there was circumstantial evidence to show that the defendant committed a similar transaction after the first incident, that the same gun an accomplice bought and used in the first crime was used in the second crime and ended up in a car at the house of the defendant's mother afterwards, and that the defendant was nervous and felt guilty about events that the defendant participated in with the accomplice, whom the defendant had only known a short time; that corroborative evidence connected the accomplice to the crimes. Ward v. State, 304 Ga. App. 517, 696 S.E.2d 471 (2010).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal because the state presented sufficient evidence to corroborate a coconspirator's testimony under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) and for the jury to find beyond a reasonable doubt that the defendant committed armed robbery, O.C.G.A. § 16-8-41(a), hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b), and kidnapping, O.C.G.A. § 16-5-40(a); the state presented the testimony of numerous witnesses and other evidence that sufficiently corroborated the co-conspirator's testimony about the defendant's participation in the crimes. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

Trial court did not err in denying the defendant's motion for directed verdict after the defendant was convicted of armed robbery because there was no violation of former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) since there was evidence from which a jury could find sufficient corroboration of the accomplice's testimony to support the defendant's conviction; the testimony of the victims corroborated the accomplice's testimony because the victims physical description of the perpetrator was consistent with the accomplice's testimony about what the defendant was wearing on the day of the robbery. Harris v. State, 311 Ga. App. 336, 715 S.E.2d 757 (2011).

Defendant's convictions of malice murder, armed robbery, and other crimes were not based on the uncorroborated testimony of an accomplice in violation of former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) as: 1) a victim testified that intruders took a wallet that police later found in the defendant's home; and 2) cell phone tower records established that the defendant and the accomplice were exchanging phone calls during the times when the crimes were committed and within the vicinity of the crime sites. Jackson v. State, 289 Ga. 798, 716 S.E.2d 188 (2011).

Evidence was sufficient to support the defendant's conviction for armed robbery as the evidence authorized the jury to find that the robber's acts created for the bank teller reasonable apprehension that the robber was threatening the teller with a grenade to force the teller to comply with the robber's demand for money. Whitmire v. State, 343 Ga. App. 282, 807 S.E.2d 46 (2017).

Testimony that defendant pointed a sawed-off shotgun at arresting officers would tend to show the commission of a separate crime (aggravated assault on a police officer); however, such evidence was nonetheless admissible in defendant's trial for armed robbery. Bradford v. State, 182 Ga. App. 337, 355 S.E.2d 735 (1987).

Evidence sufficient to convict for armed robbery and aggravated sodomy. — See Jackson v. State, 165 Ga. App. 737, 302 S.E.2d 611 (1983).

State failed to carry burden. — Since there was no evidence that a taking or a theft occurred at the time of the murder, the state failed to carry the state's burden of proving beyond a reasonable doubt that the defendant committed the underlying felony of armed robbery. Prater v. State, 273 Ga. 477, 541 S.E.2d 351 (2001).

Murder and armed robbery. — Although defendant was not the triggerman, where there was evidence which authorized findings that defendant was present with the triggerman for over two hours prior to the murder; that defendant drove the triggerman to the victim's house; that defendant was present in the room when the victim was shot; that the victim was shot with a gun of the same model and

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caliber that defendant owned; and that defendant destroyed evidence, assisted in the disposal of the decedent's body, fled from the jurisdiction where the crimes were committed, reaped benefits from the armed robbery, and at no time made any attempt to disassociate self from the criminal enterprise; a rational trier of fact could have found the defendant guilty of the crimes of murder and armed robbery beyond a reasonable doubt. Tho Van Huynh v. State, 257 Ga. 375, 359 S.E.2d 667 (1987).

Evidence sufficient to support convictions of murder, aggravated assault, armed robbery, burglary, and possession of a firearm in the commission of a felony. Baty v. State, 275 Ga. 371, 359 S.E.2d 655 (1987).

Evidence presented by the prosecution was sufficient to enable any rational trier of fact to find the defendant guilty of armed robbery, kidnapping, and aggravated assault (with intent to rob). Conway v. State, 183 Ga. 573, 359 S.E.2d 438 (1987).

Evidence insufficient to support an armed robbery charge when the crime of burglary was completed before the victim was threatened with a weapon and only an attempted armed robbery was then committed. Gould v. State, 168 Ga. App. 605, 309 S.E.2d 888 (1983); Brazle v. State, 223 Ga. App. 504, 478 S.E.2d 412 (1996).

Trial court erroneously admitted an officer's testimony regarding a statement made by one of the victims who died of natural causes prior to trial as the admission violated the defendant's right to confrontation; moreover, because there was no other evidence to support this armed robbery count, the defendant could not be retried for it. Gifford v. State, 287 Ga. App. 725, 652 S.E.2d 610 (2007).

Evidence was insufficient to support a conviction for armed robbery as to the third victim as the record lacked any evidence of a taking of property belonging to the third victim or over which the victim exercised some level of control. Bradford v. State, 327 Ga. App. 621, 760 S.E.2d 630 (2014).

Evidence was insufficient to convict the defendant of criminal attempt to commit armed robbery because, although the evidence presented supported a finding that the defendant performed certain acts in preparation for an armed robbery, the defendant's acts were merely preparatory acts and did not amount to an attempt to commit the crime of armed robbery as the defendant was not in possession of a weapon or device having the appearance of a weapon; furthermore, there was no evidence that the defendant gave the robbery notes to anyone or concealed the defendant's hands in any way as if to hide a weapon. Rainey v. State, 338 Ga. App. 413, 790 S.E.2d 106 (2016).

Evidence was insufficient to convict the defendant of armed robbery because the indictment alleged that the defendant took a chain and charm pendant from the victim, but the chain was found with the victim's clothing at the hospital, and the necklace's pendant was found on the ground at the shooting site; thus, there was no evidence that the defendant ever moved the chain or exercised control over the chain; and, while the movement of the pendant from the chain around the victim's neck to the ground might have satisfied the slight change of location requirement, there was no evidence that the defendant ever had complete dominion over the pendant. Williams v. State, 302 Ga. 404, 807 S.E.2d 418 (2017).

Circumstantial evidence insufficient. — Because no eyewitnesses saw a third defendant participate in an armed robbery, a kidnapping, an aggravated assault, or possess a firearm during the commission of the crimes, and because the third defendant was not implicated by the other defendants, did not confess to the crimes, and did not flee the jurisdiction, the evidence was insufficient to support a conviction for the third defendant. Johnson v. State, 277 Ga. App. 499, 627 S.E.2d 116 (2006).

Circumstantial evidence sufficient for bank robbery. — Any rational trier of fact could find the defendant guilty beyond a reasonable doubt of terroristic threats, O.C.G.A. § 16-11-37(a), hoax devices, O.C.G.A. § 16-7-85(a), and armed robbery, O.C.G.A. § 16-8-41(a) because al-

though circumstantial, the evidence authorized the jury to exclude every reasonable hypothesis other than that the defendant engaged in the acts that constituted the crimes; even though the defendant was apprehended while wearing clothing that did not match that described by the victims, an officer familiar with the habits of bank robbers testified that bank robbers like to wear multi-layer clothing and then shed clothes after the crime. Williams v. State, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

Victim's awareness of property being taken. — Fact that the victim was not aware until police arrived that the victim's gun had been taken did not mean that defendant's armed robbery conviction could not stand, as a jury could find that the victim, who was bound and forcibly held at gunpoint while the victim's house was ransacked, was aware that items were being taken from the victim's home. Wilson v. State, 291 Ga. App. 69, 661 S.E.2d 221 (2008).

Acceptance of stolen goods and harboring robbers insufficient. — Evidence that the defendant, who did not "directly commit" the offense and was not present at the crime, accepted stolen coins and attempted to hide the robbery participants was constitutionally insufficient to support defendant's conviction for armed robbery. Tenner v. Wallace, 615 F. Supp. 40 (S.D. Ga. 1985).

Evidence of similar incident. — Ultimate issue in determining the admissibility of evidence of other crimes is not mere similarity but relevance to the issues of the case being tried; when in addition to the use of the gun and similar obscene language, the victim of the instant incident and the charged crime was the grocery store chain from which the defendant had been fired and told not to come on the premises; therefore, the evidence was admissible. Cain v. State, 212 Ga. App. 531, 442 S.E.2d 279 (1994).

Evidence was sufficient beyond a reasonable doubt to show that the defendants committed an armed robbery of a convenience store when two employees of the store and a customer present at the time of the robbery were each able to identify the defendants as the perpetrators, despite the coverings over defendants' faces, by recognizing their voices. Shannon v. State, 275 Ga. App. 550, 621 S.E.2d 540 (2005).

Trial court did not err in admitting a virtually identical robbery as a similar transaction against the defendant as the incident was relevant to show that the defendant knew of the crimes and intended to allow two individuals to use the defendant's car to commit the crime. Lee v. State, 281 Ga. App. 479, 636 S.E.2d 547 (2006).

State was properly allowed to introduce evidence that the defendant committed another armed robbery two days after the crimes charged as: (1) the trial court found that the evidence was relevant to show the defendant's course of conduct or bent of mind; (2) the subsequent offense was similar; (3) the defendant used a drawn gun to demand money and, when the victim protested or resisted, the defendant threatened to shoot; (4) the state was only required to show that the other crime was similar, not identical, to the offenses for which the defendant was being tried. Simpson v. State, 282 Ga. 508, 651 S.E.2d 732 (2007).

Similar transaction evidence of an eight-year-old incident in which the defendant robbed two victims at gunpoint was not too remote in time or dissimilar to the armed robbery and aggravated assault charges the defendant was being tried for, and was thus properly admitted to show course of conduct, bent of mind, motive, and identity. Wallace v. State, 295 Ga. App. 452, 671 S.E.2d 911 (2009).

In a prosecution for the armed robbery of a cell phone store, evidence that the defendant robbed another cell phone store 20 minutes earlier was properly admitted to show the defendant's bent of mind and course of conduct, and to rebut the defendant's alibi defense because the victim of the earlier robbery identified the defendant from a photographic line-up and at trial, and the modus operandi of the perpetrator of both crimes was nearly identical. Fuller v. State, 295 Ga. App. 439, 672 S.E.2d 438 (2009), cert. denied, No. S09C0749, 2009 Ga. LEXIS 220 (Ga. 2009).

Defendant was charged with robbing a

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store clerk at knife-point. Evidence presented at a Ga. Unif. Super. Ct. R. 31.3(B) hearing that, on the day after this robbery, the defendant robbed a second clerk at knife-point was properly admitted as similar transaction evidence; the fact that the trial on the second robbery was pending afforded no basis to exclude the evidence. Hill v. State, 298 Ga. App. 677, 680 S.E.2d 702 (2009).

Similar transaction evidence properly admitted. — Trial court did not abuse the court's discretion by allowing the state to introduce the evidence of a similar robbery to show the defendant's intent and modus operandi or course of conduct, which were legitimate purposes at the time of trial, because the state presented sufficient evidence that the defendant committed the other robbery, which involved robbing a restaurant night manager at closing time while concealing the defendant's face with clothing. Martin v. State, 324 Ga. App. 252, 749 S.E.2d 815 (2013).

Superior court judge has no jurisdiction to probate sentence imposed on conviction of armed robbery. — The posture of such a case is that defendant has been validly convicted but has had a void sentence imposed which in law amounts to no sentence at all. State v. Stuckey, 145 Ga. App. 434, 243 S.E.2d 627 (1978).

Applicability of O.C.G.A. §§ 16-8-41 and 17-10-7. — When armed robbery indictment contains recidivist count which specifically invokes general recidivist statute, O.C.G.A. § 17-10-7, rather than the specific recidivist sentencing statute for armed robbery, O.C.G.A. § 16-8-41(b), the trial court errs when the court sets the final sentence pursuant to O.C.G.A. § 16-8-41(b). Under such an indictment and a guilty verdict, the trial court is required to sentence the defendant, pursuant to O.C.G.A. § 17-10-7(a), to "the longest period of time prescribed" for armed robbery, that sentence being life imprisonment. State v. Baldwin, 167 Ga. App. 737, 307 S.E.2d 679 (1983); Stone v. State, 218 Ga. App. 350, 461 S.E.2d 548 (1995).

Intent to take property before or after murder immaterial. — Jury may find the defendant guilty of armed robbery and find that the armed robbery is a statutory aggravating circumstance supporting the death penalty for the victim's murder regardless of whether the defendant's intent to take the victim's property arose before or after the murder. Romine v. State, 251 Ga. 208, 305 S.E.2d 93 (1983), cert. denied, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

Prior offense reliance invalid. — Court's reliance for sentencing purposes upon out-of-state conviction challenged as an involuntary, unwitting guilty plea was reversible error when imposing life sentence. Dowdy v. State, 209 Ga. App. 95, 432 S.E.2d 827 (1993).

Earlier similar transaction evidence admissible. — Although eleven years separated defendant's earlier robbery from this armed robbery, part of that time defendant was in prison, and it is the similarity of the offenses within the meaning of Williams v. State, 261 Ga. 640, 409 S.E.2d 649 (1991) that determines the admissibility of such evidence, not whether the span of time between offenses is brief. Nelson v. State, 242 Ga. App. 63, 528 S.E.2d 844 (2000).

Jury instructions proper. — Because an accomplice testified against defendant only after court threatened to hold defendant in contempt, defendant was not entitled to an instruction on leniency and immunity offered to a witness, and because the jury was not confused by the absence of alternatives on a verdict form, defendant was properly convicted of armed robbery. Arvinger v. State, 276 Ga. App. 127, 622 S.E.2d 476 (2005).

Trial court did not err by granting the state's request to charge the jury on robbery by sudden snatching, and the defendant's due process rights were not violated as: (1) the indictment alleging armed robbery gave the defendant sufficient notice; (2) the essential elements of both armed robbery and robbery by sudden snatching were contained within the indictment; (3) robbery by sudden snatching was a lesser included offense of armed robbery as a matter of law; and (4) the defendant conceded that the trial evidence supported

such a charge. Millender v. State, 286 Ga. App. 331, 648 S.E.2d 777 (2007), cert. denied, No. S07C1717, 2008 Ga. LEXIS 80 (Ga. 2008).

Inconsistent verdict rule abolished. — Defendant's claim that the defendant's attempted armed robbery verdict and three armed robbery verdicts should have been vacated as the defendant was acquitted of the firearms offenses related to those crimes was rejected; although the defendant claimed to argue that the verdicts were mutually exclusive, the defendant in fact argued that the verdicts were inconsistent and Georgia had abolished the inconsistent verdict rule. Ray v. State, 273 Ga. App. 656, 615 S.E.2d 812 (2005).

Armed robbery counts did not merge for sentencing. — Defendant's two armed robbery convictions did not merge with one another for sentencing purposes where evidence was introduced authorizing convictions on each count and the counts involved different victims and different weapons. Phanamixay v. State, 260 Ga. App. 177, 581 S.E.2d 286 (2003).

Armed robbery counts merged when there was a single victim. — Trial court erred by not merging two armed robbery counts; when a single victim was robbed of multiple items in a single transaction, there was only one robbery. Davis v. State, 281 Ga. 871, 644 S.E.2d 113 (2007).

Sentence properly enhanced. — Trial court did not unfairly enhance defendant's sentence for armed robbery based on a previous aggravated child molestation conviction, committed when defendant was 13 years old, as: (1) under O.C.G.A. § 16-3-1, the legislature made the age of 13 the age of criminal responsibility in Georgia; (2) the legislature did not elect to carve out an exception that would exempt youthful offenders from the sentencing provisions of O.C.G.A. § 17-10-7(b)(2); and (3) the Georgia Supreme Court had upheld the constitutionality of the "two violent felonies" statute, O.C.G.A. § 17-10-7(b)(2). Lee v. State, 267 Ga. App. 834, 600 S.E.2d 825 (2004).

Imposition of life sentence for armed robbery was within the range of punishment prescribed therefor and did not violate the mandate that sentences be for a determinate period. Williams v. State, 214 Ga. App. 421, 447 S.E.2d 714 (1994); Hill v. State, 250 Ga. App. 9, 550 S.E.2d 422 (2001).

Even though O.C.G.A. § 17-10-1 (prior to the 1993 amendment) did not mandate a life sentence, a life sentence on an armed robbery conviction was proper under the specific provisions of O.C.G.A. § 16-8-41. Stovall v. State, 216 Ga. App. 138, 453 S.E.2d 110 (1995).

O.C.G.A. § 16-8-41(b) read in conjunction with O.C.G.A. § 17-10-1 authorizes the imposition of a life sentence or a determinate sentence at the discretion of the trial judge. Worley v. State, 265 Ga. 251, 454 S.E.2d 461 (1995); Echols v. Thomas, 265 Ga. 474, 458 S.E.2d 100 (1995).

Life sentence was properly imposed since the statute permitted such a sentence, even without consideration of a recidivist count. Smith v. State, 234 Ga. App. 213, 505 S.E.2d 858 (1998).

Life in prison for armed robbery was a sentence within the statutory guidelines, even if the conviction was for a first offense; thus, the trial court did not err in denying the convicted criminal's motion to vacate the convicted criminal's sentence on the ground that the convicted criminal was improperly sentenced as a recidivist as the sentence was authorized by law even without regard to recidivism. Kinsey v. State, 259 Ga. App. 653, 578 S.E.2d 269 (2003).

Evidence supported the defendant's armed robbery conviction when the victim testified that the defendant brought candy to the cash register, held a silver gun to the victim's side, and took $59 from the victim's cash register, when the victim identified the defendant as the person who robbed the victim, when the store's videotape recorder made a tape of what happened, since, when the defendant was arrested shortly thereafter, the defendant was in possession of the candy, a gun, and $59 in cash, and when, after the defendant's apprehension, the defendant admitted to the police that the defendant committed the robbery to get drug money; for the purpose of punishment, armed robbery was not a capital felony, but the general recidivist statute, O.C.G.A.

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§ 17-10-7(c), included, for purpose of punishment, armed robbery, and a sentence of life without parole for defendant's armed robbery conviction was proper and was affirmed. Dixon v. State, 267 Ga. App. 479, 600 S.E.2d 415 (2004).

Sentence of life in prison plus years consecutive for convictions of felony murder and armed robbery did not exceed the statutorily authorized maximum and did not amount to cruel and unusual punishment; the felony murder statute, O.C.G.A. § 16-5-1, authorized a sentence of life in prison on conviction for felony murder, and the armed robbery statute, O.C.G.A. § 16-8-41, authorized a sentence of death or imprisonment for life or by imprisonment for not less than 10 nor more than 20 years. The trial court sentenced the defendant to life in prison for the felony murder conviction plus two 20-year terms, running concurrent to each other but consecutive to the felony murder sentence, for the two convictions for armed robbery, and thus the statutory maximum was not exceeded. Washington v. State, 285 Ga. 541, 678 S.E.2d 900 (2009).

First Offender Act treatment unavailable. — There was no error in the trial court's failure to convict the defendant of kidnapping and armed robbery in violation of O.C.G.A. §§ 16-5-40 and 16-8-41, respectively, under the First Offender Act as O.C.G.A. § 42-8-66 specifically stated that the Act did not apply to sentences for violent felonies outlined in O.C.G.A. § 17-10-6.1, and those two crimes were listed as serious violent felonies. Isaac v. State, 275 Ga. App. 254, 620 S.E.2d 483 (2005).

First offender treatment not available for armed robbery conviction. — Trial court was authorized to sentence a defendant to life imprisonment for armed robbery, even when the defendant was not a recidivist; defendant was not eligible to be sentenced as a first offender, because such treatment was not available for a conviction for armed robbery. Johnson v. State, 274 Ga. App. 848, 619 S.E.2d 488 (2005).

Failure to consider mitigating circumstances while sentencing. — When a defendant convicted of armed robbery asserted the trial court erred in imposing a life sentence without hearing mitigating circumstances, the Court of Appeals found no error in this regard as there was no indication in the record that the defendant sought an opportunity to present mitigating evidence or that the defendant objected to going forward with the sentencing proceeding. Wright v. State, 187 Ga. App. 311, 370 S.E.2d 160, cert. denied, 187 Ga. App. 909, 370 S.E.2d 160 (1988).

Resentencing. — Case was remanded for resentencing where trial court had imposed a sentence of imprisonment for at least 10 years, although neither of the two statutory aggravating factors were present. Flagg v. State, 187 Ga. App. 297, 370 S.E.2d 46 (1988).

Case was remanded for resentencing after the trial court improperly sentenced the defendant to a term of imprisonment beyond the 20 year maximum sentence. Tesfaye v. State, 275 Ga. 439, 569 S.E.2d 849 (2002).

Motion for mistrial properly denied. — Denial of defendant's motion for a new trial was affirmed as defendant's fingerprint was on the robbery note, the victim eliminated all but defendant's and one other's photos from a photo lineup, the victim's description matched the defendant's appearance, and the victim in a similar robbery positively identified the defendant as the robber; a defense witness' testimony that the witness saw the defendant playing with cards in the hotel lobby a few days before the robbery did not exonerate the defendant as the witness did not see the defendant playing with cards similar to the one on which the robbery note was written. Dailey v. State, 271 Ga. App. 492, 610 S.E.2d 126 (2005).

Motion for mistrial should have been granted. — In defendant's trial on a charge of armed robbery, in violation of O.C.G.A. § 16-8-41, an investigating officer's testimony that, based on defendant's conduct, the victim believed that the robbers and defendant had acted in concert, should not have been admitted; as there was no limiting instruction, and it was the only direct evidence of defendant's participation, the error was not harmless, such

that a mistrial should have been granted. Windhom v. State, 315 Ga. App. 855, 729 S.E.2d 25 (2012).

Evidence sufficient for aider and abetter to armed robbery. — Evidence supported defendant's conviction for armed robbery as an aider and abetter under O.C.G.A. § 16-2-20(b)(3) and (4) as a codefendant testified that defendant had provided the gun used in the crime, which was corroborated by defendant's admission that defendant provided the shooter with the gun and that defendant knew that they intended to use the gun to rob a place on the interstate. Terrell v. State, 268 Ga. App. 173, 601 S.E.2d 500 (2004).

Motion to withdraw guilty plea. — Defendant's motion to withdraw the defendant's guilty plea was properly denied as withdrawal of the plea was not necessary to correct a manifest injustice since: (1) the defense counsel was not ineffective; (2) the state showed that the defendant's plea was knowing, intelligent, and voluntary; (3) the trial court was entitled to discredit contradictory testimony given by the defendant at the motion to withdraw the plea hearing; and (4) the defendant's claim that the defendant had nothing to gain by entering a "blind" plea failed as even assuming, that an aggravated assault conviction would have merged with an armed robbery conviction and that five convictions of possession of a firearm during the commission of a crime would have merged with each other for sentencing purposes, the defendant still would have faced an additional five years' to serve if the defendant had not pled guilty. Brown v. State, 280 Ga. App. 767, 634 S.E.2d 875 (2006).

Conviction reversed due to ineffective assistance of counsel. — Defendant's convictions for armed robbery and aggravated assault were reversed as the defendant established that the defendant was rendered ineffective assistance of counsel based on trial counsel's failure to object to the inadmissible hearsay statements of two witnesses, and the admission of improper impeachment evidence against the defendant regarding a crime for which the defendant was never adjudicated guilty for as a result of being a first offender at the time. Rayshad v. State, 295 Ga. App. 29, 670 S.E.2d 849 (2008).

No ineffective assistance for failure to object to cell phone records. — Although the transcript failed to show that the investigator was qualified as an expert in the meaning of cell phone records, there was direct evidence that the defendant was at the scene of the robbery, thus, the defendant failed to show a reasonable likelihood that, but for counsel's failure to object, the outcome of the trial would have been different. Young v. State, 328 Ga. App. 857, 763 S.E.2d 137 (2014).

Conceding guilt on lesser charge not ineffective assistance. — Counsel was not ineffective by conceding the defendant's guilt on a fleeing and eluding charge in order to build credibility and avoid conviction on the more serious charges; the fleeing charge carried a five-year maximum sentence, O.C.G.A. § 40-6-395(b)(5)(A), whereas the defendant faced a sentence of life without parole were the defendant convicted of armed robbery. Payne v. State, 338 Ga. App. 677, 791 S.E.2d 451 (2016).

Reversible error occurred for failure of trial court to question juror. — Codefendant's conviction for armed robbery was reversed because the trial court abused the court's discretion by refusing to strike a juror for cause since the trial court never questioned the juror and the juror never gave an affirmative response that the juror would be able to follow the court's instructions. Carter v. State, 326 Ga. App. 144, 756 S.E.2d 232 (2014).

Jury Charge

Jury charge which created an unconstitutional burden-shifting presumption as to intent was harmless error since the defendant's defense was alibi and misidentification, and in the alternative, insanity, and such defenses did not put into issue criminal intent. Williams v. State, 180 Ga. App. 893, 350 S.E.2d 768 (1986).

When charge did not cover lesser offenses, verdict of guilty refers to armed robbery. — Although charge of armed robbery includes lesser offenses, when the defendant was not charged with any other crime, nor did charge to jury

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adequately instruct on elements of such lesser included offenses, the jury's general verdict of guilty must be construed as finding the defendant guilty of the gravest possible offense, armed robbery, therefore requiring that there be evidence of an armed robbery. Dixon v. Hopper, 407 F. Supp. 58 (M.D. Ga. 1976), overruled on other grounds, Jarrell v. Balkcom, 735 F.2d 1242 (11th Cir. 1984).

Charge on lesser included offense not required. — While robbery by intimidation is an offense included within armed robbery, a charge on the included offense is not required where the uncontradicted evidence shows completion of the offense of armed robbery. Millis v. State, 196 Ga. App. 799, 397 S.E.2d 71 (1990).

With regard to the defendant's conviction for armed robbery of a taxi driver, the defendant was not entitled to a jury instruction on the lesser included offense of robbery by sudden snatching as, although there was evidence from which the jury could have found that the defendant took the money from the taxi driver's pocket by snatching the money rather than through use of the gun, the evidence further showed without dispute that, by the time defendant completed the robbery, the defendant had taken additional money from the taxi meter after brandishing the handgun and hitting the taxi driver with the gun. Ortiz v. State, 292 Ga. App. 378, 665 S.E.2d 333 (2008), cert. denied, No. S08C1851, 2008 Ga. LEXIS 928 (Ga. 2008).

Trial court did not err in failing to give a jury charge on robbery or conspiracy as a lesser offense of armed robbery because the evidence was uncontradicted that a video store was robbed at gunpoint, the gun was brandished throughout the incident, and the defendant participated in the robbery while the gun was being used to accomplish the robbery; in light of the overwhelming evidence against the defendant, it was highly probable that the failure to give the lesser charge did not contribute to the verdicts. Rainly v. State, 307 Ga. App. 467, 705 S.E.2d 246 (2010).

Jury instruction on accessory after fact not warranted. — In an armed robbery prosecution, defense counsel was not deficient in not requesting jury charges on the law of abandonment and accessory after-the-fact as there was no evidence that the defendant abandoned the crime before an overt act occurred or that the defendant was an accessory after the fact rather than a party to the robbery. Bihlear v. State, 295 Ga. App. 486, 672 S.E.2d 459 (2009).

Charge on parties to crime. — When the victim testified that the defendant was one of three assailants who robbed the victim, the trial court did not err in charging on parties to a crime. Webb v. State, 187 Ga. App. 348, 370 S.E.2d 204 (1988).

Charge to jury setting forth entire text of O.C.G.A. § 16-8-41(a), including last sentence on "robbery by intimidation," was not error even though the portion of the charge on intimidation was unnecessary based on the allegations and evidence in the case. Cottingham v. State, 206 Ga. App. 197, 424 S.E.2d 794 (1992).

Pattern jury charge on armed robbery upheld on appeal. — Trial court did not err in refusing to instruct the jury as requested by both the defendants as to a charge of armed robbery, but properly gave the pattern jury charge instead as the charge given covered the principle of law in the requested charge. Richard v. State, 287 Ga. App. 399, 651 S.E.2d 514 (2007).

Jury instructions proper. — Trial court properly charged the jury in the defendant's prosecution for armed robbery, O.C.G.A. § 16-8-41(a); taken as a whole the jury charge would not have mislead the jury into concluding that no offensive weapon or appearance of an offensive weapon had to be proved. Durham v. State, 259 Ga. App. 829, 578 S.E.2d 514 (2003).

In a prosecution for armed robbery, possession of a firearm during the commission of a felony, and obstruction, the defendant was not entitled to a new trial based on allegations that trial counsel was ineffective, as: (1) a jury charge on the testimony of an accomplice was not required; and (2) in light of trial counsel's cross-examination of the accomplice, the court's credibility charge, as well as the overwhelming evidence of the defendant's

guilt, a leniency instruction was unnecessary. Hayes v. State, 281 Ga. App. 749, 637 S.E.2d 128 (2006).

There was no merit to the defendant's argument that because the indictment alleged that the defendant had used a gun including the full definition of "offensive weapon" in the instruction allowed the jury to convict the defendant for committing an armed robbery in a manner other than as alleged in the indictment; viewed in its entirety, the charge was not misleading, and the trial court had specifically tailored the instruction to fit the allegations in the indictment, and the jury was told that it could convict only if it found that the defendant committed the offense as alleged in the indictment, which went out with the jury. Montgomery v. State, 287 Ga. App. 382, 651 S.E.2d 491 (2007).

Jury charge improper when charge indicated defendant had hand under shirt. — Trial court's jury charge in an armed robbery trial suggested facts that were not supported by any evidence, specifically, that the assailant held the assailant's hand underneath the assailant's shirt during the robbery. The erroneous charge was an impermissible comment on the evidence in violation of O.C.G.A. § 17-8-57 and constituted plain error, entitling the defendant to a new trial. Gonzalez v. State, 306 Ga. App. 887, 703 S.E.2d 433 (2010).

Jury instructions did not require unanimity. — Jury instructions did not constitute reversible error as the instructions did not require the jury to unanimously agree on the greater offense of armed robbery before reaching the lesser offense of robbery by intimidation. Garrett v. State, 271 Ga. App. 646, 610 S.E.2d 595 (2005).

Charging conspiracy to commit armed robbery as "lesser included crime" was reversible error, where the jury acquitted defendant of the object of the conspiracy (armed robbery) and the alleged conspiracy was a separate crime but was not charged in the indictment. Brockington v. State, 178 Ga. App. 533, 343 S.E.2d 708 (1986).

Failure to charge on included offenses of robbery and theft by taking was not error since there was no evidentiary alternative crime to armed robbery. Oliver v. State, 232 Ga. App. 816, 503 S.E.2d 28 (1998).

Trial court did not err in failing to give a requested jury instruction on a lesser offense of theft by receiving stolen property as theft by receiving stolen property is not a lesser included offense of armed robbery, theft by taking, or hijacking a motor vehicle. Mullins v. State, 267 Ga. App. 393, 599 S.E.2d 340 (2004).

Lesser-included offense charges not given when not supported by evidence. — In a prosecution for armed robbery, even though defendant may have intended simple robbery, defendant was not entitled to charge on lesser included offense where evidence showed defendant's accomplices committed armed robbery. Martin v. State, 213 Ga. App. 146, 444 S.E.2d 103 (1994).

Since the evidence established all the elements of armed robbery, including defendant's confession on the witness stand that the theft was committed with the use of a gun, albeit unloaded, the trial court did not err in failing to give defendant's requested charge on robbery. Worthy v. State, 237 Ga. App. 565, 515 S.E.2d 869 (1999).

Charge on receiving stolen property denied. — Defendant's oral request for a jury instruction on theft by receiving stolen property was properly denied because it is not a lesser included offense of armed robbery. Hawkins v. State, 242 Ga. App. 603, 528 S.E.2d 853 (2000).

Charge on included offense not required where evidence shows completion of greater offense. — While robbery by intimidation is an offense included within armed robbery, a charge on the included offense was not required where the uncontradicted evidence showed completion of the offense of armed robbery. Kirkland v. State, 173 Ga. App. 687, 327 S.E.2d 808 (1985).

Instructions to jury about presence of weapon. — When the court's jury charge and re-charge on armed robbery and robbery by intimidation came directly from the pattern jury instructions, and the charge was both a complete and an accurate statement of the principles of law involved, no error was committed by the

Jury Charge (Cont'd)

trial court, and the trial court need not have charged the jury more thoroughly on robbery by intimidation to make it clear to the jury that even if the jury found that a weapon was present at the time of the robbery, the jury would have to further find that it was used in the commission of the crime to conclude that an armed robbery had taken place. Harris v. State, 204 Ga. App. 11, 418 S.E.2d 394 (1992).

Jury charge not erroneous. — Trial court's charging of the entire armed robbery provision of O.C.G.A. § 16-8-41(a) did not erroneously instruct the jury as to other means by which the offense of armed robbery could have been committed where the indictment specifically alleged "by use of a handgun; the same being an offensive weapon", since, considering the charge in its entirety in connection with the evidence adduced at trial, the jury could not have been misled into convicting defendant of armed robbery by any means other than as charged in the indictment. Daniels v. State, 207 Ga. App. 689, 428 S.E.2d 820 (1993).

Jury charge which instructed the jury that a person committed the offense of armed robbery "by use of an offensive weapon or any replica, article, or device having the appearance of such weapon," could not have misled the jury into convicting the defendant of armed robbery by any means other than as charged in the indictment, which alleged armed robbery "by use of a handgun," since all the eyewitnesses testified that the robber was holding a handgun and because two bullets found in the defendant's pocket were not evidence of a replica having the appearance of an offensive weapon. Head v. State, 279 Ga. App. 608, 631 S.E.2d 808 (2006).

Failure to instruct jury on burden of proof. — Trial court's failure to instruct a jury on the burden of proof required to convict the defendant of armed robbery with circumstantial evidence was harmless error given the overwhelming direct evidence of the defendant's guilt, which included a videotape of the robbery, the defendant's parent's identification of the defendant as the person on the videotape with a gun, and the defendant's accomplice's confession and implication of the defendant in the crime. Bradwell v. State, 262 Ga. App. 651, 586 S.E.2d 355 (2003).

Instruction covered principle that force had to be contemporaneous with taking requirement. — Trial court did not err in giving the jury the pattern instruction on armed robbery and in refusing to give the armed robbery charge requested by the defendant, which stated that the force used to commit the robbery had to be contemporaneous with the taking; the pattern charge covered the principle of law stated in the requested charge. Kirk v. State, 271 Ga. App. 640, 610 S.E.2d 604 (2005).

Requested instruction should have been given. — In defendant's trial on a charge of armed robbery, in violation of O.C.G.A. § 16-8-41, the trial court should have provided the jury with a requested instruction on mistake of fact pursuant to O.C.G.A. § 16-3-5, as the defendant's knowledge of a plan or intent to rob was a material element of the charge and there was evidence that might have supported the defendant's version of events. Windhom v. State, 315 Ga. App. 855, 729 S.E.2d 25 (2012).

Failure to request limiting instruction. — With regard to the defendant's trial for armed robbery and possession of a firearm, the trial court did not commit plain error in failing to give the jury limiting instructions for evidence presented against the co-defendant concerning charges that were unique to the co-defendant because the defendant failed to make such a request. McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290 (2014).

Offensive weapon reference in jury instruction. — Defendant failed to preserve for appellate review the defendant's contention that the trial court erred in using the "offensive weapon" definition of O.C.G.A. § 16-8-41(a) as armed robbery was not one of the charged offenses because the defendant did not object to the charge and expressly declined the trial court's offer to recharge the jury. The charge did not constitute plain error because the definition of "offensive weapon" applicable to armed robbery mirrored very

closely the definition of aggravated assault set forth in O.C.G.A. § 16-5-21(a)(2), and an "offensive weapon" under the armed robbery statute necessarily would fall within the category of weapons described in § 16-5-21(a)(2), and therefore the defendant could not show that the instruction affected the outcome of the proceedings. Jackson v. State, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Omission of the element of "taking" from a jury charge definition of "robbery" by sudden snatching was harmless error since the omission apparently was inadvertent and the jury otherwise was in fact clearly informed of all the elements of the offense. Whitehead v. State, 177 Ga. App. 259, 339 S.E.2d 365 (1985).

Instruction held to fully cover all principles of law concerning armed robbery. — Trial court did not err in refusing the defendant's requested instruction that, in order to convict, the state must show affirmatively an intention to aid and abet or an active involvement in the two crimes charged since the charge given covered fully (even to overflowing) each and every applicable principle of law concerning the crimes of armed robbery and aggravated assault and the law of principals as well as intent and participation only under coercion. August v. State, 180 Ga. App. 510, 349 S.E.2d 532 (1986).

In the defendant's trial on a charge of armed robbery, in violation of O.C.G.A. § 16-8-41, there was no error in the trial court's failure to provide the jury with certain instructions requested by the defendant, as the charges given either adequately and substantially covered the principles contained in the requested charge, or there was no evidence that supported the requested charge. Windhom v. State, 315 Ga. App. 855, 729 S.E.2d 25 (2012).

Effect of proof required for joint charge of possession of firearm by convicted felon. — In a prosecution for possession of a firearm by a convicted felon, armed robbery and possession of a firearm during the commission of a crime, trial of the charges together was not required since defendant made no motion to sever and, in view of the limiting instructions given and the weight of the testimony of the victim and a corroborating witness, proof of a prior conviction did not place defendant's character in issue to such an extent as to affect the verdict on the armed robbery and firearm charges. Baker v. State, 214 Ga. App. 640, 448 S.E.2d 745 (1994).

Conspiracy instruction upheld though conspiracy not charged in indictment. — In a trial for armed robbery and kidnapping, the trial court does not err in instructing the jury on the law of conspiracy although conspiracy was not charged in the indictment, where the conspiracy instruction was properly adjusted to the evidence. Spencer v. State, 180 Ga. App. 498, 349 S.E.2d 513 (1986).

Requested instruction not necessary. — In the defendant's trial on a charge of armed robbery, in violation of O.C.G.A. § 16-8-41, the trial court did not err in failing to provide the jury with a requested instruction on hindering the apprehension of a criminal as a lesser included offense pursuant to O.C.G.A. § 16-10-50, as the hindering offense was the equivalent of being an accessory after the fact; moreover, it was not a lesser included offense of the principal crime, but a separate offense. Windhom v. State, 315 Ga. App. 855, 729 S.E.2d 25 (2012).

Error in refusal to reinstruct on tracking dog evidence held harmless. — When the jury specifically expressed confusion about the issue of tracking dog evidence and asked that the applicable law be recharged, the trial court erred in failing to reinstruct the jury on this issue. However, because the evidence against both defendants, exclusive of the track dog evidence, overwhelmingly identified the defendants as the perpetrators of the robbery, the error was harmless. Murray v. State, 180 Ga. App. 493, 349 S.E.2d 490 (1986).

Pattern jury instruction including witness's degree of certainty in identification. — Defendant's trial counsel was not ineffective for requesting the pattern jury instruction that included a witness's degree of certainty as a factor the jury could consider in assessing the reliability of a witness's identification testimony because the defendant failed to

Jury Charge (Cont'd)

show that the defendant was prejudiced by the request, given the other evidence linking the defendant to the crimes, including the defendant's possession of a victim's cell phone and a revolver matching the description of the one used in all three robberies. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Counsel not ineffective for failing to object to jury charge on armed robbery. — Trial counsel was not ineffective for failing to object to a discrepancy between the armed robberies as alleged in the indictment and the manner in which the jury was charged on the armed robbery offenses because the evidence uniformly showed that the article used in the robbery was a handgun; there was not a reasonable likelihood that the jury convicted the defendant of robbing the victims with a replica, which was mentioned in the trial court's charge to the jury, because each victim referred to the weapon only as a handgun and explicitly referred to the victims' fear of being shot. Green v. State, 310 Ga. App. 874, 714 S.E.2d 646 (2011), cert. denied, No. S11C1766, 2012 Ga. LEXIS 232 (Ga. 2012).

Evidence was sufficient to convict the defendant of the armed robbery of the victim who called for help as the victim's cell phone was under the victim's control and responsibility when the phone was taken off of the victim's bed because, although the victim was not in the room when the cell phone was taken, the victim was nearby as the evidence showed that the victim had been in the bedroom and was struck by splintered wood when the shots were fired by the intruders; the victim then escaped and ran to an adjacent building to call for help; as the victim was calling for help, and within five minutes of the shooting, the intruders fled in a vehicle; and when the victim returned to the bedroom shortly thereafter the victim's cell phone was gone. Jackson v. State, 336 Ga. App. 70, 783 S.E.2d 672 (2016).

No error in failing to instruct jury on robbery by intimidation. — Jury's return of not guilty verdicts on all 12 counts of possession of a firearm during the commission of a felony did not demonstrate that, had the jury been instructed on robbery by intimidation, it would have convicted the defendant of that lesser included offense, rather than of armed robbery; thus, the trial court did not commit plain error in failing to charge the jury on robbery by intimidation as a lesser-included offense of armed robbery. Styles v. State, 329 Ga. App. 143, 764 S.E.2d 166 (2014).

Jury instruction on theft by taking not required, since the evidence clearly indicated armed robbery. Shepherd v. State, 234 Ga. 75, 214 S.E.2d 535 (1975).

Although theft by taking has been held to be a lesser included offense of armed robbery, no charge on the lesser included offense is necessary when the evidence, as here, shows completion of the greater offense. Widner v. State, 203 Ga. App. 823, 418 S.E.2d 105 (1992).

Failure to charge on attempt to commit armed robbery. — Failing to charge the jury on the lesser included offense of criminal attempt to commit armed robbery was not error since, if the jury believed any combination of defendant's statements, defendant either was party to the completed crime of armed robbery or defendant lacked any intent to be a party to the crime. Spivey v. State, 243 Ga. App. 785, 534 S.E.2d 498 (2000).

Failure to charge on robbery by intimidation. — Although robbery by intimidation is a lesser included offense of armed robbery, it is not error in an armed robbery case to fail to charge on robbery by intimidation where there is evidence of robbery by use of an offensive weapon, but no evidence of robbery by intimidation. Hill v. State, 228 Ga. App. 362, 492 S.E.2d 5 (1997).

Because the evidence showed the completed offense of armed robbery, and because the defendant did not deny that accomplices were armed, defendant was not entitled to a jury charge on the lesser included offense of robbery by intimidation. Brinson v. State, 245 Ga. App. 411, 537 S.E.2d 795 (2000).

Trial court did not err in not charging on robbery by intimidation as a lesser in-

cluded offense of armed robbery under O.C.G.A. § 16-8-41 since there was no evidence that the defendant did not have a gun; thus, the evidence did not support a charge of robbery by intimidation even if the defendant had requested such a charge. Burden v. State, 290 Ga. App. 734, 660 S.E.2d 481 (2008).

Because the evidence showed a completed act of armed robbery under O.C.G.A. § 16-8-41, the trial court properly refused to instruct the jury on the lesser-included offense of robbery by intimidation under O.C.G.A. § 16-8-40(a)(2). Waters v. State, 294 Ga. App. 442, 669 S.E.2d 450 (2008).

Trial court did not err in refusing to give the defendant's request to charge the jury on robbery by intimidation because when there was no evidence that the robbery was committed without the use of a gun, the defendant was not entitled to a jury charge on the lesser included offense of robbery by intimidation. Hester v. State, 304 Ga. App. 441, 696 S.E.2d 427 (2010).

Trial court did not commit plain error in failing to charge the jury on robbery by intimidation as a lesser-included offense of armed robbery because the defendant denied committing any offense; and the evidence relied upon by the defendant did not show robbery by intimidation as there was no evidence that a robbery was committed without the use of a gun. Styles v. State, 329 Ga. App. 143, 764 S.E.2d 166 (2014).

Jury instructions properly charged on armed robbery and robbery by intimidation. — Jury instructions were not incomplete and confusing as the jury was given the statutory definition of armed robbery and the pattern jury instruction on the lesser offense of robbery by intimidation; defendant failed to include the jury's questions in the record on appeal, so the judgment was assumed to be correct; further, there was no evidence that the jury's questions went unanswered. Garrett v. State, 271 Ga. App. 646, 610 S.E.2d 595 (2005).

Failure to charge robbery by intimidation and theft by taking required new trial. — Where evidence on behalf of defendant denied charge of armed robbery, and was such that it would have authorized jury to find defendant guilty of either robbery by intimidation or theft by taking, failure of trial court to charge on robbery by intimidation and theft by taking requires grant of new trial. Hensley v. State, 228 Ga. 501, 186 S.E.2d 729 (1972).

Failure to instruct on robbery and theft by taking harmless. — In a prosecution for armed robbery and burglary, where evidence showed that a gun was used, that defendant at one point had possession of the gun, and that defendant disposed of the gun, defendant was guilty of armed robbery, and the court did not err in failing to instruct on the lesser included offenses of robbery and theft by taking. Hopkins v. State, 227 Ga. App. 567, 489 S.E.2d 368 (1997).

Failure to give charge on burglary harmless. — When case contained some evidence that the defendant did not use a weapon to take property from the victim, defendant was therefore entitled to a charge on the lesser included offense of burglary; however, in light of the overwhelming evidence against the defendant, it was highly probable that the failure to give this charge did not contribute to the verdict, thus the conviction was affirmed. Edwards v. State, 264 Ga. 131, 442 S.E.2d 444 (1994).

Sentence

Merged counts for sentencing. — Counts 1 and 3 should have been merged for sentencing purposes because defendant did not commit separate armed robberies against restaurant manager, but instead committed a single armed robbery in which property belonging to restaurant manager and the restaurant was taken. Deans v. State, 212 Ga. App. 571, 443 S.E.2d 6 (1994).

Trial court did not err by failing to merge the defendants' convictions on counts one through five into one conviction for armed robbery because the aggravated assaults and armed robbery (none of which could have been proven by the same or less than all the facts required to prove another) occurred later and the facts required to prove those offenses were separate from the burglary. Dunbar v. State, 273 Ga. App. 29, 614 S.E.2d 472 (2005).

Trial court had to vacate defendant's

Sentence (Cont'd)

conviction and sentence for armed robbery given that armed robbery was charged as the felony underlying defendant's conviction for felony murder; a separate conviction and sentence for armed robbery was not authorized under such circumstances. Joyner v. State, 280 Ga. 37, 622 S.E.2d 319 (2005).

Although an armed robbery served as the predicate felony for one count of felony murder, there was a separate felony murder count predicated on aggravated assault; hence, when the jury found the defendant guilty of both counts, it was within the trial court's discretion to choose to merge the aggravated assault rather than the armed robbery into the felony murder count for which appellant was sentenced. Hill v. State, 281 Ga. 795, 642 S.E.2d 64 (2007).

Although offenses related to the getaway car were part of the same criminal episode, the essential elements of armed robbery, theft by receiving, fleeing, or attempting to elude a police officer, and reckless driving were completely separate and distinct. As a result, the trial court did not err in failing to merge these offenses. Garibay v. State, 290 Ga. App. 385, 659 S.E.2d 775 (2008).

Offense of armed robbery did not merge with two counts of possession of a firearm during the commission of a crime as the expressed legislative intent was to impose double punishment for conduct which violated both O.C.G.A. § 16-11-106 and other felony statutes. Garibay v. State, 290 Ga. App. 385, 659 S.E.2d 775 (2008).

Because: (1) different facts were used to prove an aggravated assault and an armed robbery, specifically, that the armed robbery was complete after the defendant laid a handgun on the counter in the convenience store, demanded that the victim open the register, and a codefendant took money from the a register; and (2) the separate offense of aggravated assault occurred when the defendant struck the victim in the head with the gun, the offenses did not merge as a matter of fact. Thus, the separate sentences imposed for each offense were upheld, and no double jeopardy violation occurred. Garibay v. State, 290 Ga. App. 385, 659 S.E.2d 775 (2008).

Because a defendant's convictions for armed robbery (O.C.G.A. § 16-8-41(a)) and aggravated assault (O.C.G.A. § 16-5-21(a)) were based on the same conduct—the defendant's pointing a gun at the victim with the intent to rob the victim—merger was required. Therefore, the sentence for the aggravated assault was vacated. Reed v. State, 293 Ga. App. 479, 668 S.E.2d 1 (2008).

Two counts of armed robbery and two counts of theft by taking should have been merged into one armed robbery conviction. When a single victim was robbed of multiple items in a single transaction, there was only one robbery, and the same evidence was used to prove both the theft and the armed robbery charges. Wells v. State, 294 Ga. App. 277, 668 S.E.2d 881 (2008).

Two defendants committed armed robbery against each member of a family in a home invasion by taking property from the presence of each of them with the intent to commit theft by the use of a handgun. Robbery is a crime against possession, and is not affected by concepts of ownership; therefore, the convictions on the robbery counts against each family member did not merge. Kollie v. State, 301 Ga. App. 534, 687 S.E.2d 869 (2009).

Defendant's convictions for armed robbery and aggravated assault should have been merged for sentencing, as a codefendants' actions, which occurred either concurrently or in rapid succession, were committed as part of one uninterrupted criminal transaction and in pursuit of a specific, predetermined goal: the armed robbery of a single victim. Crowley v. State, 315 Ga. App. 755, 728 S.E.2d 282 (2012).

Trial court did not err in failing to merge the defendant's convictions for armed robbery and aggravated assault as the armed robbery conviction was based on evidence that the defendant took the victim's necklace after hitting the victim in the head and face with a gun, while the aggravated assault conviction was based on the defendant having shot the victim in the arm. Harris v. State, 334 Ga. App. 299, 779 S.E.2d 83 (2015).

Sentence impacted by same conduct for aggravated assault and armed robbery. — Defendant was entitled to resentencing with regard to the defendant's convictions on one count of aggravated assault and one count of armed robbery arising from the robbery of a restaurant because the two counts were based upon the same conduct, namely pointing a handgun at the restaurant's manager in order to commit a robbery. Fagan v. State, 283 Ga. App. 784, 643 S.E.2d 268 (2007).

Sentence as recidivist proper. — Upon convictions for armed robbery, possession of a firearm during the commission of a crime, and theft by taking, the trial court did not err in denying a motion to vacate an illegal sentence, despite the claim that the defendant was improperly punished as a recidivist, as nothing supported the argument that the defendant received an enhanced punishment based on an uncertified, non-final disposition from the State of Louisiana; moreover, a trial court was authorized to sentence a defendant to life imprisonment for armed robbery, even when that defendant was not a recidivist. Jefferson v. State, 279 Ga. App. 97, 630 S.E.2d 528 (2006).

Trial court did not err by imposing the maximum sentence, which was life imprisonment, upon the defendant's conviction for armed robbery given the defendant's recidivist status as the court lacked the authority to probate or suspend any part of that sentence pursuant to O.C.G.A. § 17-10-7 based on the defendant's prior felony conviction. Bryant v. State, 286 Ga. App. 493, 649 S.E.2d 597 (2007).

Trial court did not abuse the court's discretion in sentencing the defendant as a recidivist under O.C.G.A. § 17-10-7(a) and (c) because the defendant had been convicted of at least three prior felonies, and thus, the defendant was required to be sentenced to the longest period of time prescribed for the punishment of the subsequent armed robbery offense and was required to serve the maximum time provided in the sentence of the trial court based upon the defendant's conviction of armed robbery and would not be eligible for parole until the maximum sentence had been served; because life imprisonment was an authorized punishment for a conviction of armed robbery under O.C.G.A. § 16-8-41(b), and because the defendant was sentenced as a recidivist under § 17-10-7(a) and (c), the trial court lacked the discretion to sentence the defendant to a lesser sentence, and it was presumed that the trial court exercised the court's discretion in sentencing the defendant to a period of incarceration, rather than probation, when no evidence to the contrary appeared. Lester v. State, 309 Ga. App. 1, 710 S.E.2d 161 (2011).

Trial court did not err in imposing a sentence of life imprisonment without parole after the defendant was convicted of armed robbery because the record did not support the defendant's assertion that the conviction was obtained in violation of the defendant's constitutional right to counsel; the state offered evidence that the defendant's prior case was tried before a jury, that the defendant exercised the constitutional right to self representation, and that appointed standby counsel was available to assist the defendant at trial. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Trial court did not err in sentencing the defendant as a recidivist because the trial court committed no error in using the defendant's 1991 Michigan armed robbery conviction as a predicate offense for recidivist punishment as the state met the state's burden of proving that the defendant's Michigan conviction was for conduct that would have been considered a felony under Georgia law because, if the defendant had committed the offense of armed robbery in Georgia as a juvenile in 1991, a superior court would have had concurrent jurisdiction over the matter and the defendant could have been convicted of the felony offense of armed robbery. Anderson v. State, 337 Ga. App. 739, 788 S.E.2d 831 (2016).

Sentence imposed under plea agreement upheld. — Unlawful participation by trial judge in plea negotiation rendered the defendant's plea of guilty to two counts of armed robbery involuntary; advising the defendant that the judge would not give the same sentence considerations if the defendant proceeded to

Sentence (Cont'd)

trial substantially influenced the defendant's decision to plead guilty. Gibson v. State, 281 Ga. App. 607, 636 S.E.2d 767 (2006).

Trial court properly denied the defendant's petition to correct a void sentence, which alleged that he sentence was illegal because the crime of armed robbery merged with the crime of voluntary manslaughter as the sentence was imposed pursuant to a plea agreement with the state in which the defendant waived any objection to the sentence by entering a guilty plea to the charges and specifically agreeing to separate, concurrent sentences for each charge, in exchange for the dismissal of five other charges; hence, the defendant waived any complaint on appeal that the sentence was void or illegal. Carr v. State, 282 Ga. App. 134, 637 S.E.2d 835 (2006).

Plea not invalid when defendant received bargain for sentence. — Although the record did not reveal that the defendant was advised of the mandatory minimum sentences on the charges to which the defendant pled guilty, as contemplated by Ga. Unif. Super. Ct. R. 33.8(C)(4), given that the defendant received the sentence the defendant bargained for, the defendant could not establish that the defendant suffered adverse consequences from not knowing the mandatory minimum sentences for armed robbery and kidnapping. Belcher v. State, 304 Ga. App. 645, 697 S.E.2d 300 (2010).

Sentence appropriate. — Juvenile defendant was sentenced as an adult to 10 years' imprisonment after being convicted of conspiracy to commit armed robbery in a criminal episode in which a person was killed. As the 10-year sentence was within the limits set by O.C.G.A. §§ 16-4-8 and 16-8-41(b), and there was no showing that the sentence was overly severe or excessive in proportion to the offense, the sentence did not violate the Eighth Amendment. Pascarella v. State, 294 Ga. App. 414, 669 S.E.2d 216 (2008), cert. denied, No. S09C0426, 2009 Ga. LEXIS 188 (Ga. 2009).

Sentence of life in prison plus years consecutive for convictions of felony murder and armed robbery did not exceed the statutorily authorized maximum; the felony murder statute, O.C.G.A. § 16-5-1, authorized a sentence of life in prison on conviction for felony murder, and the armed robbery statute, O.C.G.A. § 16-8-41, authorized a sentence of death or imprisonment for life or by imprisonment for not less than 10 nor more than 20 years. The trial court sentenced defendant to life in prison for the felony murder conviction plus two 20-year terms, running concurrent to each other but consecutive to the felony murder sentence, for the two convictions for armed robbery, and thus the statutory maximum was not exceeded. Washington v. State, 285 Ga. 541, 678 S.E.2d 900 (2009).

Defendant's sentence of 20 years to serve for armed robbery, 20 years probation for aggravated assault, and 5 years probation for possession of a firearm during the commission of a felony, each to run consecutively, did not constitute cruel and unusual punishment in violation of the Eighth Amendment because the trial court's sentence fell within the statutory range of punishment, O.C.G.A. §§ 16-5-21(b), 16-8-41(b), and 16-11-106(b); under O.C.G.A. § 17-10-10(a), it was within the trial court's discretion to order that the defendant's sentences on armed robbery and aggravated assault run consecutively. McKenzie v. State, 302 Ga. App. 538, 691 S.E.2d 352 (2010).

Defendant's life sentence for armed robbery was within the statutory limits, O.C.G.A. § 16-8-41(b), and the 20-year sentences imposed for the defendant's aggravated assaults were within the statutory range of punishment under O.C.G.A. § 16-5-21(b). Therefore, the sentences were not void, and the court had no basis for disturbing the sentences. Gillespie v. State, 311 Ga. App. 442, 715 S.E.2d 832 (2011).

Sentence of ten years to serve for felony shoplifting was upheld; contrary to the defendant's contention, the trial court did not sentence the defendant as a recidivist pursuant to O.C.G.A. § 17-10-7. The trial court's imposition of a sentence within the statutory limits would not be disturbed. Tyner v. State, 313 Ga. App. 557, 722 S.E.2d 177 (2012).

Twenty-year sentence imposed for armed robbery did not violate the United States or Georgia Constitutions as the sentence was within the statutory range for armed robbery and was not grossly disproportionate to the crime. Windhom v. State, 326 Ga. App. 212, 756 S.E.2d 296 (2014).

Because O.C.G.A. § 16-8-41(b) is not ambiguous in its provision for a maximum sentence of life imprisonment, and because the defendant's sentence of life imprisonment fell within the statutory range of punishment, the defendant's sentence was not void. Hudson v. State, 334 Ga. App. 166, 778 S.E.2d 406 (2015).

Sentence of minor appropriate. — Trial court did not err in sentencing the defendant to 20 years to serve 10 in prison pursuant to O.C.G.A. § 16-8-41(b) and (d) because, although the defendant was only 13 years old, the defendant participated in an armed robbery; the legislature's determination that the superior court has jurisdiction over minors 13 to 17 years of age who are alleged to have committed certain serious offenses is founded on a rational basis, including the need for secure placement of certain violent juvenile offenders and the safety of students and citizens of Georgia, O.C.G.A. § 15-11-28(b)(2)(A). Cuvas v. State, 306 Ga. App. 679, 703 S.E.2d 116 (2010).

Sentence improper when beyond statutory range. — Trial court's imposition of a 30-year term of imprisonment on the defendant for the defendant's conviction of armed robbery in violation of O.C.G.A. § 16-8-41 was error because the allowable sentences were either life imprisonment or a term between 10 and 20 years of imprisonment. Bell v. State, 284 Ga. 790, 671 S.E.2d 815 (2009).

Right to counsel for resentencing. — Defendant's re-sentencing without court-appointed counsel to represent the defendant was affirmed as the trial court was simply instructed to merge the defendant's armed robbery conviction into the defendant's felony murder conviction; as the trial court had no discretion in the matter and the court's re-sentencing of the defendant was a ministerial act, the re-sentencing was proper. Robertson v. State, 280 Ga. 885, 635 S.E.2d 138 (2006).

Resentence proper. — Trial court did not err in resentencing the defendant to a probated sentence of ten years for a theft by receiving conviction, upon filing a motion under O.C.G.A. § 16-8-12, with such sentence to commence ten years after the beginning of a term of imprisonment for an armed robbery conviction as: (1) the revised sentence did not impermissibly increase the original sentence imposed; (2) the revised probated sentence effected no change in the probation term to be served following the confinement for armed robbery as both the original and revised sentences provided for five years of probation, consecutive to the defendant's confinement; and (3) the defendant failed to show fulfillment of the maximum legal term for the theft by receiving conviction, or that any of the probation requirements had been satisfied. Fair v. State, 281 Ga. App. 518, 636 S.E.2d 712 (2006), cert. denied, No. S07C0125, 2007 Ga. LEXIS 494 (Ga. 2007).

Sentence within range and not subject to resentencing. — Defendant could not appeal the denial of a motion to correct a void sentence as the motion was filed in 2007, more than 12 years after the defendant's conviction for armed robbery was affirmed in 1994 and outside the statutory period in O.C.G.A. § 17-10-1(f), and the defendant's sentence of life imprisonment was not void as the sentence was within the range set out in former O.C.G.A. § 16-8-41(b). Brown v. State, 295 Ga. App. 66, 670 S.E.2d 867 (2008).

Merger of aggravated assault and armed robbery. — Trial court erred in failing to merge the defendant's conviction for aggravated assault into the defendant's conviction for armed robbery. Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Armed robbery counts did not merge into malice murder counts because the evidence was sufficient to show both victims were subjected to the defendant's exercise of actual force by the use of an offensive weapon so as to induce the relinquishment of another's property. Hulett v. State, 296 Ga. 49, 766 S.E.2d 1 (2014), cert. denied, 135 S. Ct. 2358, 192 L. Ed. 2d 153 (U.S. 2015).

Because the victim was still being pistol

Sentence (Cont'd)

whipped while the men asked the victim what the victim had and took the victim's wallet and cell phone, the robbery by use of a handgun was completed at the same place and approximately the same time as the aggravated assault with a handgun; thus, the timing of the offenses of armed robbery and aggravated assault with intent to rob did not preclude their merger. Curtis v. State, 330 Ga. App. 839, 769 S.E.2d 580 (2015).

Because the "assault" element of aggravated assault with intent to rob is contained within the "use of an offensive weapon" element of armed robbery and both crimes share the "intent to rob" element, there is no element of aggravated assault with intent to rob that is not contained in armed robbery, and the offenses merge. Curtis v. State, 330 Ga. App. 839, 769 S.E.2d 580 (2015).

Defendant's conviction for aggravated assault should have merged with the conviction for criminal attempt to commit armed robbery because those acts were predicated upon the same act, the defendant's use of a handgun to overpower and intimidate the victim for the purpose of attempting to rob the victim of the victim's belongings. Morris v. State, 340 Ga. App. 295, 797 S.E.2d 207 (2017).

Because an attempted armed robbery began when the defendant kicked down the victim's door, entered the victim's home with a firearm, and demanded that the victim give it up, and continued as the victim and a codefendant struggled outside; after the victim was able to run away, the codefendant shot the victim twice; the robbery and aggravated assault were separate offenses and did not merge. Cuyler v. State, 344 Ga. App. 532, No. A17A1804, 2018 Ga. App. LEXIS 63 (2018).

No merger of aggravated assault and attempted armed robbery. — Trial court erred in failing to merge the defendant's convictions for attempted armed robbery and aggravated assault because the aggravated assault charge did not require proof of any fact that was not also required to prove the attempted armed robbery as that offense could have been proved under the indictment in the current case; and the conduct involved in the attempted armed robbery count and aggravated assault count arose out of the same act or transaction as both counts alleged that the defendant pointed the gun at the victim, and the victim indicated that the gun was directed at the victim one time. Wilson v. State, 344 Ga. App. 285, 810 S.E.2d 303 (2018).

Death Penalty

Constitutionality. — See Coker v. State, 234 Ga. 555, 216 S.E.2d 782 (1975).

Punishment of death does not invariably violate Constitution. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Conviction for armed robbery standing alone will not authorize incorporation of death penalty. — While for appellate jurisdictional purposes armed robbery is no longer a capital felony, notwithstanding the above, armed robbery is still considered a capital offense under the aggravating circumstances provision of O.C.G.A. § 17-10-30. Simmons v. State, 149 Ga. App. 830, 256 S.E.2d 79 (1979).

Sufficient evidence to impose death penalty. — Petitioner, a death row inmate, in a federal habeas petition argued the death sentence was unconstitutionally imposed because there was insufficient evidence to establish that the murder occurred during the commission of an armed robbery under O.C.G.A. § 16-8-41 for purposes of O.C.G.A. § 17-10-30(b)(2); however, the argument was rejected because while the victim's wallet was never found, the wallet was missing, the petitioner had not yet cashed the petitioner's paycheck but nevertheless was in possession of a large sum of cash the night the murder occurred, the petitioner was in possession of an ATM card later determined to belong to the victim, and the petitioner attempted to use the ATM card to withdraw money while wearing a straw hat and sunglasses. Jefferson v. Terry, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), aff'd in part and rev'd in part, 570 F.3d 1283 (11th Cir. Ga. 2009).

Finding of aggravating circumstance is prerequisite to imposition

of death penalty. — Before convicted defendant may be sentenced to death, jury or trial judge, in cases tried without a jury, must find beyond a reasonable doubt one of the ten aggravating circumstances specified in O.C.G.A. § 17-10-30. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

There was no merit in appellant's contention that armed robbery is no longer a capital felony for purpose of applying the aggravating circumstances provision of O.C.G.A § 17-10-30. Solomon v. State, 247 Ga. 27, 277 S.E.2d 1 (1980), cert. denied, 451 U.S. 1011, 101 S. Ct. 2348, 68 L. Ed. 2d 863 (1981).

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As to sentences for armed robbery imposed after July 1, 1976 for less than five years, see 1977 Op. Att'y Gen. No. 77-71.

RESEARCH REFERENCES

Am. Jur. 2d. — 67 Am. Jur. 2d, Robbery, § 7 et seq.

C.J.S. — 77 C.J.S., Robbery, §§ 1 et seq., 81.

ALR. — Threat to arrest or prosecute and acts in connection therewith as force or putting in fear for purposes of robbery, 27 A.L.R. 1299.

What constitutes larceny "from a person," 74 A.L.R.3d 271.

Retaking of money lost at gambling as robbery or larceny, 77 A.L.R.3d 1363.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Stationary object or attached fixture as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 8 A.L.R.5th 775.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 124 A.L.R.5th 657.

Robbery: Identification of victim as person named in indictment or information, 4 A.L.R.6th 577.

Parts of human body, other than feet, as deadly or dangerous weapons or instrumentalities for purposes of statutes aggravating offenses such as assault and robbery, 67 A.L.R.6th 103.

"Intimidation" as element of bank robbery under 18 USCA § 2113(a), 163 A.L.R. Fed. 225.

ARTICLE 3

CRIMINAL REPRODUCTION AND SALE OF RECORDED MATERIAL

16-8-60. Reproduction of recorded material; transfer, sale, distribution, circulation; civil forfeiture; restitution.

(a) It is unlawful for any person, firm, partnership, corporation, or association knowingly to:

(1) Transfer or cause to be transferred any sounds or visual images recorded on a phonograph record, disc, wire, tape, videotape, film, or other article on which sounds or visual images are recorded onto any other phonograph record, disc, wire, tape, videotape, film, or article without the consent of the person who owns the master phonograph

record, master disc, master tape, master videotape, master film, or other device or article from which the sounds or visual images are derived; or

(2) Sell; distribute; circulate; offer for sale, distribution, or circulation; possess for the purpose of sale, distribution, or circulation; cause to be sold, distributed, or circulated; cause to be offered for sale, distribution, or circulation; or cause to be possessed for sale, distribution, or circulation any article or device on which sounds or visual images have been transferred, knowing it to have been made without the consent of the person who owns the master phonograph record, master disc, master tape, master videotape, master film, or other device or article from which the sounds or visual images are derived.

(b) It is unlawful for any person, firm, partnership, corporation, or association to sell; distribute; circulate; offer for sale, distribution, or circulation; or possess for the purposes of sale, distribution, or circulation any phonograph record, disc, wire, tape, videotape, film, or other article on which sounds or visual images have been transferred unless such phonograph record, disc, wire, tape, videotape, film, or other article bears the actual name and address of the transferor of the sounds or visual images in a prominent place on its outside face or package.

(c) This Code section shall not apply to any person who transfers or causes to be transferred any such sounds or visual images:

(1) Intended for or in connection with radio or television broadcast transmission or related uses;

(2) For archival purposes; or

(3) Solely for the personal use of the person transferring or causing the transfer and without any profit being derived by the person from the transfer.

(d) Every person convicted of violating this Code section shall be guilty of a felony and shall be punished as follows:

(1) Upon the first conviction of violating this Code section, by a fine of not less than $500.00 nor more than $25,000.00, by imprisonment for not less than one year nor more than two years, or both such fine and imprisonment;

(2) Upon the second conviction of violating this Code section, by a fine of not less than $1,000.00 nor more than $100,000.00, by imprisonment for not less than one year nor more than three years and the judge may suspend, stay, or probate all but 48 hours of any term of imprisonment, or both such fine and imprisonment; or

(3) Upon the third or subsequent conviction of violating this Code section, by a fine of not less than $2,000.00 nor more than

$250,000.00, by imprisonment for not less than two nor more than five years and the judge may suspend, stay, or probate all but six days of any term of imprisonment, or both such fine and imprisonment.

(e) This Code section shall neither enlarge nor diminish the right of parties to enter into a private contract.

(f)(1) Any phonograph record, disc, wire, tape, videotape, film, or other article onto which sounds or visual images have been transferred in violation of this Code section are declared to be contraband and no person shall have a property right in them; provided, however, that notwithstanding paragraph (2) of subsection (a) of Code Section 9-16-17, no property of any owner shall be forfeited under this paragraph, to the extent of the interest of such owner, by reason of an act or omission established by such owner to have been committed or omitted without knowledge or consent of such owner.

(2) Any property subject to forfeiture pursuant to paragraph (1) of this subsection shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9.

(g) For purposes of imposing restitution pursuant to Chapter 14 of Title 17 when a person is convicted pursuant to this Code section, the court shall consider damages to any owner or lawful producer of a master phonograph record, master disc, master tape, master videotape, master film, or other device or article from which sounds or visual images are derived. Restitution shall be based upon the aggregate wholesale value of lawfully manufactured and authorized recorded devices corresponding to the nonconforming recorded devices involved in the violation of this Code section and shall also include reasonable investigative costs related to the detection of the violation of this Code section. (Ga. L. 1975, p. 44, § 1; Ga. L. 1978, p. 1938, § 1; Ga. L. 1986, p. 652, § 1; Ga. L. 1988, p. 13, § 16; Ga. L. 2008, p. 240, § 1/SB 406; Ga. L. 2015, p. 693, § 2-7/HB 233.)

Cross references. — Deceptive or unfair trade or consumer practices generally, § 10-1-370 et seq. Criminal penalty for obtaining telephone, telegraph, or cable television service by means of schemes, devices, etc., which avoid payment of lawful charges for such service, § 46-5-2 et seq.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).

For note, "(Don't) Give It Up Or Turn It Loose: State Law Copyright Protection of Pre-1972 Sound Recordings in Blank Slate Jurisdictions Like Georgia," see 49 Ga. L. Rev. 819 (2015).

JUDICIAL DECISIONS

Constitutionality. — Trial court did not err in finding that O.C.G.A. § 16-8-60(b) was not unconstitutionally vague nor overbroad and was not preempted by federal law, as: (1) the statute aimed to protect the public and entertainment industry from piracy and bootlegging, a legitimate governmental interest unrelated to free speech concerns; (2) the statute did not impinge upon pure speech, but, at most, regulated a combination of commercial conduct and speech; (3) the statute's deterrent effect on legitimate expression was minimal; and (4) the statute plainly prohibited the sale or possession for the purposes of sale of an article that did not prominently display the name and address of the individual (or entity) who transferred the sounds to the article; moreover, there was no federal preemption as the statute contained an extra element, specifically, labeling, which qualitatively distinguished it from federal copyright law. Briggs v. State, 281 Ga. 329, 638 S.E.2d 292 (2006).

Conviction not time-barred. — Conviction for criminal reproduction of recorded material in violation of O.C.G.A. § 16-8-60(b) was not time-barred under O.C.G.A. § 17-3-1(c); the defendant was observed committing the crime on May 22, 2004, when illegally recorded material was found in the defendant's car, and a superseding indictment was issued on February 7, 2006. Hayward-El v. State, 284 Ga. App. 125, 643 S.E.2d 242 (2007).

Multiple charges. — Because defendant's argument on appeal was a challenge to defendant's convictions for making 91 unauthorized offers to sell recorded material under O.C.G.A. § 16-8-60(b), and because an O.C.G.A. § 16-1-7(a) motion to correct or modify an illegal sentence was not an appropriate remedy to attack a conviction in a criminal case, defendant did not properly challenge the convictions; defendant's only recourse was through habeas corpus proceedings. Rogers v. State, 314 Ga. App. 398, 724 S.E.2d 417 (2012).

Exemption applied. — Exemption to O.C.G.A. § 16-8-60, set forth in § 16-8-60(c)(l), applies such that Internet radio services of the type offered by the operator were exempt from application of § 16-8-60 because there was no significant difference in either the user experience or the nature of the broadcast of sound recordings between terrestrial AM/FM and Internet transmissions of the type offered by the operator and, thus, the latter was a related use of the former. iHeartMedia, Inc. v. Sheridan, 300 Ga. 771, 798 S.E.2d 223 (2017).

16-8-61. Display of official rating on video movies.

(a) As used in this Code section, the term:

(1) "Official rating" means the official rating of a motion picture by the Classification and Rating Administration of the Motion Picture Association of America.

(2) "Video movie" means a videotape, video cassette, video disc, any prerecorded video display or visual depiction, any prerecorded device that can be converted to a visual depiction, or other reproduction or reconstruction of a motion picture.

(b) No person may sell, rent, loan, or otherwise disseminate or distribute for monetary consideration a video movie unless the official rating of the motion picture from which the video movie is copied is clearly and prominently displayed in boldface type on the outside of the cassette, case, jacket, or other covering containing the video movie.

Such video movie shall be clearly and prominently marked as "not rated" if:

(1) The motion picture from which the video movie is copied has no official rating;

(2) The official rating of the motion picture from which the video movie is copied is not readily available to such person; or

(3) The video movie has been altered so that its content materially differs from the motion picture.

(c) Any person who violates subsection (b) of this Code section shall, upon conviction thereof, be punished by a fine of not more than $100.00. (Code 1981, § 16-8-61, enacted by Ga. L. 1987, p. 1384, § 1.)

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Fingerprintable offense. — Failure of persons selling or renting video movies to display the official rating of the motion picture on the covering of the video movie is not at this time designated as an offense which requires that persons charged with the statute's violation be fingerprinted. 1987 Op. Att'y Gen. No. 87-21.

16-8-62. Film piracy prohibited; exceptions; penalty for violation.

(a) As used in this Code section, the term:

(1) "Audiovisual recording device" means any device capable of recording or transmitting a motion picture, or any part thereof, using any technology now known or later developed.

(2) "Facility" shall not include a personal residence.

(b) Any person who knowingly operates the recording function of an audiovisual recording device while a motion picture is being exhibited, without the consent of the owner, operator, or lessee of the exhibition facility and of the licensor of the motion picture being exhibited, shall be guilty of film piracy.

(c) The provisions of this Code section shall not be construed to prevent any lawfully authorized investigative, law enforcement, or intelligence personnel of the state or federal government from operating any audiovisual recording device in a facility where a motion picture is being exhibited as part of their official duties or activities.

(d) This Code section is not applicable to a person who operates an audiovisual recording device in a retail establishment solely to demonstrate the use of the device for sales purposes.

(e) A prosecution under this Code section shall not preclude obtaining any other civil or criminal remedy under any other provision of law.

(f) Violation of this Code section is a misdemeanor of a high and aggravated nature and punishable upon conviction as provided in Code Section 17-10-4. A second or subsequent conviction for violation of this Code section shall be punishable as a felony. (Code 1981, § 16-8-62, enacted by Ga. L. 2004, p. 341, § 1.)

Cross references. — Actions for false arrest and false imprisonment for individuals suspected of film piracy, § 51-7-62.

ARTICLE 4

MOTOR VEHICLE CHOP SHOPS AND STOLEN AND ALTERED PROPERTY

16-8-80. Short title.

This article shall be known and may be cited as the "Motor Vehicle Chop Shop and Stolen and Altered Property Act." (Code 1981, § 16-8-80, enacted by Ga. L. 1991, p. 1805, § 1.)

Cross references. — Scrap metal processors, § 43-43-1 et seq. Used motor vehicle and used motor vehicle parts dealers, § 43-47-1.

16-8-81. Legislative findings.

(a) The General Assembly finds and declares the following:

(1) The annual number of reported motor vehicle thefts has exceeded 1 million. Approximately 50 percent of all larcenies reported to law enforcement authorities in the United States are directed against motor vehicles. The recovery rate of stolen motor vehicles has decreased significantly during the most recent decade;

(2) Thefts of motor vehicles and the disposition of stolen motor vehicles and motor vehicle parts are becoming more professional in nature. Such theft and disposition activities have attracted criminal elements which have used intimidation and violence as a means of obtaining increased control of such activities;

(3) The theft of motor vehicles has brought increased and unnecessary burdens to motor vehicle users and taxpayers, as the national financial cost of motor vehicle related theft offenses currently approaches $5 billion annually;

(4) Prosecutors should give increased emphasis to the prosecution of persons committing motor vehicle thefts, with particular emphasis given to professional motor vehicle theft operations and to persons engaged in the dismantling of stolen motor vehicles for the purpose of trafficking in stolen motor vehicle parts; and

(5) Traditional law enforcement strategies and techniques that concentrate on bringing criminal penalties to bear on motor vehicle thieves, but do not focus on chop shops that are heavily involved in the dismantling of stolen motor vehicles or the distribution of motor vehicle parts and that do not enlist the assistance of private enforcement and use civil sanctions, are inadequate to control motor vehicle theft, as well as related offenses. Comprehensive strategies must be formulated; more effective law enforcement techniques must be developed; evidentiary, procedural, and substantive laws must be strengthened; and criminal penalties and civil sanctions must be enhanced.

(b) The General Assembly, therefore, concludes that for the protection of the general public interest, the "Motor Vehicle Chop Shop and Stolen and Altered Property Act" shall be enacted. (Code 1981, § 16-8-81, enacted by Ga. L. 1991, p. 1805, § 1.)

16-8-82. Definitions.

As used in this article, the term:

(1) "Chop shop" means any building, lot, or other premise where one or more persons knowingly engage in altering, destroying, disassembling, dismantling, reassembling, or storing any motor vehicle or motor vehicle part known to be illegally obtained by theft, fraud, or conspiracy to defraud in order to either:

(A) Alter, counterfeit, deface, destroy, disguise, falsify, forge, obliterate, or remove the identification, including the vehicle identification number of such motor vehicle or motor vehicle part, in order to misrepresent the identity of such motor vehicle or motor vehicle part or to prevent the identification of such motor vehicle or motor vehicle part; or

(B) Sell or dispose of such motor vehicle or motor vehicle part.

(2) "Motor vehicle" includes every device in, upon, or by which any person or property is or may be transported or drawn upon a highway which is self-propelled or which may be connected to and towed by a self-propelled device and also includes any and all other land based devices which are self-propelled but which are not designed for use upon a highway, including, but not limited to, farm machinery and construction equipment.

(3) "Person" includes a natural person, company, corporation, unincorporated association, partnership, professional corporation, and any other legal entity.

(4) "Unidentifiable" means that the uniqueness of a motor vehicle or motor vehicle part cannot be established by either expert law

enforcement investigative personnel specially trained and experienced in motor vehicle theft investigative procedures and motor vehicle identification examination techniques or by expert employees of not for profit motor vehicle theft prevention agencies specially trained and experienced in motor vehicle theft investigation procedures and motor vehicle identification examination techniques.

(5) "Vehicle identification number" includes, but is not limited to, a number or numbers, a letter or letters, a character or characters, a datum or data, a derivative or derivatives, or a combination or combinations thereof, used by the manufacturer or the Department of Revenue for the purpose of uniquely identifying a motor vehicle or motor vehicle part. (Code 1981, § 16-8-82, enacted by Ga. L. 1991, p. 1805, § 1; Ga. L. 2002, p. 415, § 16; Ga. L. 2003, p. 140, § 16; Ga. L. 2005, p. 334, § 6-1/HB 501.)

JUDICIAL DECISIONS

Cited in Conley v. State, 281 Ga. App. 841, 637 S.E.2d 438 (2006).

16-8-83. Owning, operating, or conducting a chop shop; penalty.

(a) Any person who knowingly and with intent:

(1) Owns, operates, or conducts a chop shop;

(2) Transports any motor vehicle or motor vehicle part to or from a location knowing it to be a chop shop; or

(3) Sells, transfers, purchases, or receives any motor vehicle or motor vehicle part either to or from a location knowing it to be a chop shop

shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than three years nor more than ten years, by a fine of not more than $100,000.00, or by both such fine and imprisonment.

(b) Any person who knowingly alters, counterfeits, defaces, destroys, disguises, falsifies, forges, obliterates, or removes a vehicle identification number with the intent to misrepresent the identity or prevent the identification of a motor vehicle or motor vehicle part shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years, by a fine of not more than $50,000.00, or by both such fine and imprisonment.

(c)(1) Any person who buys, disposes, sells, transfers, or possesses a motor vehicle or motor vehicle part with knowledge that the vehicle identification number of the motor vehicle or motor vehicle part has

been altered, counterfeited, defaced, destroyed, disguised, falsified, forged, obliterated, or removed shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years, by a fine of not more than $50,000.00, or by both such fine and imprisonment.

(2) The provisions of paragraph (1) of this subsection shall not apply to a motor vehicle scrap processor who, in the normal legal course of business and in good faith, processes a motor vehicle or motor vehicle part by crushing, compacting, or other similar methods, provided that any vehicle identification number is not removed from the motor vehicle or motor vehicle part prior to or during any such processing.

(3) The provisions of paragraph (1) of this subsection shall not apply to any owner or authorized possessor of a motor vehicle recovered by law enforcement authorities after having been stolen or where the condition of the vehicle identification number of the motor vehicle or motor vehicle part is known to or has been reported to law enforcement authorities. It shall be presumed that law enforcement authorities have knowledge of all vehicle identification numbers on a motor vehicle or motor vehicle part which are altered, counterfeited, defaced, disguised, falsified, forged, obliterated, or removed when law enforcement authorities deliver or return the motor vehicle or motor vehicle part to its owner or authorized possessor after it has been recovered by law enforcement authorities after having been reported stolen.

(d) A person commits the offense of attempted operation of a chop shop when, with the intent to commit a violation proscribed by subsection (a), (b), or (c) of this Code section, the person does any act which constitutes a substantial step toward the commission of a violation proscribed by subsection (a), (b), or (c) of this Code section; and such person shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than five years, by a fine of not more than $25,000.00, or by both such fine and imprisonment.

(e) A person commits the offense of conspiracy when, with the intent that a violation proscribed by subsection (a), (b), or (c) of this Code section be committed, the person agrees with another to the commission of a violation proscribed by subsection (a), (b), or (c) of this Code section; and such person shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than five years, by a fine of not more than $25,000.00, or by both such fine and imprisonment. No person may be convicted of conspiracy under this subsection unless an act in furtherance of such agreement is alleged and proved to have been committed by that person or a coconspirator.

(f) A person commits the offense of solicitation when, with the intent that a violation proscribed by subsection (a), (b), or (c) of this Code section be committed, the person commands, encourages, or requests another to commit a violation proscribed by subsection (a), (b), or (c) of this Code section; and such person shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than five years, by a fine of not more than $25,000.00, or by both such fine and imprisonment.

(g) A person commits the offense of aiding and abetting when, either before or during the commission of a violation proscribed by subsection (a), (b), or (c) of this Code section and with the intent to promote or facilitate such commission, the person aids, abets, agrees, or attempts to aid another in the planning or commission of a violation proscribed by subsection (a), (b), or (c) of this Code section; and such person shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than five years, by a fine of not more than $25,000.00, or by both such fine and imprisonment.

(h) A person is an accessory after the fact who maintains, assists, or gives any other aid to an offender while knowing or having reasonable grounds to believe the offender has committed a violation under subsection (a), (b), or (c) of this Code section; and such person shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than five years, by a fine of not more than $25,000.00, or by both such fine and imprisonment.

(i) No prosecution shall be brought and no person shall be convicted of any violation under this Code section where the acts of such person otherwise constituting a violation were done in good faith in order to comply with the laws or regulations of any state or territory of the United States or of the United States government.

(j) The sentence imposed upon a person convicted of any violation of this Code section shall not be reduced to less than one year of imprisonment for a second conviction or less than five years for a third or subsequent conviction, and no sentence imposed upon a person for a second or subsequent conviction of any violation of this Code section shall be suspended or reduced until such person shall have served the minimum period of imprisonment provided for in this Code section. A person convicted of a second or subsequent violation of this Code section shall not be eligible for probation, parole, furlough, or work release.

(k)(1) In addition to any other punishment, a person who violates this Code section shall be ordered to make restitution to the lawful owner or owners of the stolen motor vehicle or vehicles or the stolen

motor vehicle part or parts, to the owner's insurer to the extent that the owner has been compensated by the insurer, and to any other person for any financial loss sustained as a result of a violation of this Code section.

(2) For purposes of this Code section, the term:

(A) "Financial loss" shall include, but not be limited to, loss of earnings, out-of-pocket and other expenses, repair and replacement costs, and claims payments.

(B) "Lawful owner" shall include an innocent bona fide purchaser for value of a stolen motor vehicle or motor vehicle part who does not know that the motor vehicle or part is stolen or an insurer to the extent that such insurer has compensated a bona fide purchaser for value.

(3) The court shall determine the extent and method of restitution required under this subsection. In an extraordinary case, the court may determine that the best interests of the victim and justice would not be served by ordering restitution. In any such case, the court shall make and enter specific written findings on the record concerning the extraordinary circumstances presented which mitigated against restitution. (Code 1981, § 16-8-83, enacted by Ga. L. 1991, p. 1805, § 1; Ga. L. 1992, p. 6, § 16.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, in the second sentence of subsection (e), "coconspirator" was substituted for "coconspirator".

JUDICIAL DECISIONS

Evidence sufficient for conviction. — Evidence supported a conviction for operating a "chop shop" when the defendant admitted storing a vehicle that the defendant did not own and selling the vehicle to another person, and the car had a drive-out tag, a replaced steering column, and a missing door lock when the defendant obtained the vehicle; the person who provided the vehicle to the defendant had no proof of ownership, and when the defendant sold the automobile, multiple parts were missing, there was a discrepancy in the vehicle identification numbers on the windshield and on the engine, and the defendant admitted that the defendant had removed parts of the engine and failed to replace the parts before selling the vehicle. Maclin v. State, 287 Ga. App. 220, 651 S.E.2d 138 (2007).

Evidence that auto parts and a shell of a stolen car lacking a vehicle identification number plate were found at the defendant's home, that the defendant was always working on cars, and that it was apparent that a lot of work on cars occurred at the home was sufficient to convict the defendant of theft by receiving a stolen car, O.C.G.A. § 16-8-7(a), and operating a chop shop, O.C.G.A. § 16-8-82(1). Xiong v. State, 295 Ga. App. 697, 673 S.E.2d 86 (2009).

Because the evidence was more than sufficient for the jury to infer that the original vehicle identification numbers (VINs) on the vehicles allegedly registered to defendant were removed and replaced with false VINs, defendant was properly convicted of violating O.C.G.A. § 16-8-83(c)(1). Jarrett v. State, 299 Ga. App. 525, 683 S.E.2d 116 (2009).

Verdicts not mutually exclusive. — Although the defendant characterized the

jury's verdicts finding the defendant guilty of operating a chop shop and of falsifying a vehicle identification number as mutually exclusive, the two guilty verdicts returned by the jury could be logically reconciled as a finding that a person wilfully removed or falsified the identification number of a vehicle does not logically exclude a finding that the person owned, operated, or conducted a premise in which the person knowingly altered a vehicle identification number with the intent of misrepresenting the vehicle's identity, and the defendant's challenge was actually predicated upon the inconsistent verdict rule, which had been abolished in Georgia. Wilmott v. State, 326 Ga. App. 1, 755 S.E.2d 818 (2014).

16-8-84. Seizure of personal property used or possessed in connection with violation of Code Section 16-8-83.

(a) Any tool, implement, or instrumentality, including, but not limited to, a motor vehicle or motor vehicle part, used or possessed in connection with any violation of Code Section 16-8-83 may be seized by a member of a state or local law enforcement agency upon process issued by any court of competent jurisdiction.

(b) Seizure of property described in subsection (a) of this Code section may be made by a member of a state or local law enforcement agency without process if:

(1) The seizure is made in accordance with any applicable law or regulation;

(2) The seizure is incident to inspection under an administrative inspection warrant;

(3) The seizure is incident to a search made under a search warrant;

(4) The seizure is incident to a lawful arrest;

(5) The seizure is made pursuant to a valid consent to search;

(6) The property seized has been the subject of a prior judgment in favor of the state in a criminal proceeding or in an injunction or forfeiture proceeding under Code Section 16-8-86; or

(7) There are reasonable grounds to believe that the property is directly or indirectly dangerous to the health or safety of the public.

(c) When property is seized pursuant to this Code section, the seizing agency may:

(1) Place the property under seal; or

(2) Remove the property to a place selected and designated by the seizing agency. (Code 1981, § 16-8-84, enacted by Ga. L. 1991, p. 1805, § 1.)

16-8-85. Civil forfeiture of personal property seized.

(a) The following are subject to forfeiture unless obtained by theft, fraud, or conspiracy to defraud and the rightful owner is known or can be identified and located:

(1) Any tool;

(2) Any implement; or

(3) Any instrumentality, including, but not limited to, any motor vehicle or motor vehicle part, whether or not owned by the person from whose possession or control it was seized, which is used or possessed either in violation of Code Section 16-8-83 or to promote or facilitate a violation of Code Section 16-8-83.

(b) Any motor vehicle, other conveyance, or motor vehicle part used by any person as a common carrier is subject to forfeiture under this Code section where the owner or other person in charge of the motor vehicle, other conveyance, or motor vehicle part is a consenting party to a violation of Code Section 16-8-83.

(c) If a motor vehicle part has an apparent value in excess of $1,000.00:

(1) The seizing agency shall consult with an expert of the type specified in paragraph (4) of Code Section 16-8-82; and

(2) The seizing agency shall also request searches of the online and offline files of the National Crime Information Center and the National Automobile Theft Bureau when the Georgia Bureau of Investigation and Georgia Crime Information Center files have been searched with negative results.

(d) Any property subject to forfeiture pursuant to this Code section shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9, except as specifically set forth in subsections (g) through (j) of this Code section.

(e) A copy of a forfeiture order shall be filed with the sheriff of the county in which the forfeiture occurs and with each federal or state department or agency with which such property is required to be registered. Such order, when filed, constitutes authority for the issuance to the agency to whom the property is delivered and retained for use or to any purchaser of the property of a certificate of title, registration certificate, or other special certificate as may be required by law in consideration of the condition of the property.

(f) No motor vehicle, either seized under Code Section 16-8-84 or forfeited under this Code section, shall be released by the seizing agency or used or sold by an agency designated by the court unless any

altered, counterfeited, defaced, destroyed, disguised, falsified, forged, obliterated, or removed vehicle identification number is corrected by the issuance and affixing of either an assigned or replacement vehicle identification number plate as may be appropriate under laws or regulations of this state.

(g) No motor vehicle part having any altered, counterfeited, defaced, destroyed, disguised, falsified, forged, obliterated, or removed vehicle identification number may be disposed of upon forfeiture except by destruction thereof, except that this subsection shall not apply to any such motor vehicle part which is assembled with and constitutes part of a motor vehicle.

(h) No motor vehicle or motor vehicle part shall be forfeited under this Code section solely on the basis that it is unidentifiable. Instead of forfeiture, any seized motor vehicle or motor vehicle part which is unidentifiable shall be the subject of a written report sent by the seizing agency to the Department of Revenue which shall include a description of the motor vehicle or motor vehicle part, including its color, if any; the date, time, and place of its seizure; the name of the person from whose possession or control it was seized; the grounds for its seizure; and the location where the same is held or stored.

(i) When a seized unidentifiable motor vehicle or motor vehicle part has been held for 60 days or more after the notice to the Department of Revenue specified in subsection (h) of this Code section has been given, the seizing agency, or its agent, shall cause the motor vehicle or motor vehicle part to be sold at a public sale to the highest bidder. Notice of the time and place of sale shall be posted in a conspicuous place for at least 30 days prior to the sale on the premises where the motor vehicle or motor vehicle part has been stored.

(j)(1) When a seized unidentifiable motor vehicle or motor vehicle part has an apparent value of $1,000.00 or less, the seizing agency shall authorize the disposal of the motor vehicle or motor vehicle part, provided that no such disposition shall be made sooner than 60 days after the date of seizure.

(2) The proceeds of the public sale of an unidentifiable motor vehicle or motor vehicle part shall be deposited into the general fund of the state, county, or municipal corporation employing the seizing agency after deduction of any reasonable and necessary towing and storage charges.

(k) Seizing agencies shall utilize their best efforts to arrange for the towing and storing of motor vehicles and motor vehicle parts in the most economical manner possible. In no event shall the owner of a motor vehicle or a motor vehicle part be required to pay more than the minimum reasonable costs of towing and storage.

(l) A seized motor vehicle or motor vehicle part that is neither forfeited nor unidentifiable shall be held subject to the order of the court in which the criminal action is pending or, if a request for its release from such custody is made, until the prosecutor has notified the defendant or the defendant's attorney of such request and both the prosecution and defense have been afforded a reasonable opportunity for an examination of the property to determine its true value and to produce or reproduce, by photographs or other identifying techniques, legally sufficient evidence for introduction at trial or other criminal proceedings. Upon expiration of a reasonable time for the completion of the examination, which in no event shall exceed 14 days from the date of service upon the defense of the notice of request for return of property as provided in this subsection, the property shall be released to the person making such request after satisfactory proof of such person's entitlement to the possession thereof. Notwithstanding the foregoing, upon application by either party with notice to the other, the court may order retention of the property if it determines that retention is necessary in the furtherance of justice.

(m) When a seized vehicle is forfeited, restored to its owner, or disposed of as unidentifiable, the seizing agency shall retain a report of the transaction for a period of at least one year from the date of the transaction.

(n) When an applicant for a certificate of title or salvage certificate of title presents to the Department of Revenue proof that the applicant purchased or acquired a motor vehicle at public sale conducted pursuant to this Code section and such fact is attested to by the seizing agency, the Department of Revenue shall issue a certificate of title or a salvage certificate of title, as determined by the state revenue commissioner, for such motor vehicle upon receipt of the statutory fee, a properly executed application for a certificate of title or other certificate of ownership, and the affidavit of the seizing agency that a state assigned number was applied for and affixed to the motor vehicle prior to the time that the motor vehicle was released by the seizing agency to the purchaser. (Code 1981, § 16-8-85, enacted by Ga. L. 1991, p. 1805, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 2000, p. 951, § 12-2; Ga. L. 2005, p. 334, § 6-2/HB 501; Ga. L. 2015, p. 693, § 2-8/HB 233.)

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, pro-

vides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).

16-8-86. Civil action for violation of this article.

(a) The Attorney General, any prosecutor, or any aggrieved person may institute a civil action against any person in a court of competent jurisdiction seeking relief from conduct constituting a violation of any provision of this article. If the plaintiff in such action proves the alleged violation, or its threat, by a preponderance of the evidence, any court of competent jurisdiction after due provision for the rights of innocent persons shall grant relief by entering any appropriate order or judgment, including, but not limited to:

(1) Ordering any defendant to be divested of any interest in any property;

(2) Imposing reasonable restrictions upon the future activities or investments of any defendant, including prohibiting any defendant from engaging in the same type of endeavor as the defendant was engaged in previously;

(3) Ordering the suspension or revocation of a license, permit, or prior approval granted by any public agency or any other public authority; or

(4) Ordering the surrender of the charter of a corporation organized under the laws of this state or the revocation of a certificate authorizing a foreign corporation to conduct business within this state upon a finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct made unlawful by this article and that, for the prevention of future criminal conduct, the public interest requires the charter of the corporation be surrendered and the corporation dissolved or the certificate to conduct business in this state revoked.

(b) In a proceeding under this Code section, injunctive relief shall be granted in conformity with the principles that govern the granting of relief from injury or threatened injury in other cases, but no showing of special or irreparable injury shall have to be made. Pending final determination of a proceeding under this Code section, a temporary restraining order or a preliminary injunction may be issued upon a showing of immediate danger of significant injury, including the possibility that any judgment for money damages might be difficult to execute, and, in a proceeding initiated by an aggrieved person, upon the

execution of proper bond against injury for an injunction improvidently granted.

(c) Any person injured, directly or indirectly, by conduct constituting a violation by any person of Code Section 16-8-83 shall, in addition to any other relief, have a cause of action for threefold the actual damages sustained by the person.

(d) A final judgment or decree rendered against the defendant in any civil or criminal proceeding shall estop the defendant in any subsequent civil action or proceeding brought by any person as to all matters to which the judgment or decree would be an estoppel as between the parties to the civil or criminal proceeding.

(e) Notwithstanding any other provision of law providing for a shorter period of limitations, a civil action under this Code section may be commenced at any time within five years after the conduct made unlawful under Code Section 16-8-83 terminates or the cause of action accrues or within any longer statutory period that may be applicable. If any action is brought by a prosecutor to punish, prevent, or restrain any activity made unlawful under Code Section 16-8-83, the running of the period of limitations shall be suspended during the pendency of such action and for two years following its termination.

(f) Personal service of any process in an action under this Code section may be made upon any person outside the state if the person has engaged in any conduct constituting a violation of Code Section 16-8-83 in this state. The person shall be deemed to have thereby submitted to the jurisdiction of the courts of this state for the purposes of this subsection.

(g) Obtaining any civil remedy under this Code section shall not preclude obtaining any other civil or criminal remedy under this article or any other provision of law. Civil remedies under this Code section are supplemental and not exclusive. (Code 1981, § 16-8-86, enacted by Ga. L. 1991, p. 1805, § 1.)

ARTICLE 5

RESIDENTIAL MORTGAGE FRAUD

Editor's notes. — Ga. L. 2005, p. 848, § 1/SB 100, not codified by the General Assembly, provides that: "The General Assembly finds and declares that fraud involving residential mortgages is at an all-time high in the United States and in Georgia. Mortgage lending institutions and borrowers have suffered hundreds of millions of dollars in losses due to residential mortgage fraud. Homeowners in neighborhoods plagued by mortgage fraud have witnessed the deterioration of their neighborhoods. Fraudulently inflated property values in their neighborhoods have resulted in substantial increases in property taxes. The General Assembly therefore concludes that for the protection of the general public, and particularly for the protection of borrowers, homeowners, lending institutions, and the integrity of

the mortgage lending process, the 'Georgia Residential Mortgage Fraud Act' shall be enacted."

RESEARCH REFERENCES

C.J.S. — 59 C.J.S., Mortgages, §§ 79, 278, 279, 410, 411, 492.

16-8-100. Short title.

This article shall be known and may be cited as the "Georgia Residential Mortgage Fraud Act." (Code 1981, § 16-8-100, enacted by Ga. L. 2005, p. 848, § 2/SB 100.)

Law reviews. — For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005). For article on 2005 enactment of this article, see 22 Ga. St. U.L. Rev. 49 (2005). For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

16-8-101. Definitions.

As used in this article, the term:

(1) "Mortgage lending process" means the process through which a person seeks or obtains a residential mortgage loan including, but not limited to, solicitation, application, or origination, negotiation of terms, third-party provider services, underwriting, signing and closing, and funding of the loan. Such term shall also include the execution of deeds under power of sale that are required to be recorded pursuant to Code Section 44-14-160 and the execution of assignments that are required to be recorded pursuant to subsection (b) of Code Section 44-14-162. Documents involved in the mortgage lending process include, but shall not be limited to, uniform residential loan applications or other loan applications; appraisal reports; HUD-1 settlement statements; supporting personal documentation for loan applications such as W-2 forms, verifications of income and employment, bank statements, tax returns, and payroll stubs; and any required disclosures.

(2) "Pattern of residential mortgage fraud" means one or more misstatements, misrepresentations, or omissions made during the mortgage lending process that involve two or more residential properties, which have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics.

(3) "Person" means a natural person, corporation, company, limited liability company, partnership, trustee, association, or any other entity.

(4) "Residential mortgage loan" means a loan or agreement to extend credit made to a person, which loan is secured by a deed to secure debt, security deed, mortgage, security interest, deed of trust, or other document representing a security interest or lien upon any interest in one-to-four family residential property located in Georgia including the renewal or refinancing of any such loan. (Code 1981, § 16-8-101, enacted by Ga. L. 2005, p. 848, § 2/SB 100; Ga. L. 2006, p. 72, § 16/SB 465; Ga. L. 2012, p. 668, § 1/HB 237.)

Law reviews. — For annual survey on real property, see 64 Mercer L. Rev. 255 (2012).

JUDICIAL DECISIONS

Cited in State v. Corhen, 306 Ga. App. 495, 700 S.E.2d 912 (2010).

16-8-102. Residential mortgage fraud.

A person commits the offense of residential mortgage fraud when, with the intent to defraud, such person:

(1) Knowingly makes any deliberate misstatement, misrepresentation, or omission during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process;

(2) Knowingly uses or facilitates the use of any deliberate misstatement, misrepresentation, or omission, knowing the same to contain a misstatement, misrepresentation, or omission, during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process;

(3) Receives any proceeds or any other funds in connection with a residential mortgage closing that such person knew resulted from a violation of paragraph (1) or (2) of this Code section;

(4) Conspires to violate any of the provisions of paragraph (1), (2), or (3) of this Code section; or

(5) Files or causes to be filed with the official registrar of deeds of any county of this state any document such person knows to contain a deliberate misstatement, misrepresentation, or omission.

An offense of residential mortgage fraud shall not be predicated solely upon information lawfully disclosed under federal disclosure laws, regulations, and interpretations related to the mortgage lending process nor upon truthful information contained in documents filed

with the official registrar of deeds of any county of this state for the stated purpose of correcting scrivener's errors, mistakes, inadvertent misstatements, or omissions contained in previously filed documents. (Code 1981, § 16-8-102, enacted by Ga. L. 2005, p. 848, § 2/SB 100; Ga. L. 2012, p. 668, § 2/HB 237.)

JUDICIAL DECISIONS

Indictment sufficient. — Trial court erred in quashing an indictment for counts of residential mortgage fraud, in violation of O.C.G.A. § 16-8-102, and counts of felony theft by deception, in violation of O.C.G.A. § 16-8-3, because: (1) certain allegations between counts in the indictment were mere surplusage and did not invalidate the indictment; (2) the indictment was not duplicitous under O.C.G.A. § 16-1-7(a)(2); (3) the indictment was sufficient pursuant to the requirements of O.C.G.A. § 17-7-54(a) to withstand general and special demurrers as each count sufficiently stated the offense; and (4) each count was sufficient to charge each of the named defendants as either the actual perpetrator or as a party to the crime pursuant to O.C.G.A. §§ 16-2-20(a) and 16-2-21. State v. Corhen, 306 Ga. App. 495, 700 S.E.2d 912 (2010).

Theft by deception and residential mortgage fraud predicate acts for RICO. — Trial court erred in dismissing a mortgagor's RICO claim because the complaint alleged that the mortgagor was injured by at least two predicate acts (theft by deception and residential mortgage fraud) which could constitute a pattern of racketeering activity, and the mortgagee did not show that the mortgagor could not possibly introduce evidence within the framework of the complaint sufficient to grant relief on the RICO claim. Mbigi v. Wells Fargo Home Mortg., 336 Ga. App. 316, 785 S.E.2d 8 (2016).

Evidence sufficient for conviction. — Evidence that the defendant, a loan officer who handled the closing on a codefendant's home, was a party to a scheme whereby the defendant gave the codefendant money for the downpayment before closing, the codefendant falsely stated in the loan application that the codefendant had not borrowed the down payment, and later defaulted on the loan was sufficient to convict the defendant of residential mortgage fraud as a party to that crime. Gilford v. State, 295 Ga. App. 651, 673 S.E.2d 40 (2009), cert. denied, No. S09C0827, 2009 Ga. LEXIS 258 (Ga. 2009).

16-8-103. Venue.

For the purpose of venue under this article, any violation of this article shall be considered to have been committed:

(1) In the county in which the residential property for which a mortgage loan is being sought is located;

(2) In any county in which any act was performed in furtherance of the violation;

(3) In any county in which any person alleged to have violated this article had control or possession of any proceeds of the violation;

(4) If a closing occurred, in any county in which the closing occurred; or

(5) In any county in which a document containing a deliberate misstatement, misrepresentation, or omission is filed with the official registrar of deeds. (Code 1981, § 16-8-103, enacted by Ga. L. 2005, p. 848, § 2/SB 100.)

16-8-104. Authority to investigate and prosecute for residential mortgage fraud.

District attorneys and the Attorney General shall have the authority to conduct the criminal investigation and prosecution of all cases of residential mortgage fraud under this article or under any other provision of this title. Nothing in this Code section shall be construed to preclude otherwise authorized law enforcement agencies from conducting investigations of offenses related to residential mortgage fraud. (Code 1981, § 16-8-104, enacted by Ga. L. 2005, p. 848, § 2/SB 100; Ga. L. 2010, p. 1162, § 1/SB 371.)

Cross references. — Subpoena authority for investigating fraudulent real estate transactions, § 35-3-4.2.

Law reviews. — For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

16-8-105. Penalties.

(a) Any person violating this article shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not less than one year nor more than ten years, by a fine not to exceed $5,000.00, or both.

(b) If a violation of this article involves engaging or participating in a pattern of residential mortgage fraud or a conspiracy or endeavor to engage or participate in a pattern of residential mortgage fraud, said violation shall be punishable by imprisonment for not less than three years nor more than 20 years, by a fine not to exceed $100,000.00, or both.

(c) Each residential property transaction subject to a violation of this article shall constitute a separate offense and shall not merge with any other crimes set forth in this title. (Code 1981, § 16-8-105, enacted by Ga. L. 2005, p. 848, § 2/SB 100.)

JUDICIAL DECISIONS

Cited in State v. Corhen, 306 Ga. App. 495, 700 S.E.2d 912 (2010).

16-8-106. Civil forfeiture.

(a) As used in this Code section, the terms "civil forfeiture proceedings," "proceeds," and "property" shall have the same meanings as set forth in Code Section 9-16-2.

(b) Any property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of this article and any proceeds are declared to be contraband and no person shall have a property right in them.

(c) Any property subject to forfeiture pursuant to subsection (b) of this Code section shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9.

(d) The Attorney General shall be specifically authorized to commence civil forfeiture proceedings under this Code section. (Code 1981, § 16-8-106, enacted by Ga. L. 2005, p. 848, § 2/SB 100; Ga. L. 2015, p. 693, § 2-9/HB 233.)

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).

CHAPTER 9

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RESEARCH REFERENCES

ALR. — False statement as to matter of record as false pretense within criminal statute, 56 A.L.R. 1217

Appropriation or removal without payment of property delivered in expectation of immediate cash payment, as criminal offense, 83 A.L.R. 441.

Necessity of alleging and proving in prosecution for larceny, embezzlement, or receiving stolen property that "owner" of property, if not a natural person, was incorporated or otherwise a legal entity capable of owning property, 88 A.L.R. 485.

Offense of obtaining property by false pretenses predicated upon transaction involving conditional sales, 134 A.L.R. 874.

Admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempts on other occasions, 78 A.L.R.2d 1359.

Stolen money or property as subject of larceny or robbery, 89 A.L.R.2d 1435.

Admissibility, in prosecution for obtaining money or property by fraud or false pretenses, of evidence of subsequent payments made by accused to victim, 10 A.L.R.3d 572.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes, 77 A.L.R.3d 689.

Spouse's acceptance or retention of benefits of other spouse's fraudulent act as ratification of transaction, 82 A.L.R.3d 625.

ARTICLE 1

FORGERY AND RELATED OFFENSES

RESEARCH REFERENCES

ALR. — Forgery: use of fictitious or assumed name, 49 A.L.R.2d 852.

Procuring signature by fraud as forgery, 11 A.L.R.3d 1074.

16-9-1. Forgery; classification of forgery offenses.

(a) As used in this Code section, the term:

(1) "Bank" means incorporated banks, savings banks, banking companies, trust companies, credit unions, and other corporations doing a banking business.

(2) "Check" means any instrument for the payment or transmission of money payable on demand and drawn on a bank.

(3) "Writing" includes, but shall not be limited to, printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trademarks, and other symbols of value, right, privilege, or identification.

(b) A person commits the offense of forgery in the first degree when with the intent to defraud he or she knowingly makes, alters, or possesses any writing, other than a check, in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority and utters or delivers such writing.

(c) A person commits the offense of forgery in the second degree when with the intent to defraud he or she knowingly makes, alters, or possesses any writing, other than a check, in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority.

(d) A person commits the offense of forgery in the third degree when with the intent to defraud he or she knowingly:

(1) Makes, alters, possesses, utters, or delivers any check written in the amount of $1,500.00 or more in a fictitious name or in such manner that the check as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority; or

(2) Possesses ten or more checks written without a specified amount in a fictitious name or in such manner that the checks as made or altered purport to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority.

(e) A person commits the offense of forgery in the fourth degree when with the intent to defraud he or she knowingly:

(1) Makes, alters, possesses, utters, or delivers any check written in the amount of less than $1,500.00 in a fictitious name or in such manner that the check as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority; or

(2) Possesses less than ten checks written without a specified amount in a fictitious name or in such manner that the checks as made or altered purport to have been made by another person, at

another time, with different provisions, or by authority of one who did not give such authority. (Code 1933, § 26-1701, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 6; Ga. L. 2012, p. 899, § 3-5/HB 1176.)

Cross references. — Requirements regarding affixing of signatures to negotiable instruments, § 11-3-401 et seq.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Penal Code 1895, §§ 240, 243, former Penal Code 1910, §§ 231, 232, 236, 241, 245, and former Code 1933, § 26-3910, are included in the annotations for this Code section.

Uttering or delivering writing is an essential element of forgery in first degree. Ward v. State, 123 Ga. App. 216, 180 S.E.2d 280 (1971); Reeves v. State, 139 Ga. App. 214, 228 S.E.2d 201 (1976); Stone v. State, 166 Ga. App. 245, 304 S.E.2d 94 (1983); McGowan v. State, 173 Ga. App. 438, 326 S.E.2d 805 (1985).

Time is not an essential element of forgery in the first degree and a variance of several days between the date of the offense in the indictment and the proof is not fatal. Thompson v. State, 163 Ga. App. 828, 296 S.E.2d 123 (1982).

Pecuniary damage not necessary element. — Statutory definition of forgery in the first degree does not contain a requirement of pecuniary damage; it only requires an intent to defraud coupled with the possession of an altered writing and delivery thereof. Heard v. State, 181 Ga. App. 803, 354 S.E.2d 11 (1987).

If writing purports to have legal efficacy it may be the subject of forgery. Chambers v. State, 22 Ga. App. 748, 97 S.E. 256 (1918) (decided under former Penal Code 1910, § 231).

There need be no signature to constitute a forgery. Curtis v. State, 16 Ga. App. 678, 85 S.E. 980 (1915) (decided under former Penal Code 1910, § 245).

Intent to defraud is essence of the crime and must be proved beyond reasonable doubt. Chambers v. State, 22 Ga. App. 748, 97 S.E. 256 (1918) (decided under former Penal Code 1910, § 231).

District court's finding that the defendant was personally involved in making a fraudulent card had no bearing on whether the defendant committed forgery under O.C.G.A. § 16-9-1(b), nor did it appear to affect the defendant's sentence upon revocation of supervised release; sentence of 12 months and a day in prison and 12 months of supervised release was not error. United States v. Thomas, No. 12-13632, 2013 U.S. App. LEXIS 8317 (11th Cir. Apr. 24, 2013) (Unpublished).

Knowingly passing as genuine a forged instrument is conclusive of intent to defraud. Fincher v. State, 42 Ga. App. 250, 155 S.E. 344 (1930) (decided

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under former Penal Code 1910, § 241); Taylor v. State, 128 Ga. App. 13, 195 S.E.2d 294 (1973).

Knowledge that instrument is forged is essential ingredient of crime of uttering a forged instrument. Brown v. State, 117 Ga. App. 827, 162 S.E.2d 254 (1968) (decided under former Code 1933, § 26-3910).

Uttering requires intent to injure someone. — To complete offense of uttering forged paper, it must not only be published as true when party knows it to be fraudulent, but also with intent to injure someone. Raper v. State, 16 Ga. App. 121, 84 S.E. 560 (1915) (decided under former Penal Code 1910, § 232).

Unauthorized use of bank credit card constitutes forgery. Allstate Ins. Co. v. Renshaw, 151 Ga. App. 80, 258 S.E.2d 744 (1979), overruled on other grounds, Seaboard Coast Line R.R. v. Mobil Chem. Co., 172 Ga. App. 543, 323 S.E.2d 849 (1984).

O.C.G.A. § 16-13-43(a)(3) did not repeal by implication O.C.G.A. § 16-9-1. — Repeal by implication is not favored and if later Act does not embrace whole subject matter of prior Act and is not entirely repugnant to it, court should apply construction that will give the two statutes concurrent efficacy. State v. O'Neal, 156 Ga. App. 384, 274 S.E.2d 575 (1980).

O.C.G.A. §§ 16-9-1 and 16-13-43(a)(3) do not proscribe same conduct. — Prosecution under former Code 1933, § 26-1701 (see now O.C.G.A. § 16-9-1) was not barred because former Code 1933, § 79A-822 (see now O.C.G.A. § 16-13-43) prohibiting acquisition of controlled substance by forgery was enacted at a subsequent date. The two statutes do not proscribe the same conduct. State v. O'Neal, 156 Ga. App. 384, 274 S.E.2d 575 (1980).

Proof of "authority of one who did not give such authority." — O.C.G.A. § 16-9-1 does not require that the state prove that defendant uttered writings actually written on a third party's account, but instead only requires proof that defendant cashed checks purporting to be drawn on such an account. McBride v. State, 202 Ga. App. 556, 415 S.E.2d 13, cert. denied, 202 Ga. App. 906, 415 S.E.2d 13 (1992).

Reindictment and reprosecution under O.C.G.A. § 16-9-1. — If former Code 1933, § 79A-822 (see now O.C.G.A. § 16-13-43) was the exclusive section to be applied in a given case, former Code 1933, § 26-1701 (see now O.C.G.A. § 16-9-1) still generally proscribed part of same conduct, and any attempt to reindict and reprosecute would be barred by plea of former jeopardy under former Code 1933, § 26-507 (see now O.C.G.A. § 16-1-8). State v. O'Neal, 156 Ga. App. 384, 274 S.E.2d 575 (1980).

Intent to defraud must be alleged in indictment. Beall v. State, 21 Ga. App. 73, 94 S.E. 74 (1917) (decided under former Penal Code 1910, § 231).

Indictment need not set out name of defrauded party. Howell v. State, 25 Ga. App. 574, 103 S.E. 799 (1920) (decided under former Penal Code 1910, § 245).

Extrinsic facts necessary to establish fraud need not appear on face of indictment. — Extrinsic facts requisite to render writing efficient as means of consummating a fraud need not appear on face of indictment, but can be shown by evidence. McLean v. State, 3 Ga. App. 660, 60 S.E. 332 (1908) (decided under former Penal Code 1895, § 243).

Indictment must allege that forged paper was uttered and published as true. Barron v. State, 12 Ga. App. 342, 77 S.E. 214 (1913) (decided under former Penal Code 1910, § 236).

Evidence did not fatally vary from indictment. — Trial court did not err in denying a defendant's motion for directed verdict of acquittal, which alleged that the evidence fatally varied from the allegations in the accusation as: (1) the defendant failed to raise a challenge to the sufficiency of an indictment through a special demurrer; and (2) the defendant admitted to possessing, endorsing, and uttering a check belonging to the victim. Tucker v. State, 283 Ga. App. 428, 641 S.E.2d 653 (2007).

While the date on one check differed from that alleged in the indictment, the other information identifying the check was sufficient to apprise the defendant of

the charge. Martinez v. State, 325 Ga. App. 267, 750 S.E.2d 504 (2013).

No charge of conspiracy or parties to crime required in indictment. — While it may be better practice to charge conspiracy or parties to a crime in a forgery indictment, the absence of such does not render indictment fatally defective. Wright v. State, 165 Ga. App. 790, 302 S.E.2d 706 (1983).

Defendant may be indicted for first and second-degree forgery and convicted of only one. Ward v. State, 123 Ga. App. 216, 180 S.E.2d 280 (1971).

Indictment sufficient. — Trial court properly denied a defendant's motion to quash when the indictment quoted the language of O.C.G.A. § 16-9-1 and identified the offense as forgery in the first degree, and further identified the date and place of the offense as well as the bank on which the purported check was drawn and the check number. The defendant could not reasonably claim that the defendant was surprised by evidence at trial or was unable to prepare a defense, or that the defendant risked future prosecution for the same offense; the challenge at best went to the form of the accusation and should have been raised via special demurrer prior to trial. Wilkes v. State, 293 Ga. App. 724, 667 S.E.2d 705 (2008), overruled on other grounds, Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012).

Forgery and false writing not included in each other. — When the defendant was convicted of first-degree forgery under O.C.G.A. § 16-9-1 and false writing under O.C.G.A. § 16-10-20 for obtaining expungement order by presenting a Georgia Crimes Information Center certificate that had been altered to state that the defendant had no criminal record, the counts were not included in each other under O.C.G.A. §§ 16-1-6 and 16-1-7; false writing charge did not require proof that the writing purported to be made by authority of one who in fact gave no such authority, and the forgery charge did not require proof that the writing was made or used in a matter within jurisdiction of the district attorney's office. Jones v. State, 290 Ga. App. 490, 659 S.E.2d 875 (2008).

Included offenses. — Offense of issuing bad checks is not a lesser included offense of forgery, and, in a prosecution for forgery, the trial court's failure to give a charge on issuing bad checks was not error. Adams v. State, 217 Ga. App. 759, 458 S.E.2d 918 (1995).

Offense of negotiating a fictitious check is a lesser included offense of forgery, and, in a prosecution for forgery, the trial court's failure to give a charge on negotiating fictitious checks constituted reversible error. Adams v. State, 217 Ga. App. 759, 458 S.E.2d 918 (1995).

Trial court did not err by failing to merge the defendant's convictions for giving a false name and forgery in the first degree. Clark v. State, 239 Ga. App. 245, 520 S.E.2d 245 (1999).

Lesser included offense not warranted in RICO prosecution. — As a defendant was only charged with racketeering, in violation of O.C.G.A. § 16-14-4(a), based on the predicate offense of forgery, in violation of O.C.G.A. § 16-9-1, the defendant's requested jury instruction of a lesser-included offense of forgery was properly denied by the trial court; if the jury had not found a "pattern of racketeering activity" under former paragraph (8)(a) of O.C.G.A. § 16-14-3, the jury could not have convicted the defendant of forgery. Redford v. State, 309 Ga. App. 118, 710 S.E.2d 197 (2011).

Rule of lenity applied. — Under O.C.G.A. § 16-9-1(b), the defendant was guilty of intending to defraud the sheriff's department by knowingly making four writings in a fictitious name and under O.C.G.A. § 16-10-20, the defendant was guilty of knowingly and willfully making a false statement of the defendant's name, in four writings, with the intent to deceive the sheriff's department; therefore, because the two statutes provided for different penalties for the same conduct, the rule of lenity applied and resentencing was required. Martinez v. State, 337 Ga. App. 374, 787 S.E.2d 308 (2016).

Cited in Smokes v. State, 136 Ga. App. 8, 220 S.E.2d 39 (1975); Zachery v. State, 136 Ga. App. 209, 220 S.E.2d 756 (1975); Green v. State, 138 Ga. App. 466, 226 S.E.2d 618 (1976); Jones v. State, 141 Ga. App. 17, 232 S.E.2d 365 (1977); Simmons v. State, 144 Ga. App. 618, 241 S.E.2d 490 (1978); Holmes v. State, 145 Ga. App. 125,

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243 S.E.2d 328 (1978); Hitchcock v. State, 146 Ga. App. 470, 246 S.E.2d 477 (1978); Bairentine v. State, 156 Ga. App. 341, 274 S.E.2d 736 (1980); Johnson v. State, 158 Ga. App. 183, 279 S.E.2d 483 (1981); Painter v. State, 159 Ga. App. 479, 283 S.E.2d 695 (1981); Cantrell v. State, 162 Ga. App. 42, 290 S.E.2d 140 (1982); Estes v. State, 169 Ga. App. 685, 314 S.E.2d 700 (1984); Minter v. State, 170 Ga. App. 801, 318 S.E.2d 226 (1984); Walden v. State, 173 Ga. App. 478, 326 S.E.2d 838 (1985); Lewis v. State, 180 Ga. App. 890, 351 S.E.2d 100 (1986); Walker v. State, 289 Ga. App. 879, 658 S.E.2d 375 (2008).

Evidence

Proof of uttering and publishing. — Allegation of uttering and publishing is proved by evidence that defendant offered to pass instrument to another person, declaring or asserting, directly or indirectly, by words or actions, that it was good. Taylor v. State, 128 Ga. App. 13, 195 S.E.2d 294 (1973).

Proof of uttering or delivering. — With regard to a charge of first-degree forgery involving a check taken from the company checkbook of defendant's employer, the state had not shown uttering or delivering; although an employer testified that an unidentified person from a service station had demanded payment of the check after the employer stopped payment on the check, no one from the service station testified that the check had been presented there, no bank witness testified that stamps on the check were deposit stamps, and the employer's testimony that someone from the service station had demanded payment was inadmissible hearsay. Archer v. State, 291 Ga. App. 175, 661 S.E.2d 230 (2008).

Proof of uttering. — Uttering element was established by sufficient evidence that the defendant's friend presented the check to a bank for cashing at the defendant's behest; the trial court properly charged the jury on the corroboration requirement for accomplice testimony. King v. State, 277 Ga. App. 190, 626 S.E.2d 161 (2006).

What constitutes uttering. — See Walker v. State, 127 Ga. 48, 56 S.E. 113, 119 Am. St. R. 314, 8 L.R.A. (n.s.) 1175 (1906) (decided under former Penal Code 1895, § 240).

Evidence supporting venue. — Evidence that a forged instrument was forged in a given county would, in the absence of evidence to the contrary, warrant the inference by the jury that the uttering was committed in that county. Howard v. State, 181 Ga. App. 187, 351 S.E.2d 550 (1986).

Since there was evidence from the defendant's confession to police and testimony from bank employees, together with physical evidence, that the defendant wrote a check out from a victim's checkbook in the defendant's name and then cashed the check at the bank, there was sufficient evidence to support a conviction for forgery in violation of O.C.G.A. § 16-9-1(a); the element of venue was properly established by the evidence as well pursuant to O.C.G.A. § 17-2-2(a). Bell v. State, 284 Ga. 790, 671 S.E.2d 815 (2009).

Checks which were basis for prior forgery conviction can be offered for handwriting comparison as to checks at issue in forgery case on trial, as they had a direct relevancy to case and, therefore, were not objectionable because they also tended to show a distinct and separate crime on part of appellant. Watkins v. State, 151 Ga. App. 510, 260 S.E.2d 547 (1979).

Availability of handwriting samples other than previously forged checks does not affect rule as to admissibility of checks forming basis of prior forgery conviction. Watkins v. State, 151 Ga. App. 510, 260 S.E.2d 547 (1979).

Alleged returning of check. — Defendant's testimony that defendant placed a personal check in the drive-in receptacle but had found it on the ground and was merely attempting to return it and did not intend to cash it was sufficient to warrant denial of a directed verdict of forgery. Tucker v. State, 208 Ga. App. 224, 430 S.E.2d 84 (1993).

Forgery may be proved by circumstantial evidence. Hudson v. State, 188 Ga. App. 684, 374 S.E.2d 212 (1988).

Forgery and each individual factual element thereof are capable of proof by direct and/or circumstantial evidence. Johnson v. State, 211 Ga. App. 151, 438 S.E.2d 657 (1993).

Defendant forced the victim to sign checks while being held at gunpoint and the victim did not authorize the victim's signature on the checks; thus, when the defendant tried to cash the checks, the defendant committed forgery. Sapp v. State, 271 Ga. 446, 520 S.E.2d 462 (1999).

Evidence sufficient for conviction. — See Woody v. State, 166 Ga. App. 666, 305 S.E.2d 365 (1983); Howard v. State, 181 Ga. App. 187, 351 S.E.2d 550 (1986); Gaily v. State, 181 Ga. App. 906, 354 S.E.2d 442 (1987); Carruth v. State, 183 Ga. App. 203, 358 S.E.2d 610 (1987); Faulkner v. State, 186 Ga. App. 879, 368 S.E.2d 820 (1988); Chapman v. State, 187 Ga. App. 746, 371 S.E.2d 273 (1988); McIntosh v. State, 188 Ga. App. 387, 373 S.E.2d 858 (1988); Foster v. State, 193 Ga. App. 368, 387 S.E.2d 637 (1989); Matula v. State, 264 Ga. 673, 449 S.E.2d 850 (1994); Jenkins v. State, 217 Ga. App. 655, 458 S.E.2d 497 (1995); Huewitt v. State, 218 Ga. App. 566, 462 S.E.2d 463 (1995); Williams v. State, 228 Ga. App. 622, 492 S.E.2d 290 (1997); McClure v. State, 234 Ga. App. 304, 506 S.E.2d 667 (1998); Jordan v. State, 242 Ga. App. 547, 528 S.E.2d 858 (2000); Hunt v. State, 244 Ga. App. 578, 536 S.E.2d 251 (2000); Grimes v. State, 245 Ga. App. 277, 537 S.E.2d 720 (2000).

Undisputed evidence which showed that defendant presented three checks at two banks and tried to cash them by showing his identification card and endorsing the backs of the checks was sufficient to prove not only the signing, but the possession of the checks, purportedly endorsed by others, and the utterance of said writings; moreover, such evidence was conclusive of the intent to defraud. Collins v. State, 258 Ga. App. 400, 574 S.E.2d 423 (2002).

Where defendant went to a check cashing store and gave the store manager a check made out to defendant, the check issued by a business, and where the suspicious store manager verified with the bank that the check was fraudulent, and the business manager testified that the check was not issued by the business, the evidence was sufficient to authorize a rational trier of fact to find defendant guilty of forgery in the first degree under the standard of Jackson v. Virginia, 443 U.S. 307 (1979). Watson v. State, 264 Ga. App. 41, 589 S.E.2d 867 (2003).

Trial court properly entered judgments of conviction after defendant was found guilty of five counts of forgery in the first degree as the evidence was sufficient to support those convictions; the five forgeries pertained to the false name on defendant's driver's license and the false name defendant signed on four documents defendant filled out when defendant was arrested; the offense of giving a law enforcement officer a false name, a misdemeanor, was not a lesser included offense of forgery of the first degree. Quaweay v. State, 274 Ga. App. 657, 618 S.E.2d 707 (2005).

Because defendant's conviction for forgery was not only based on the police officers' identification of a single photograph, but also on the separate testimony by one of the passengers and the fact that the vehicle in question was co-registered to defendant, the use of a single photograph for identification purposes was harmless error; consequently, the jury was authorized to find defendant guilty. Brittian v. State, 274 Ga. App. 863, 619 S.E.2d 376 (2005).

Sufficient evidence supported the first degree forgery conviction under O.C.G.A. § 16-9-1 because defendant allegedly cashed a check that was made out to defendant and because the construction company, on whose account the check was drawn, dishonored the check and stated that it had not given defendant permission to cash the check. Farmer v. State, 276 Ga. App. 443, 623 S.E.2d 545 (2005).

Evidence was sufficient to support a forgery conviction when the defendant endorsed a check made out to someone else with that person's name, and included a false social security number on the back of the check. Jackson v. State, 277 Ga. App. 801, 627 S.E.2d 853 (2006).

Sufficient evidence established first degree forgery as: (1) the defendant lived with the victim from whom the forged

Evidence (Cont'd)

checks at issue were stolen; (2) the business owner who cashed the checks identified the defendant as the person who presented the checks; (3) the victim testified that the victim did not write the checks or authorize anyone else to do so; and (4) the defendant admitted cashing one or two of the victim's checks made payable to another at the business at which the forged checks were cashed. Overton v. State, 277 Ga. App. 819, 627 S.E.2d 875 (2006).

Based on the defendant's concession that the state's evidence tended to show an inference of the defendant's guilt in making a false claim against the county as to money the county allegedly owed to the defendant, and despite a claim that the facts supported the conclusion that the county's aquatic center director was the culpable party, when the defendant pointed to no evidence proving such, convictions for criminal attempt to commit theft by taking and first-degree forgery were supported by the evidence. Brown v. State, 285 Ga. App. 453, 646 S.E.2d 289 (2007), cert. denied, No. S07C1503, 2007 Ga. LEXIS 672 (Ga. 2007).

When the defendant gave U.S. currency to a bartender and had currency with the same serial number in the defendant's wallet, and the bartender, an officer, and a detective testified as to the chain of custody of the currency and as to the currency's physical characteristics inconsistent with genuine currency, there was sufficient evidence to support the defendant's forgery convictions under O.C.G.A. §§ 16-9-1 and 16-9-2; the jury was authorized to conclude on the basis of this evidence that the currency was not genuine and that the defendant tendered one and possessed another for the purpose of defrauding the bar. Walsh v. State, 283 Ga. App. 817, 642 S.E.2d 879 (2007).

Because sufficient evidence was presented consisting of the victim's identification of the defendant as the perpetrator of a burglary, who threatened the victim with a sharp, knife-like letter opener, forcing the victim into a closet, and stealing the victim's camera upon fleeing, sufficient evidence supported the defendant's burglary, armed robbery, aggravated assault, and kidnapping convictions; further, when the letter opener was found in a search incident to the defendant's arrest, and the defendant signed a false name on a waiver of Miranda rights form, sufficient evidence supported convictions for carrying a concealed weapon and forgery. Bryant v. State, 286 Ga. App. 493, 649 S.E.2d 597 (2007).

Defendant testified to receiving the counterfeit checks that the defendant attempted to cash from someone the defendant met on a website. The evidence was sufficient to prove the defendant's intent to defraud under O.C.G.A. § 16-9-1, since even if the jury believed the defendant did not know the checks were counterfeit, the defendant's failure to inspect the checks, which would have revealed that the checks were fakes, or to ask why the person who sent the checks could not cash the checks, was sufficient evidence of the defendant's willful ignorance to convict the defendant of first degree forgery. Taylor v. State, 293 Ga. App. 551, 667 S.E.2d 405 (2008).

The following evidence was sufficient to convict the defendant of felony forgery: 1) the defendant's accomplice testified to cashing forged checks supplied by defendant and giving the defendant the money; 2) surveillance tapes showed the two talking together before, and the defendant chasing the accomplice after, the checks were cashed; 3) a witness testified that, just prior to the charged offense, the witness saw the defendant use an accomplice to cash forged checks. Chandler v. State, 311 Ga. App. 86, 714 S.E.2d 597 (2011), cert. denied, No. S11C1861, 2011 Ga. LEXIS 985 (Ga. 2011).

Evidence that the defendant borrowed a sister's car, struck the rear of a slower moving car leading to the deaths of the driver and passenger, the defendant identified herself as her sister, and the defendant signed her sister's name on the Miranda form and on her written statement supported the defendant's convictions for first degree homicide by vehicle, forgery, reckless driving, and giving a false name. Smith v. State, 319 Ga. App. 164, 735 S.E.2d 153 (2012).

Evidence that the defendant received a $17,450.10 check from an entity with

whom the defendant had no connection or expectation of payment and presented the check to a bank in an attempt to obtain cash was sufficient for a reasonable jury to determine that, at the very least, the defendant remained deliberately ignorant of the fraudulent nature of the checks and supported the defendant's forgery conviction. Thomas v. State, 319 Ga. App. 690, 738 S.E.2d 149 (2013).

As the jury could have inferred from the defendant's use of a photocopy of a redacted driver's license that the defendant possessed the document with an intent to defraud a prospective employer, the evidence supported the forgery conviction. Pardon v. State, 322 Ga. App. 393, 745 S.E.2d 658 (2013).

Evidence that on four of the five checks at issue, the checking account number printed on the checks was not the correct account number for the alleged issuer and the logo and signatures on the actual checks different from those on the forged checks was sufficient to support a conviction for forgery. Despite an alleged variance, the defendant was protected for further prosecution for those offenses because copies of all the checks referenced in the indictment were introduced as evidence. Martinez v. State, 325 Ga. App. 267, 750 S.E.2d 504 (2013).

Sufficient circumstantial evidence supported the defendant's conviction for forgery based on the reasonable inferences arising from the evidence showing that a check was drawn on an account of a roofing company for which the defendant never worked for, thus, the inference arose that the defendant knew that the company did not owe any money to the defendant and that the defendant was not authorized to present the check for payment. Bettes v. State, 329 Ga. App. 13, 763 S.E.2d 366 (2014).

Sufficient evidence existed to support the defendant's conviction for forgery because the evidence established that the defendant was named as the guardian in the fraudulent letters of guardianship, there was direct evidence that the defendant claimed to be the guardian of the defendant's father, and there was ample circumstantial evidence that the defendant possessed and uttered that falsified document. Graham v. State, 331 Ga. App. 36, 769 S.E.2d 753 (2015), cert. denied, 2015 Ga. LEXIS 428 (Ga. 2015).

There was sufficient evidence from which the jury could have found that the defendant acted with the intent to defraud and that the defendant knew that the signature on the contractor license application was not the defendant's business partner's signature, and the jury rationally could have found beyond a reasonable doubt that the evidence excluded every reasonable hypothesis except that of the defendant's guilt of forgery. Rowan v. State, 338 Ga. App. 773, 792 S.E.2d 400 (2016).

Evidence insufficient to support conviction. — Because there was no competent evidence establishing that the defendant possessed or made a counterfeit money order, the evidence was not sufficient to sustain the defendant's conviction for forgery in the first degree in violation of O.C.G.A. § 16-9-1(a); the only evidence introduced at trial to prove that money orders the defendant deposited in a bank were counterfeit was copies of the processed orders themselves, but no one testified to confirm the counterfeit status of the money orders, and no one testified that the alleged payors were fictitious persons or actual persons who never gave authority for the money orders to be issued. Holmes v. State, 315 Ga. App. 812, 727 S.E.2d 520 (2012).

Evidence sufficient for conviction of financial transaction card theft and forgery. — See Alexander v. State, 186 Ga. App. 787, 368 S.E.2d 550 (1988).

Evidence was insufficient to support defendant's conviction on an indictment charging defendant with issuing checks "signed in the fictitious name of Angela Shaw…," where the evidence showed Angela Shaw was not a fictitious person, and the only evidence concerning the identity of the account on which the check was written showed that it was written on the account of Angela Shaw's employer. McBride v. State, 199 Ga. App. 527, 405 S.E.2d 345 (1991).

State failed to prove that the defendant lacked the authority to possess and deliver money orders as required to support forgery convictions under O.C.G.A.

Evidence (Cont'd)

§ 16-9-1(a) because the trial court erred in admitting the "counterfeit" stamps on the money orders as business records under former O.C.G.A. § 24-3-14(b) (see now O.C.G.A. § 24-8-803), and the state failed to present any other evidence to establish that the money orders were counterfeit; the testimony of the branch manager at a bank indicated that the determination that the money orders were counterfeit was a conclusion made by a third party institution, whose representatives did not testify at trial. Forrester v. State, 315 Ga. App. 1, 726 S.E.2d 476 (2012).

Hearsay testimony was harmless error. — With regard to charge of first-degree forgery and charge of identity fraud involving checks taken from the company checkbook of defendant's employer, the deputy's improper hearsay testimony that the driver's license number written on the checks matched the defendant's driver's license number was harmless error given the overwhelming evidence of guilt, including all of the stolen checks having been made payable to the defendant by someone other than the employer, the defendant's endorsement appearing on all of the checks, and the defendant's image captured on a bank security camera cashing one check. Archer v. State, 291 Ga. App. 175, 661 S.E.2d 230 (2008).

Other crimes evidence admissible as part of res gestae. — In a prosecution for felony forgery, a witness's testimony that, just prior to the charged offense, the defendant had tried to induce the witness to cash forged checks and that the witness saw the defendant use an accomplice to cash forged checks, was properly admitted as res gestae evidence because the testimony showed the planning process for the forgeries in question. Chandler v. State, 311 Ga. App. 86, 714 S.E.2d 597 (2011), cert. denied, No. S11C1861, 2011 Ga. LEXIS 985 (Ga. 2011).

Evidence of prior forgery conviction admissible. — In a forgery case, the trial court properly admitted similar transaction evidence of a prior forgery conviction. The trial court admitted the similar transaction evidence to show the defendant's identity and course of conduct, which were proper purposes; furthermore, in both cases, the defendant cashed or tried to cash bogus checks issued to the defendant and endorsed by the defendant at a check-cashing location other than at the bank where the checks were purportedly drawn. Beck v. State, 291 Ga. App. 702, 662 S.E.2d 798 (2008).

Offense involves dishonesty or false statement and admissible in child molestation trial. — Defendant's prior convictions for felony forgery, O.C.G.A. § 16-9-1(a), misdemeanor theft by deception, O.C.G.A. § 16-8-3(a), and misdemeanor giving a false name to a law enforcement officer, O.C.G.A. § 16-10-25, were all less than 10 years old and involved dishonesty or false statements. Therefore, those convictions were admissible in the defendant's child molestation trial under former O.C.G.A. § 24-9-84.1(b) (see now O.C.G.A. § 24-6-609). Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82 (2011).

Money orders stamped "apparent counterfeit" were inadmissible hearsay. — Trial court erred in admitting money orders stamped "apparent counterfeit" during the defendant's trial for forgery in the first degree, O.C.G.A. § 16-9-1(a), because the stamped money orders constituted inadmissible hearsay; the testimony of a bank's chief financial officer indicated that the determination that the money orders were counterfeit was a conclusion or opinion made by a third party institution, whose representatives did not testify at trial and, thus, the money orders were inadmissible as a business record under former O.C.G.A. § 24-3-14(b) (see now O.C.G.A. § 24-8-803) to prove that the money orders were counterfeit. Holmes v. State, 315 Ga. App. 812, 727 S.E.2d 520 (2012).

Jury Instructions

Charge requiring showing that defendant was present at place check was uttered. — Request that in order to establish the corpus delicti of a crime of forgery in the first degree, the evidence must show that the defendant personally committed the crime and show the presence of the defendant, ignores the fact

that the defendant could be guilty as a principal to the crime and yet be nowhere near the place of the uttering of the check. Pratt v. State, 180 Ga. App. 389, 348 S.E.2d 922 (1986).

Insufficient proof of uttering. — Conviction under O.C.G.A. § 16-9-1 was reversed where there was no witness from the bank who could identify defendant as having presented any of the forged checks. There was no handwriting comparison presented by an expert or lay witness; nothing to tie defendant to the presentation of these checks except that defendant regularly conducted the company's business at the bank and had, on occasion, cashed other employees' checks with their permission, signing their own name under that of the payee. Gordon v. State, 206 Ga. App. 450, 425 S.E.2d 906 (1992).

Jury instructions adhered to allegations of accusation. — Because the jury in the defendant's first degree forgery, under O.C.G.A. § 16-9-1, was instructed that a person committed forgery in the first degree when that person, in part, possessed any writing made in the name of another, this instruction did not cause the defendant to be convicted of forgery in a manner not charged in the accusation. Farmer v. State, 276 Ga. App. 443, 623 S.E.2d 545 (2005).

"Mistake of fact" instruction not warranted. — In a prosecution for first degree forgery, O.C.G.A. § 16-9-1, if the defendant was truly mistaken regarding the authenticity of counterfeit checks, the defendant's own negligence in failing to question the person who furnished the checks or to examine the security features of the checks caused the mistake. Therefore, due to the defendant's own negligence, the trial court was not obliged to give the defendant's tendered "mistake of fact" instruction. Taylor v. State, 293 Ga. App. 551, 667 S.E.2d 405 (2008).

"Willful blindness" instruction proper. — In a prosecution for first degree forgery, O.C.G.A. § 16-9-1, the jury was properly instructed on "willful blindness" because while the defendant testified to not knowing that the checks the defendant tried to cash were counterfeit, the defendant failed to inspect the checks, which would have revealed that the checks were fake, and did not ask why the person who sent the checks to the defendant to cash could not have cashed the checks. Taylor v. State, 293 Ga. App. 551, 667 S.E.2d 405 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A. § 16-9-1(e) are offenses for which those charged are to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Forgery, § 1 et seq.

C.J.S. — 37 C.J.S., Forgery, § 1 et seq.

ALR. — Genuine making of instrument for purpose of defrauding as constituting forgery, 51 A.L.R. 568.

Liability for leaving contract forms accessible to stranger who, by forgery, gives such forms apparent authenticity as completed contracts, 85 A.L.R. 83.

Filling in terms other than authorized in paper executed with blanks, as forgery, 87 A.L.R. 1169.

Alteration of written instrument in order to conform to actual intention as forgery, 93 A.L.R. 864.

Alteration or counterfeiting of postage stamps as criminal offense, 127 A.L.R. 1469.

Presumptions and inferences in criminal cases from unexplained possession or uttering of forged paper, 164 A.L.R. 621.

Invalid instrument as subject of forgery, 174 A.L.R. 1300.

Alteration of figures indicating amount of check, bill, or note, without change in written words, as forgery, 64 A.L.R.2d 1029.

Propriety of jury, or court sitting as trier of facts, making a comparison of a disputed writing with a standard produced in

court, without the aid of an expert witness, 80 A.L.R.2d 272.

Signing credit charge or credit sales slip, as forgery, 90 A.L.R.2d 822.

Criminal prosecution or disciplinary action against medical practitioner for fraud in connection with claims under medicaid, medicare, or similar welfare program for providing medical service, 50 A.L.R.3d 549.

Falsifying of money order as forgery, 65 A.L.R.3d 1307.

Filing of false insurance claims for medical services as ground for disciplinary action against dentist, physician, or other medical practitioner, 70 A.L.R.4th 132.

What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense, 75 A.L.R.4th 1067.

Evidence of intent to defraud in state forgery prosecution, 108 A.L.R.5th 593.

Signing credit charge, credit sales slip, or credit electronic point of sale terminal, as forgery, 80 A.L.R.6th 599.

16-9-2. Penalties for forgery.

(a) A person who commits the offense of forgery in the first degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 15 years.

(b) A person who commits the offense of forgery in the second degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

(c) A person who commits the offense of forgery in the third degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

(d) A person who commits the offense of forgery in the fourth degree shall be guilty of a misdemeanor; provided, however, that upon the third and all subsequent convictions for such offense, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years. (Code 1933, § 26-1702, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 6; Ga. L. 1982, p. 3, § 16; Ga. L. 2012, p. 899, § 3-5/HB 1176.)

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

JUDICIAL DECISIONS

Uttering or delivering writing is not an essential element of forgery in second degree, as it is in forgery in first degree. Ward v. State, 123 Ga. App. 216,

180 S.E.2d 280 (1971); McGowan v. State, 173 Ga. App. 438, 326 S.E.2d 805 (1985).

Uttering or delivering a writing is an essential element of the offense of forgery in the first degree; but it is not an essential element of the offense of forgery in the second degree. Browning v. State, 174 Ga. App. 759, 331 S.E.2d 625 (1985).

Defendant may be indicted for first and second-degree forgery and convicted of only one. Ward v. State, 123 Ga. App. 216, 180 S.E.2d 280 (1971).

Proof of forgery and elements thereof. — Forgery and each individual factual element thereof are capable of proof by direct and/or circumstantial evidence. Johnson v. State, 211 Ga. App. 151, 438 S.E.2d 657 (1993).

When defendant was convicted of second degree forgery under O.C.G.A. § 16-9-2(a), defendant was not entitled, under the rule of lenity, to have that reduced to a misdemeanor conviction under the false identification statute, O.C.G.A. § 16-9-4(b)(1), because the two offenses were not identical. Velasquez v. State, 276 Ga. App. 527, 623 S.E.2d 721 (2005).

Defendant's conviction for second degree forgery under O.C.G.A. § 16-9-2(a), based on the mere possession of an identification card from another state bearing a likeness but the name of another person, had to be reversed because there was no evidence that defendant had ever presented the card to anyone, so defendant's intent to defraud, which was an element of the offense, was not proved. Velasquez v. State, 276 Ga. App. 527, 623 S.E.2d 721 (2005).

Interpretation of the second degree forgery statute, O.C.G.A. § 16-9-2(a), stating that mere possession of a fraudulent identification card was sufficient for a conviction would improperly subsume the offense of possession of a false identification document, under O.C.G.A. § 16-9-4(b)(1), in second degree fraud, under O.C.G.A. § 16-9-2(a). Velasquez v. State, 276 Ga. App. 527, 623 S.E.2d 721 (2005).

Trial court erred in convicting the defendant of forgery because the state failed to prove the intent to defraud required by O.C.G.A. § 16-9-2(a) when the defendant did not present a counterfeit $100 bill since it was only found when officers inventoried the defendant's personal effects prior to booking the defendant into the county jail; the state did not present evidence that the defendant had ever presented or attempted to negotiate the bill to anyone at any time, and all that was shown was mere possession. Nelson v. State, 302 Ga. App. 583, 691 S.E.2d 363 (2010).

Effect of restrictive endorsement by payee. — Fact that check had been restrictively endorsed (i.e., for deposit only) by the payee (not the defendant) did not bar defendant's conviction of second degree forgery for possessing the check with intent to defraud. Browning v. State, 174 Ga. App. 759, 331 S.E.2d 625 (1985).

Separate offenses. — Simultaneous possession of forged documents, when accompanied by the requisite fraudulent intent, constitutes separate offenses. Ebenezer v. State, 191 Ga. App. 901, 383 S.E.2d 373 (1989).

Evidence sufficient to find forgery with intent to defraud. — Defendant's possession of forged United States currency, defendant's posting of forged writings and defendant's flight from law enforcement officers was sufficient to authorize the jury's finding, beyond a reasonable doubt, that defendant possessed the forged United States currency with the requisite intent to defraud. Ebenezer v. State, 191 Ga. App. 901, 383 S.E.2d 373 (1989).

When the defendant gave U.S. currency to a bartender and had currency with the same serial number in the defendant's wallet, and the bartender, an officer, and a detective testified as to the chain of custody of the currency and as to the currency's physical characteristics inconsistent with genuine currency, there was sufficient evidence to support the defendant's forgery convictions under O.C.G.A. §§ 16-9-1 and 16-9-2; the jury was authorized to conclude on the basis of this evidence that the currency was not genuine and that the defendant tendered one and possessed another for the purpose of defrauding the bar. Walsh v. State, 283 Ga. App. 817, 642 S.E.2d 879 (2007).

Conviction for second-degree forgery. — When the defendant represented

to a ticket agency that the defendant had authentic badges for a golf tournament that were actually fake, when the defendant sold and attempted to sell the badges to the agency, and when the defendant had 26 more fake badges at home the evidence was sufficient for conviction for second degree forgery since the jury was free to believe or disbelieve the defense theory that, although the badges were fake, the defendant did not know that the badges were fake. Davis v. State, 264 Ga. App. 128, 589 S.E.2d 700 (2003).

Defendant's conviction of forgery in the second degree under O.C.G.A. § 16-9-2(a) was affirmed, because while the state improperly offered hearsay evidence, there was overwhelming and uncontroverted competent evidence that the checks in question were in fact forged. Middlebrooks v. State, 277 Ga. App. 551, 627 S.E.2d 154 (2006).

Defendant's conviction for second degree forgery was supported by evidence that checks with a fictitious name were found under the driver's seat of the car the defendant was driving after the defendant and others attempted to present a similar fraudulent check for merchandise. Smith v. State, 322 Ga. App. 433, 745 S.E.2d 683 (2013).

Altered prescription. — Evidence supported forgery conviction because defendant's doctor testified that the doctor wrote a narcotic prescription for defendant with no refills, the prescription form presented by defendant to the pharmacist had the "2" for refills circled, the pharmacist filled the prescription for defendant, who was a regular customer, the altered prescription was admitted into evidence, and defendant admitted altering the prescription. Allen v. State, 272 Ga. App. 23, 611 S.E.2d 697 (2005).

Bank's liability for acceptance of forged instrument. — Where an attorney lacked authority to endorse checks on behalf of a client, a bank, which accepted for deposit to the attorney's trust account a check payable to the client and the attorney containing the attorney's forged endorsement of the client's name, was liable for conversion; overruling John Bean Mfg. Co. v. Citizens Bank of Gainesville, 60 Ga. App. 616, 4 S.E.2d 924 (1939) and Titus v. Commercial Bank, 214 Ga. App. 657, 448 S.E.2d 753 (1994). Tifton Bank & Trust Co. v. Knight's Furn. Co., 215 Ga. App. 471, 452 S.E.2d 219 (1994).

Cited in Cross v. State, 122 Ga. App. 208, 176 S.E.2d 517 (1970); Johnson v. State, 126 Ga. App. 757, 191 S.E.2d 614 (1972); Forbes v. State, 129 Ga. App. 231, 199 S.E.2d 548 (1973); Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311 (1973); Hitchcock v. State, 146 Ga. App. 470, 246 S.E.2d 477 (1978); Allstate Ins. Co. v. Renshaw, 151 Ga. App. 80, 258 S.E.2d 744 (1979); Harrison v. State, 151 Ga. App. 758, 261 S.E.2d 482 (1979); Bairentine v. State, 156 Ga. App. 341, 274 S.E.2d 736 (1980); Lewis v. State, 180 Ga. App. 890, 351 S.E.2d 100 (1986); Trust Co. Bank v. Henderson, 185 Ga. App. 367, 364 S.E.2d 289 (1987); Loden v. State, 199 Ga. App. 683, 406 S.E.2d 103 (1991); Sosebee v. State, 282 Ga. App. 905, 640 S.E.2d 379 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Forgery, § 1 et seq.

C.J.S. — 37 C.J.S., Forgery, § 1 et seq.

ALR. — Genuine making of instrument for purpose of defrauding as constituting forgery, 51 A.L.R. 568.

Liability for leaving contract forms accessible to stranger who, by forgery, gives such forms apparent authenticity as completed contracts, 85 A.L.R. 83.

Filling in terms other than authorized in paper executed with blanks, as forgery, 87 A.L.R. 1169.

Alteration of written instrument in order to conform to actual intention as forgery, 93 A.L.R. 864.

Alteration or counterfeiting of postage stamps as criminal offense, 127 A.L.R. 1469.

Presumptions and inferences in criminal cases from unexplained possession or uttering of forged paper, 164 A.L.R. 621.

Invalid instrument as subject of forgery, 174 A.L.R. 1300.

Alteration of figures indicating amount of check, bill, or note, without change in

written words, as forgery, 64 A.L.R.2d 1029.

Propriety of jury, or court sitting as trier of facts, making a comparison of a disputed writing with a standard produced in court, without the aid of an expert witness, 80 A.L.R.2d 272.

Signing credit charge or credit sales slip, as forgery, 90 A.L.R.2d 822.

Criminal prosecution or disciplinary action against medical practitioner for fraud in connection with claims under medicaid, medicare, or similar welfare program for providing medical service, 50 A.L.R.3d 549.

Falsifying of money order as forgery, 65 A.L.R.3d 1307.

Filing of false insurance claims for medical services as ground for disciplinary action against dentist, physician, or other medical practitioner, 70 A.L.R.4th 132.

What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense, 75 A.L.R.4th 1067.

Evidence of intent to defraud in state forgery prosecution, 108 A.L.R.5th 593.

16-9-3. "Writing" defined.

Reserved. Repealed by Ga. L. 2012, p. 899, § 3-5/HB 1176, effective July 1, 2012.

Editor's notes. — This Code section was based on Code 1933, § 26-1703, enacted by Ga. L. 1968, p. 1249, § 1.

Law reviews. — For article on the 2012 repeal of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

RESEARCH REFERENCES

ALR. — Signing credit charge, credit sales slip, or credit electronic point of sale terminal, as forgery, 80 A.L.R.6th 599.

16-9-4. Manufacturing, selling, or distributing false identification document; civil forfeiture; penalty.

(a) As used in this Code section, the term:

(1) "Access device" means a unique electronic identification number, address, description, or routing code or a device containing a unique electronic identification number, address, description, or routing code issued to an individual which permits or facilitates entry into a facility or computer or provides access to the financial resources, including, but not limited, to the credit resources of the individual to whom the device or card is issued.

(2) "Description" means any identifying information about a person, including, but not limited to, date of birth, place of birth, address, social security number, height, weight, hair or eye color, or unique biometric data such as fingerprint, voice print, retina or iris image, DNA profile, or other unique physical representation.

(3) "Government agency" means any agency of the executive, legislative, or judicial branch of government or political subdivision

or authority thereof of this state, any other state, the United States, or any foreign government or international governmental or quasi-governmental agency recognized by the United States or by any of the several states.

(4) "Identification document" means:

(A) Any document or card issued to an individual by a government agency or by the authority of a government agency containing the name of a person and a description of the person or such person's photograph, or both, and includes, without being limited to, a passport, visa, military identification card, driver's license, or an identification card;

(B) Any document issued to an individual for the purpose of identification by or with the authority of the holder of a trademark or trade name of another, as these terms are defined in Code Section 10-1-371, that contains the trademark or trade name and the name of the person to whom the document is issued and a description of the person or the person's photograph, or both; or

(C) Any access device.

(b)(1) It shall be unlawful for any person to knowingly possess, display, or use any false, fictitious, fraudulent, or altered identification document.

(2) It shall be unlawful for any person to knowingly manufacture, alter, sell, distribute, deliver, possess with intent to sell, deliver, or distribute, or offer for sale, delivery, or distribution a false, fraudulent, or fictitious identification document or any identification document which contains any false, fictitious, or fraudulent statement or entry.

(3) It shall be unlawful for any person to knowingly manufacture, alter, sell, distribute, deliver, possess with the intent to sell, deliver, or distribute, or offer for sale, delivery, or distribution any identification document containing the trademark or trade name of another without the written consent of the owner of the trademark or trade name.

(4) It shall be unlawful for any person to knowingly possess, display, or use any false, fictitious, fraudulent, or altered identification document containing the logo or legal or official seal of a government agency or any colorable imitation thereof in furtherance of a conspiracy or attempt to commit a violation of the criminal laws of this state or of the United States or any of the several states which is punishable by imprisonment for one year or more.

(5) It shall be unlawful for any person to knowingly manufacture, alter, sell, distribute, deliver, possess with the intent to sell, deliver,

or distribute, or offer for sale or distribution any other identification document containing the logo or legal or official seal of a government agency or any colorable imitation thereof without the written consent of the government agency.

(6) It shall be unlawful for any person to knowingly possess, display, or use an identification document issued to or on behalf of another person without the permission or consent of the other person for a lawful purpose, unless the identification document is possessed, displayed, or used with the intent to restore it to the other person or government agency or other entity that issued the identification document to the person.

(c)(1) Except as provided in paragraph (2) or (3) of this subsection, any person who violates the provisions of paragraph (1), (3), or (6) of subsection (b) of this Code section shall be guilty of a misdemeanor.

(2) Except as provided in paragraph (3) of this subsection, any person who violates the provisions of paragraph (1), (3), or (6) of subsection (b) of this Code section for the second or any subsequent offense shall be guilty of a felony and shall be punished by a fine of not more than $25,000.00 or by imprisonment for not more than three years, or both.

(3) Except as provided in paragraph (5) of this subsection, any person who manufactures, alters, sells, distributes, delivers, receives, possesses, or offers for sale or distribution three or more identification documents in violation of the provisions of subsection (b) of this Code section shall be punished by imprisonment for not less than three nor more than ten years, a fine not to exceed $100,000.00, or both.

(4) Except as provided in paragraph (3) or (5) of this subsection, any person who violates the provisions of paragraph (2), (4), or (5) of subsection (b) of this Code section shall be punished by imprisonment for not less than one nor more than five years, a fine not to exceed $100,000.00, or both.

(5) Any person who is under 21 years of age and violates the provisions of subsection (b) of this Code section for the purpose of the identification being used to obtain entry into an age restricted facility or being used to purchase a consumable good that is age restricted, shall, upon a first conviction thereof, be guilty of a misdemeanor and upon a second or subsequent conviction shall be punished as for a misdemeanor of a high and aggravated nature.

(6) Any person convicted of an attempt or conspiracy to violate the provisions of subsection (b) of this Code section shall be punished by imprisonment, by a fine, or by both such punishments not to exceed

the maximum punishment prescribed for the offense the commission of which was the object of the attempt or conspiracy.

(d) Each violation of this Code section shall constitute a separate offense.

(e) Any violation of this Code section shall be considered to have been committed in any county of this state in which the evidence shows that the identification document was manufactured, altered, sold, displayed, distributed, delivered, received, offered for sale or distribution, or possessed.

(f) The provisions of this Code section shall not apply to any lawfully authorized investigative, protective, or intelligence activity of an agency of the United States, this state, or any of the several states or their political subdivisions or any activity authorized under Chapter 224 of Title 18 of the United States Code or any similar such law relating to witness protection.

(g) It shall not be a defense to a violation of this Code section that a false, fictitious, fraudulent, or altered identification document contained words indicating that it is not an identification document.

(h)(1) As used in this subsection, the terms "proceeds" and "property" shall have the same meanings as set forth in Code Section 9-16-2.

(2) Any property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of this Code section and any proceeds are declared to be contraband and no person shall have a property right in them.

(3) Any property subject to forfeiture pursuant to paragraph (2) of this subsection shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9.

(i) It shall be an affirmative defense to the manufacturing, selling, or distributing of identification documents that contain false, fictitious, or altered information that the person manufacturing, selling, or distributing the documents used due diligence to ascertain the truth of the information contained in the identification document. (Code 1981, § 16-9-4, enacted by Ga. L. 1988, p. 760, § 1; Ga. L. 2002, p. 551, § 1; Ga. L. 2008, p. 808, § 1/SB 421; Ga. L. 2009, p. 299, § 1/HB 71; Ga. L. 2015, p. 693, § 2-10/HB 233.)

Editor's notes. — Ga. L. 2008, p. 808, § 2, not codified by the General Assembly, provides that the amendment to this Code section shall apply to all offenses committed on or after July 1, 2008.

Ga. L. 2009, p. 299, § 2, not codified by the General Assembly, provides that the amendment to this Code section by this Act shall apply to offenses committed on or after October 1, 2009.

Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to

seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).

For note on the 2002 amendment of this Code section, see 19 Ga. St. U.L. Rev. 81 (2002).

JUDICIAL DECISIONS

Second degree forgery. — When the defendant was convicted of second degree forgery under O.C.G.A. § 16-9-2(a), the defendant was not entitled, under the rule of lenity, to have that reduced to a misdemeanor conviction under the false identification statute, O.C.G.A. § 16-9-4(b)(1), because the two offenses were not identical. Velasquez v. State, 276 Ga. App. 527, 623 S.E.2d 721 (2005).

Interpretation of the second degree forgery statute, O.C.G.A. § 16-9-2(a), stating that mere possession of a fraudulent identification card was sufficient for a conviction would improperly subsume the offense of possession of a false identification document, under O.C.G.A. § 16-9-4(b)(1), in second degree fraud, under O.C.G.A. § 16-9-2(a). Velasquez v. State, 276 Ga. App. 527, 623 S.E.2d 721 (2005).

Cited in Walker v. State, 289 Ga. App. 879, 658 S.E.2d 375 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising under O.C.G.A. § 16-9-4(b)(1), (2), (3), and (6) require fingerprinting. 2002 Op. Att'y Gen. No. 2002-7.

Fingerprinting not required. — An offense arising from a violation of O.C.G.A. § 16-9-4(c)(5) does not, at this time, appear to be an offense for which fingerprinting is required; thus, this offense is not designated as one for which those charged are to be fingerprinted. 2010 Op. Att'y Gen. No. 2010-2.

16-9-5. Counterfeit or false proof of insurance document.

(a) As used in this Code section, the term "proof of insurance document" means any document issued by, on behalf of, or purportedly on behalf of an insurer to a motor vehicle policyholder or applicant for motor vehicle coverage, which document is designed to constitute proof or evidence of the minimum motor vehicle liability insurance required by law for the purposes of Code Section 40-6-10.

(b)(1) It shall be unlawful for any person knowingly to manufacture, sell, or distribute a counterfeit or false proof of insurance document.

(2) It shall be unlawful for any person to possess a counterfeit or false proof of insurance document that he or she knows to be a counterfeit or false proof of insurance document.

(3) A proof of insurance document shall be deemed counterfeit or false if the proof of insurance document has been altered, modified, or originally issued in any manner which contains false information concerning the insurer, the owner, the motor vehicle, or the insurance thereon.

(c)(1) Any person who violates paragraph (1) of subsection (b) of this Code section shall be guilty of a felony and upon conviction shall be punished by a fine of not more than $10,000.00 or by imprisonment for not less than two nor more than ten years, or both.

(2) Any person who violates paragraph (2) of subsection (b) of this Code section shall upon conviction be guilty of and be punished as for a misdemeanor. (Code 1981, § 16-9-5, enacted by Ga. L. 1990, p. 1440, § 1; Ga. L. 1991, p. 94, § 16; Ga. L. 2000, p. 429, § 2; Ga. L. 2017, p. 417, § 5-1/SB 104.)

The 2017 amendment, effective July 1, 2017, added "that he or she knows to be a counterfeit or false proof of insurance document" at the end of paragraph (b)(2); substituted the present provisions of paragraph (c)(1) for the former provisions, which read: "Any person who violates paragraph (1) of subsection (b) of this Code section on the first offense shall be guilty of a misdemeanor. Any person who violates paragraph (1) of subsection (b) of this Code section for the second or any subsequent offense shall be guilty of a felony and shall be punished by a fine of not more than $5,000.00 or by imprisonment for not more than three years, or both."; and, in paragraph (c)(2), inserted "upon conviction" and inserted "and be punished as for".

Editor's notes. — Ga. L. 2000, p. 429, § 1, not codified by the General Assembly, provides: "(a) The General Assembly finds that a significant number of motor vehicle owners in this state fail to meet the requirements of existing law for minimum motor vehicle liability insurance. The General Assembly finds further that enforcement of such requirements is made difficult by existing methods and procedures for tracking insurance coverage and providing proof of insurance.

"(b) The General Assembly declares that the purpose of this Act is to improve enforcement of minimum motor vehicle liability insurance requirements by providing the Department of Public Safety with updated information from insurers regarding those vehicles for which minimum motor vehicle liability insurance coverage is in effect, which information may be made accessible to law enforcement officers throughout the state, all without hampering the underwriting activities of any insurer or changing existing penalties for operating a motor vehicle without minimum liability insurance coverage."

Law reviews. — For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 61 (2017). For annual survey on criminal law, see 69 Mercer L. Rev. 73 (2017).

JUDICIAL DECISIONS

Cited in Warren v. State, 289 Ga. App. 481, 657 S.E.2d 533 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violation of O.C.G.A. § 16-9-5. — Violation of O.C.G.A. § 16-9-5 is designated as an offense for which persons charged with a violation shall be fingerprinted. 1990 Op. Att'y Gen. No. 90-22.

16-9-6. Punishment for fiduciary in violation of chapter.

Unless a greater penalty is specifically provided in this chapter, any violation of this chapter by a fiduciary in breach of a fiduciary obligation

against a person who is 65 years of age or older shall be punished by imprisonment for not less than one nor more than 15 years, a fine not to exceed the amount provided by Code Section 17-10-8, or both. (Code 1981, § 16-9-6, enacted by Ga. L. 2000, p. 1085, § 4.)

Editor's notes. — Ga. L. 2000, p. 1085, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia Protection of Elder Persons Act of 2000'."

Law reviews. — For note on 2000 enactment of O.C.G.A. § 16-9-6, see 17 Ga. St. U.L. Rev. 93 (2000).

ARTICLE 2

DEPOSIT ACCOUNT FRAUD

Law reviews. — For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

16-9-20. Deposit account fraud.

(a) A person commits the offense of deposit account fraud when such person makes, draws, utters, executes, or delivers an instrument for the payment of money on any bank or other depository in exchange for a present consideration or wages, knowing that it will not be honored by the drawee. For the purposes of this Code section, it is prima-facie evidence that the accused knew that the instrument would not be honored if:

(1) The accused had no account with the drawee at the time the instrument was made, drawn, uttered, or delivered;

(2) Payment was refused by the drawee for lack of funds upon presentation within 30 days after delivery and the accused or someone for him or her shall not have tendered the holder thereof the amount due thereon, together with a service charge, within ten days after receiving written notice that payment was refused upon such instrument. For purposes of this paragraph:

(A) Notice mailed by certified or registered mail or statutory overnight delivery evidenced by return receipt to the person at the address printed on the instrument or given at the time of issuance shall be deemed sufficient and equivalent to notice having been received as of the date on the return receipt by the person making, drawing, uttering, executing, or delivering the instrument. A single notice as provided in subparagraph (B) of this paragraph shall be sufficient to cover all instruments on which payment was refused and which were delivered within a ten-day period by the accused to a single entity, provided that the form of notice lists and identifies each instrument; and

(B) The form of notice shall be substantially as follows:

"You are hereby notified that the following instrument(s)

Number	Date	Amount	Name of Bank

drawn upon _____ and payable to _____, (has) (have) been dishonored. Pursuant to Georgia law, you have ten days from receipt of this notice to tender payment of the total amount of the instrument(s) plus the applicable service charge(s) of $_____ and any fee charged to the holder of the instrument(s) by a bank or financial institution as a result of the instrument(s) not being honored, the total amount due being _____ dollars and _____ cents. Unless this amount is paid in full within the specified time above, a presumption in law arises that you delivered the instrument(s) with the intent to defraud and the dishonored instrument(s) and all other available information relating to this incident may be submitted to the magistrate for the issuance of a criminal warrant or citation or to the district attorney or solicitor-general for criminal prosecution."; or

(3) Notice mailed by certified or registered mail or statutory overnight delivery is returned undelivered to the sender when such notice was mailed within 90 days of dishonor to the person at the address printed on the instrument or given by the accused at the time of issuance of the instrument.

(b)(1) Except as provided in paragraphs (2) and (3) of this subsection and subsection (c) of this Code section, a person convicted of the offense of deposit account fraud shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as follows:

(A) When the instrument is for less than $500.00, a fine of not more than $500.00 or imprisonment not to exceed 12 months, or both;

(B) When the instrument is for $500.00 or more but less than $1,000.00, a fine of not more than $1,000.00 or imprisonment not to exceed 12 months, or both; or

(C) When more than one instrument is involved and such instruments were drawn within 90 days of one another and each is in an amount less than $500.00, the amounts of such separate instruments may be added together to arrive at and be punishable under subparagraph (B) of this paragraph.

(2) Except as provided in paragraph (3) of this subsection and subsection (c) of this Code section, a person convicted of the offense of deposit account fraud, when the instrument is for an amount of not less than $1,000.00 nor more than $1,499.99, shall be guilty of a misdemeanor of a high and aggravated nature. When more than one instrument is involved and such instruments were given to the same entity within a 15 day period and the cumulative total of such instruments is not less than $1,000.00 nor more than $1,499.00, the person drawing and giving such instruments shall upon conviction be guilty of a misdemeanor of a high and aggravated nature.

(3) Except as provided in subsection (c) of this Code section, a person convicted of the offense of deposit account fraud, when the instrument is for $1,500.00 or more, shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not less than $500.00 nor more than $5,000.00 or by imprisonment for not more than three years, or both.

(4) Upon conviction of a first or any subsequent offense under this subsection or subsection (c) of this Code section, in addition to any other punishment provided by this Code section, the defendant shall be required to make restitution of the amount of the instrument, together with all costs of bringing a complaint under this Code section. The court may require the defendant to pay as interest a monthly payment equal to 1 percent of the amount of the instrument. Such amount shall be paid each month in addition to any payments on the principal until the entire balance, including the principal and any unpaid interest payments, is paid in full. Such amount shall be paid without regard to any reduction in the principal balance owed. Costs shall be determined by the court from competent evidence of costs provided by the party causing the criminal warrant or citation to issue; provided, however, that the minimum costs shall not be less than $25.00. Restitution may be made while the defendant is serving a probated or suspended sentence.

(c) A person who commits the offense of deposit account fraud by the making, drawing, uttering, executing, or delivering of an instrument on a bank of another state shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or by a fine in an amount of up to $1,000.00, or both.

(d) The prosecuting authority of the court with jurisdiction over a violation of subsection (c) of this Code section may seek extradition for criminal prosecution of any person not within this state who flees the state to avoid prosecution under this Code section.

(e) In any prosecution or action under this Code section, an instrument for which the information required in this subsection is available at the time of issuance shall constitute prima-facie evidence of the identity of the party issuing or executing the instrument and that the person was a party authorized to draw upon the named account. To establish this prima-facie evidence, the following information regarding the identity of the party presenting the instrument shall be obtained by the party receiving such instrument: the full name, residence address, and home phone number.

(1) Such information may be provided by either of two methods:

(A) The information may be recorded upon the instrument itself; or

(B) The number of a check-cashing identification card issued by the receiving party may be recorded on the instrument. The check-cashing identification card shall be issued only after the information required in this subsection has been placed on file by the receiving party.

(2) In addition to the information required in this subsection, the party receiving an instrument shall witness the signature or endorsement of the party presenting such instrument and as evidence of such the receiving party shall initial the instrument.

(f) As used in this Code section, the term:

(1) "Bank" shall include a financial institution as defined in this Code section.

(2) "Conviction" shall include the entering of a guilty plea, the entering of a plea of nolo contendere, or the forfeiting of bail.

(3) "Financial institution" shall have the same meaning as defined in paragraph (21) of Code Section 7-1-4 and shall also include a national bank, a state or federal savings bank, a state or federal credit union, and a state or federal savings and loan association.

(4) "Holder in due course" shall have the same meaning as in Code Section 11-3-302.

(5) "Instrument" means a check, draft, debit card sales draft, or order for the payment of money.

(6) "Present consideration" shall include without limitation:

(A) An obligation or debt of rent which is past due or presently due;

(B) An obligation or debt of state taxes which is past due or presently due;

(C) An obligation or debt which is past due or presently due for child support when made for the support of such minor child and which is given pursuant to an order of court or written agreement signed by the person making the payment;

(D) A simultaneous agreement for the extension of additional credit where additional credit is being denied; and

(E) A written waiver of mechanic's or materialmen's lien rights.

(7) "State taxes" shall include payments made to the Georgia Department of Labor as required by Chapter 8 of Title 34.

(g) This Code section shall in no way affect the authority of a sentencing judge to provide for a sentence to be served on weekends or during the nonworking hours of the defendant as provided in Code Section 17-10-3.

(h)(1) Any party holding a worthless instrument and giving notice in substantially similar form to that provided in subparagraph (a)(2)(B) of this Code section shall be immune from civil liability for the giving of such notice and for proceeding as required under the forms of such notice; provided, however, that, if any person shall be arrested or prosecuted for violation of this Code section and payment of any instrument shall have been refused because the maker or drawer had no account with the bank or other depository on which such instrument was drawn, the one causing the arrest or prosecution shall be deemed to have acted with reasonable or probable cause even though he, she, or it has not mailed the written notice or waited for the ten-day period to elapse. In any civil action for damages which may be brought by the person who made, drew, uttered, executed, or delivered such instrument, no evidence of statements or representations as to the status of the instrument involved or of any collateral agreement with reference to the instrument shall be admissible unless such statements, representations, or collateral agreement shall be written simultaneously with or upon the instrument at the time it is delivered by the maker thereof.

(2) Except as otherwise provided by law, any party who holds a worthless instrument, who complies with the requirements of subsection (a) of this Code section, and who causes a criminal warrant or citation to be issued shall not forfeit his or her right to continue or pursue civil remedies authorized by law for the collection of the worthless instrument; provided, however, that if interest is awarded

and collected on any amount ordered by the court as restitution in the criminal case, interest shall not be collectable in any civil action on the same amount. It shall be deemed conclusive evidence that any action is brought upon probable cause and without malice where such party holding a worthless instrument has complied with the provisions of subsection (a) of this Code section regardless of whether the criminal charges are dismissed by a court due to payment in full of the face value of the instrument and applicable service charges subsequent to the date that affidavit for the warrant or citation is made. In any civil action for damages which may be brought by the person who made, drew, uttered, executed, or delivered such instrument, no evidence of statements or representations as to the status of the instrument involved or of any collateral agreement with reference to the instrument shall be admissible unless such statements, representations, or collateral agreement shall be written simultaneously with or upon the instrument at the time it is delivered by the maker thereof.

(i) Notwithstanding paragraph (2) of subsection (a) of this Code section or any other law on usury, charges, or fees on loans or credit extensions, any lender of money or extender of other credit who receives an instrument drawn on a bank or other depository institution given by any person in full or partial repayment of a loan, installment payment, or other extension of credit may, if such instrument is not paid or is dishonored by such institution, charge and collect from the borrower or person to whom the credit was extended a bad instrument charge. This charge shall not be deemed interest or a finance or other charge made as an incident to or as a condition to the granting of the loan or other extension of credit and shall not be included in determining the limit on charges which may be made in connection with the loan or extension of credit or any other law of this state.

(j) For purposes of this Code section, no service charge or bad instrument charge shall exceed $30.00 or 5 percent of the face amount of the instrument, whichever is greater, except that the holder of the instrument may also charge the maker an additional fee in an amount equal to that charged to the holder by the bank or financial institution as a result of the instrument not being honored.

(k) An action under this Code section may be prosecuted by the party initially receiving a worthless instrument or by any subsequent holder in due course of any such worthless instrument. (Ga. L. 1959, p. 252, §§ 1-3; Code 1933, § 26-1704, enacted by Ga. L. 1968, p. 1249, § 1; Code 1933, § 41A-9909, enacted by Ga. L. 1974, p. 705, § 1; Ga. L. 1975, p. 482, § 1; Ga. L. 1977, p. 1266, §§ 1, 2; Ga. L. 1978, p. 2020, § 1; Ga. L. 1980, p. 1034, § 1; Ga. L. 1980, p. 1147, §§ 1-3; Ga. L. 1981, p. 1550, § 1; Ga. L. 1983, p. 484, § 1; Ga. L. 1983, p. 485, § 1; Ga. L. 1983,

p. 1189, §§ 1, 2; Ga. L. 1984, p. 22, § 16; Ga. L. 1984, p. 1435, § 1; Ga. L. 1985, p. 708, § 1; Ga. L. 1986, p. 209, § 1; Ga. L. 1987, p. 983, § 1; Ga. L. 1988, p. 268, § 1; Ga. L. 1988, p. 762, § 1; Ga. L. 1989, p. 1570, § 1; Ga. L. 1990, p. 8, § 16; Ga. L. 1994, p. 1787, § 3; Ga. L. 1995, p. 910, §§ 1, 2; Ga. L. 1996, p. 748, § 10; Ga. L. 1996, p. 1014, §§ 1, 2; Ga. L. 1999, p. 720, § 1; Ga. L. 2000, p. 1352, § 1; Ga. L. 2000, p. 1589, § 4; Ga. L. 2003, p. 140, § 16; Ga. L. 2003, p. 478, § 1; Ga. L. 2012, p. 899, § 3-6/HB 1176.)

Cross references. — Presentment, or notice of dishonor, § 11-3-501 et seq.

Editor's notes. — Ga. L. 2000, p. 1352, § 16, not codified by the General Assembly, provides that the 2000 amendment to this section is applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For annual survey on criminal law and procedure, 42 Mercer L. Rev. 141 (1990). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

JUDICIAL DECISIONS

Analysis

General Consideration
Civil Liability
Constitutional Issues
Present Consideration or Wages

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1919, pp. 212, 220, former Ga. L. 1924, p. 194 and former Code 1933, § 13-9933, are included in the annotations for this Code section.

Purpose of Code section. — O.C.G.A. § 16-9-20 was enacted to punish the criminal behavior of knowingly passing bad checks, and to protect those legally authorized to negotiate checks given for value. Calhoon v. Mr. Locksmith Co., 200 Ga. App. 618, 409 S.E.2d 226 (1991).

Gravamen of offense of writing check knowing there are insufficient funds is intent to defraud. Berry v. State, 153 Ga. 169, 111 S.E. 669, 35 A.L.R. 370 (1922) (decided under former Ga. L. 1919, p. 212). Barnes v. Gossett Oil Co., 56 Ga. App. 220, 192 S.E. 254, later appeal, 58 Ga. App. 102, 197 S.E. 902 (1937) (decided under former Code 1933, § 13-9933). Crain v. State, 78 Ga. App. 806, 52 S.E.2d 577 (1949) (decided under former Code 1933, § 13-9933).

Regular business transaction. — Requirement of present consideration or a contemporaneous transaction is satisfied by a regular business practice of paying at the end of each week for gasoline purchased by retail customers during the preceding week. Porado v. State, 211 Ga. App. 728, 440 S.E.2d 690 (1994).

Immunity under O.C.G.A. § 16-9-20(h)(1) applies only to suits by those who "made, drew, uttered, executed, or delivered such instrument," and not to persons who were the victim of "financial identity fraud." Nicholl v. Great Atl. & Pac. Tea Co., 238 Ga. App. 30, 517 S.E.2d 561 (1999).

General Consideration (Cont'd)

Establishing requisite of present consideration. — Requisite of present consideration may exist although goods or services are received before a check is delivered in payment when the interval is slight and the exchange can be characterized as a single contemporaneous transaction. Watson v. State, 235 Ga. App. 381, 509 S.E.2d 87 (1998); Holder v. State, 242 Ga. App. 479, 529 S.E.2d 907 (2000).

Elements of subsection (e)(2) are not requirements. — In a bad check case, there was no merit to the defendant's argument that the evidence was insufficient because the state failed to show pursuant to O.C.G.A. § 16-9-20(e)(2) that the representative receiving the check witnessed the defendant's signature on the check and then initialed the check. These provisions of § 16-9-20(e)(2) were not essential elements of the offense, but means to establish a statutory presumption with respect to the identity of the party who issued the check and the party's authority to draw on the named account; here, the state did not rely on the presumption because other evidence established that the defendant issued the check on the defendant's business account. Dougherty v. State, 292 Ga. App. 188, 664 S.E.2d 258 (2008).

Crime of moral turpitude. — Heart of bad check crime, whether its commission is a felony or a misdemeanor, is dishonesty and thus involves moral turpitude, thus evidence of pleas of guilty to its commission as a misdemeanor may be considered by a jury for the purpose of impeachment of a witness. Carruth v. Brown, 202 Ga. App. 656, 415 S.E.2d 470 (1992).

Misdemeanor of issuing a bad check in violation of O.C.G.A. § 16-9-20(a) was a crime of moral turpitude and the jury could consider evidence of a witness' guilty plea to such a crime as proof of general bad moral character which tended to impeach the credibility of that witness within the meaning of former O.C.G.A. § 24-9-84 (see now O.C.G.A. § 24-6-608). Paradise v. State, 212 Ga. App. 166, 441 S.E.2d 497 (1994).

Burden of proof. — State makes prima-facie case by proving making, drawing, etc., with knowledge at time that maker did not have sufficient funds. Burden is then cast upon defendant. Defendant is relieved of burden if it appears from state's evidence that defendant was not actuated by such intent. Berry v. State, 153 Ga. 169, 111 S.E. 669, 35 A.L.R. 370 (1922) (decided under former Ga. L. 1919, p. 212).

Sufficiency of indictment. — Variance between indictment and proof was not fatal simply because the indictment alleged the check amount to be $1,730 and the amount proved at trial was $1,730.60. Holder v. State, 242 Ga. App. 479, 529 S.E.2d 907 (2000).

"Wages" connotes employer-employee relationship. — Term "wages," as used in O.C.G.A. § 16-9-20, connotes an employer and employee relationship. Hutto v. State, 198 Ga. App. 325, 401 S.E.2d 339 (1991).

Offense occurs at time of issuance of check with knowledge that the check will not be honored. State v. Brannon, 154 Ga. App. 285, 267 S.E.2d 888 (1980); Russell v. State, 155 Ga. App. 555, 271 S.E.2d 689 (1980); Watson v. State, 235 Ga. App. 381, 509 S.E.2d 87 (1998).

Offense of uttering a bad check is completed when check is delivered, and it is the criminal intent present at that moment which the law proscribes. Russell v. State, 155 Ga. App. 555, 271 S.E.2d 689 (1980).

Purpose of defendant in giving the check. — When the purpose of the defendant in giving the check was not to deprive the payee of anything, but was only to gain temporary respite from the defendant's creditor, there is no attempt to defraud such as remains an element of the crime of issuance of bad checks. McNeal v. State, 204 Ga. App. 791, 420 S.E.2d 653 (1992).

Drawer's knowledge of insufficient funds. — In an action by the drawer of a check against a bank for damages arising from the drawer's arrest and prosecution for issuing a bad check based on the bank's negligent failure to stop payment and wrongful dishonor of the check, evidence that the drawer knew the check would not be honored was sufficient probable cause for the arrest and prosecution

and, thus, the bank could not be held accountable for such damages. Karrer v. Georgia State Bank, 215 Ga. App. 654, 452 S.E.2d 120 (1994).

Payee's filling in amount at defendant's request makes no difference in crime. — Defendant could be found guilty of the issuance of bad checks despite the defendant's contention that the checks were not "checks" because the checks did not contain a "sum certain" until the payee filled in the amount due at the defendant's request. Hutchens v. State, 174 Ga. App. 507, 330 S.E.2d 436 (1985).

Evidence of subsequent restitution irrelevant. — As opposed to the subsequent failure to make restitution, evidence of subsequent restitution, standing alone, has no real relevancy to criminal liability under O.C.G.A. § 16-9-20. Wilson v. Home Depot, Inc., 180 Ga. App. 218, 348 S.E.2d 588 (1986).

Date not element of offense. — Date on which the checks were delivered is not an essential element of the offense of deposit account fraud; the state may prove the offense by the act and the intent. Holder v. State, 242 Ga. App. 479, 529 S.E.2d 907 (2000).

Prima-facie proof of intent to defraud. — Knowledge that because of insufficient funds the check will not be honored is prima-facie proof of intent to defraud. Brooks v. State, 146 Ga. App. 626, 247 S.E.2d 209 (1978).

Drawer's contention that the drawer told the payee, at the time the drawer issued the payee a check, that the drawer's account did not have sufficient funds to cover the check did not rebut prima facie evidence of the drawer's knowing issuance of a bad check since there was no evidence of simultaneously written statements, representations, or collateral agreements and the record showed that the check was not even post-dated. Karrer v. Georgia State Bank, 215 Ga. App. 654, 452 S.E.2d 120 (1994).

Applicability to post dated checks. — Ga. L. 1919, p. 220 was not applicable to a post dated check when the payee accepts the check before the date due with knowledge that there were no funds to cover the check. Strickland v. State, 27 Ga. App. 772, 110 S.E. 39 (1921) (decided under former Ga. L. 1919, p. 220); White v. State, 27 Ga. App. 774, 110 S.E. 40 (1921) (decided under former Ga. L. 1919, p. 220).

When drawer states that check is not covered, O.C.G.A. § 16-9-20 is not violated. — If check is postdated, or if giver of check states that giver has insufficient money in the bank to cover the check though the giver expects to have the money by time the check is presented for payment, there can be no implied representation that there is now enough on deposit to cover the check. Bivens v. State, 153 Ga. App. 631, 266 S.E.2d 304 (1980).

Payment of judgment for past due rents with check on closed account. — Stipulations relating that a magistrate court had issued a judgment against defendant for past due rents, and that defendant paid the judgment to the creditor with a check on a closed account, knowing that the check would not be honored by the drawee, were sufficient to support a conviction under O.C.G.A. § 16-9-20. Cooley v. State, 197 Ga. App. 340, 398 S.E.2d 414 (1990).

President of corporation, authorized to sign checks, liable for bad check. — Defendant, who was the president of a corporation, ran the business and was the only person authorized to sign checks drawn on the corporation's account, could be held criminally liable for a bad check, even through the check was issued by a corporation on the corporate account, rather than by defendant as an individual. Parish v. State, 178 Ga. App. 177, 342 S.E.2d 360 (1986).

Civil immunity to which merchant is entitled to under O.C.G.A. § 16-9-20 merely applies to activities mentioned in the notice required by subparagraph (a)(2)(B), i.e., giving the notice and turning over the check and information concerning it to the authorities. Stallings v. Coleman, 165 Ga. App. 667, 302 S.E.2d 412 (1983).

When civil immunity unavailable to merchant. — Merchant could not claim civil immunity from action for malicious prosecution and false imprisonment based on plaintiff's allegation that the merchant failed to provide the prosecutor with evidence indicating plaintiff's innocence

General Consideration (Cont'd)

which the merchant obtained prior to plaintiff's preliminary hearing but after having sworn out a complaint which led to plaintiff's arrest. Stallings v. Coleman, 165 Ga. App. 667, 302 S.E.2d 412 (1983).

Defendant merchant is not immune under O.C.G.A. § 16-9-20(h) where evidence is conflicting as to whether plaintiff received notice of defendant's dishonored check notice and there is no evidence that plaintiff received notice in substantially similar form to that provided in subparagraph (a)(2)(B) of that Code section; the drawee bank's notation "unable to locate" is not conclusive evidence that plaintiff had no account with the drawee bank. Wilson v. Wheeler's, Inc., 190 Ga. App. 250, 378 S.E.2d 498, cert. denied, 190 Ga. App. 899, 378 S.E.2d 498 (1989).

Store owner and store manager were not entitled to civil immunity where the notice letter to the customer regarding a dishonored check did not provide the check number, check date, name of bank, name of payee, the warning "has been dishonored," and did not provide notice of the consequence of failing to make restitution within 10 days. Tallman v. Hinton, 220 Ga. App. 23, 467 S.E.2d 596 (1996).

Issuance of checks not part of same contemporaneous transaction. — Issuance of the checks by the defendant cannot be reasonably viewed as having been a part of the same contemporaneous transaction as the delivery of the goods and services where there was never intended to be an exchange of goods and services at nearly the same point in time and such did not in fact occur due to the intervening inspection of the work and the passage of time. McNeal v. State, 204 Ga. App. 791, 420 S.E.2d 653 (1992).

Offense not lesser included offense of forgery. — Offense of issuing bad checks is not a lesser included offense of forgery, and, in a prosecution for forgery, the trial court's failure to give a charge on issuing bad checks was not error. Adams v. State, 217 Ga. App. 759, 458 S.E.2d 918 (1995).

Postdating check cannot serve as basis for bad check charge. — At best, there is implied in issuance of postdated checks a promise to cover drafts when the drafts are presented in the future. Such a promise of future performance cannot serve as a basis for a bad check charge. Bivens v. State, 153 Ga. App. 631, 266 S.E.2d 304 (1980).

County sheriff's deputy in Georgia was not qualifiedly immune from liability from a Florida businesswoman's 42 U.S.C. § 1983 suit alleging that she was illegally incarcerated in Florida for six days until her family posted funds to cover postdated checks she had written to a Georgia food supplier; a prudent officer would not have found probable cause to arrest based on the facts known to the deputy, at least absent further investigation, because: (1) the supplier had a practice of accepting postdated checks from the arrestee; and (2) the offense of deposit account fraud, O.C.G.A. § 16-9-20(a), required a promise of present, rather than future, consideration. Brown v. Camden County, 583 F. Supp. 2d 1358 (S.D. Ga. 2008).

Proof of fraudulent intent in case of postdated check. — State must prove a present fraudulent intent on the part of any maker of a postdated check in order to sustain a conviction for a bad check offense. Galbreath v. State, 193 Ga. App. 410, 387 S.E.2d 915 (1989).

Present fraudulent intent may be inferred when the maker knowingly and intentionally issues a postdated check in the regular course of business without having sufficient funds to cover the check when presented for payment, and when the maker does not call attention to the payee of the fact that the check is postdated or arrange for the payee to hold the check until some future time. Galbreath v. State, 193 Ga. App. 410, 387 S.E.2d 915 (1989).

Stopping payment on check, even if fraudulent. — While it is true that one stopping payment on a check after obtaining a benefit thereunder and with intent to defraud might be guilty of cheating and swindling, that same conduct does not establish uttering of a bad check. Hardeman v. State, 154 Ga. App. 364, 268 S.E.2d 415 (1980); Fortier v. Jordan's Jewelers, Inc., 208 Ga. App. 527, 430 S.E.2d 829 (1993).

Former Code 1933, § 26-1704 did not allow a finding of guilt without

proof beyond a reasonable doubt. Hall v. State, 244 Ga. 86, 259 S.E.2d 41 (1979).

Checks as collateral for loans. — Owners of a small loan company committed perjury when the owners swore out warrants under O.C.G.A. § 16-9-20 on customers who gave the owners checks as collateral for loans and then failed to repay the loans, since the checks were not intended to be deposited and honored by banks, rendering impossible the requisite knowledge/intent required under that section. Watson v. State, 235 Ga. App. 381, 509 S.E.2d 87 (1998).

Check given for equipment rental. — Rational trier of fact could have found beyond a reasonable doubt that a check the defendant gave a construction rental company in exchange for equipment was presented in exchange for a present consideration within the meaning of O.C.G.A. § 16-9-20(a) because the rental of multiple pieces of construction equipment constituted a single transaction, which was not completed until the company picked up the equipment, calculated the amount due for necessary repairs, and presented the defendant with an invoice for which the defendant immediately wrote a check; neither § 16-9-20 nor the decisions of the courts in any way limit the definition of "rent". Gibson v. State, 315 Ga. App. 639, 727 S.E.2d 251 (2012).

Circumstantial evidence sufficient to support conviction. — With regard to a defendant's convictions on three counts of deposit account fraud and two counts of theft by deception, there was sufficient circumstantial evidence to support the convictions on two counts of deposit account fraud and both counts of theft by deception based on the defendant delivering two checks to two banks and receiving funds in exchange for the checks, which were subsequently dishonored; the defendant's failure to repay the funds as demanded; and the defendant's implausible story that the checks were from business partners whom the defendant had never met from another country. One count of deposit account fraud regarding a second check presented to one of the banks in the amount of $301,392 was not supported by the evidence as the prosecution failed to present any evidence that the defendant received anything of value in return for the check since the check was dishonored immediately and the defendant received no funds for that check. Vadde v. State, 296 Ga. App. 405, 674 S.E.2d 323 (2009), cert. denied, No. S09C1087, 2009 Ga. LEXIS 348 (Ga. 2009); cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010); reh'g denied, 559 U.S. 998, 130 S. Ct. 1756, 176 L. Ed. 2d 224 (2010).

Cited in Marshall v. State, 128 Ga. App. 413, 197 S.E.2d 161 (1973); Wiggins v. State, 139 Ga. App. 98, 227 S.E.2d 895 (1976); Purvis v. State, 143 Ga. App. 447, 238 S.E.2d 575 (1977); Harrington v. State, 145 Ga. App. 609, 244 S.E.2d 130 (1978); Farmer v. State, 148 Ga. App. 6, 251 S.E.2d 6 (1978); United States v. Payne, 602 F.2d 1215 (5th Cir. 1979); Pittman v. State, 154 Ga. App. 691, 269 S.E.2d 522 (1980); Bairentine v. State, 156 Ga. App. 341, 274 S.E.2d 736 (1980); Voliton v. Piggly Wiggly, 161 Ga. App. 813, 288 S.E.2d 924 (1982); Bowers v. State, 161 Ga. App. 239, 290 S.E.2d 362 (1982); Goodman v. State, 167 Ga. App. 378, 306 S.E.2d 417 (1983); Reynolds v. State, 172 Ga. App. 628, 323 S.E.2d 912 (1984); Marchman v. State, 173 Ga. App. 257, 325 S.E.2d 879 (1985); Hiers v. State, 182 Ga. App. 743, 356 S.E.2d 763 (1987); Blackford v. Wal-Mart Stores, Inc., 17 F.3d 367 (11th Cir. 1994); Vadner v. Dickerson, 212 Ga. App. 255, 441 S.E.2d 527 (1994); Nicholl v. NationsBank, 227 Ga. App. 287, 488 S.E.2d 751 (1997).

Civil Liability

Evidence required to support malicious prosecution action. — Malicious prosecution action by plaintiff who had issued a bad check was properly dismissed where plaintiff's allegation that plaintiff only wrote the check upon defendant's agreement that defendant would not cash it until plaintiff obtained funds to cover it was not supported by simultaneous written evidence as required by O.C.G.A. § 16-9-20(h)(2). Hartsfield v. Union City Chrysler-Plymouth, 218 Ga. App. 873, 463 S.E.2d 713 (1995).

Evidence of oral statements inadmissible. — Under O.C.G.A. § 16-9-20(h)(2), a civil rights litigant's

Civil Liability (Cont'd)

oral representations regarding the litigant's business transaction with a payee of three checks that the litigant postdated were inadmissible to prove liability on the litigant's state law causes of actions, including false arrest and imprisonment, in the litigant's 42 U.S.C. § 1983 suit. Brown v. Camden County, 583 F. Supp. 2d 1358 (S.D. Ga. 2008).

Charge that defendant must negative state's evidence to reasonable satisfaction of jury. — Charge pertaining to prima-facie evidence which states that jury can entertain reasonable doubt as to guilt only where defendant has proved to its reasonable satisfaction facts which negative state's evidence, is impermissible because it ignores state's burden of proof and defendant's presumption of innocence. Bess v. State, 138 Ga. App. 528, 226 S.E.2d 626 (1976).

Immunity on false arrest and malicious prosecutions claims found. — Upon the grant of certiorari to consider the circumstances under which the deposit account fraud statute provided a defendant with immunity from civil liability in an action for false arrest and malicious prosecution, given the multiple references within O.C.G.A. § 16-9-20(a) and (h) to the making, drawing, uttering, executing, or delivering of an instrument, it could not be said that the holder of a dishonored check was only entitled to immunity from civil liability when the action was brought by the person who signed that check; because the defendants complied with the notice requirements of § 16-9-20(a)(2), the defendants were entitled to immunity on a holder's false arrest and malicious prosecution claims, and the Court of Appeals erred by holding otherwise. Blue Moon Cycle, Inc. v. Jenkins, 281 Ga. 863, 642 S.E.2d 637 (2007).

Constitutional Issues

O.C.G.A. § 16-9-20 does not authorize imprisonment for debt as prohibited by Ga. Const. 1976, Art. I, Sec. I, Para. XX (see now Ga. Const. 1983, Art. I, Sec. I, Para. XXIII). Cobb v. State, 246 Ga. 567, 272 S.E.2d 299 (1980); Griffith v. State, 159 Ga. App. 252, 283 S.E.2d 40 (1981), rev'd on other grounds, 249 Ga. 19, 287 S.E.2d 187 (1982).

O.C.G.A. § 16-9-20(c) is constitutional. — O.C.G.A. § 16-9-20(c), which elevates criminal issuance of a bad check to a felony when drawn on an out-of-state bank, is constitutional. This statutory classification is not based upon residency; it applies to anyone's check drawn on an out-of-state bank. Nor is that subsection a burden on interstate commerce, as the state may qualify right of travel when criminal offense is committed. Finally, there is a rational relationship for differing penalties for bad checks on in-state and out-of-state banks because victim of this criminal act is exposed to possibility of greater harm, as a check on an out-of-state bank requires longer to clear, and thus that subsection constitutes a valid exercise of state's police power. Davis v. State, 248 Ga. 783, 286 S.E.2d 430 (1982).

Imprisonment for act of giving bad check for antecedent debt is not imprisonment for debt but, rather, for an independent act. Cobb v. State, 246 Ga. 567, 272 S.E.2d 299 (1980).

State interest justifying criminal liability for giving bad check in payment of rent or state taxes. — State's interest in insuring orderly flow of commerce and in preventing disruption and mischief which worthless check passing promotes is a proper and appropriate basis for creation of criminal liability for act of giving bad check in payment of existing debt for rent or state taxes. Cobb v. State, 246 Ga. 567, 272 S.E.2d 299 (1980).

Effect of notice. — Defendant merchant was immune from civil liability for giving notice of its holding worthless checks in a manner substantially in compliance with the form provided by O.C.G.A. § 16-9-20 since defendant pursued its collection action with probable cause and without malice. Grand Union Co. v. Edwards, 217 Ga. App. 154, 456 S.E.2d 736 (1995).

Present Consideration or Wages

State may sufficiently establish requisite intent without following procedure to establish prima-facie case. — Court trying bad check case without jury

may be convinced by other evidence in record that, notwithstanding fact that notice provisions were not followed so as to make out a prima-facie case, state sufficiently established mens rea of defendant. Russell v. State, 155 Ga. App. 555, 271 S.E.2d 689 (1980).

Notice of dishonor and subsequent failure to pay. — Notice of drawee's refusal to pay, followed by ten days for defendant to pay the check (upon notice of its dishonor), is not an element of offense of issuing a bad check. State v. Brannon, 154 Ga. App. 285, 267 S.E.2d 888 (1980); Russell v. State, 155 Ga. App. 555, 271 S.E.2d 689 (1980).

Notice of dishonor and subsequent failure to pay are evidentiary matters. — Provisions in former Code 1933, § 26-1704 (see now O.C.G.A. § 16-9-20(a)(2)), relating to notice to defendant and defendant's subsequent failure to pay amount due were evidentiary matters and were not prerequisites to commission of or convictions of offense of issuing a bad check. State v. Brannon, 154 Ga. App. 285, 267 S.E.2d 888 (1980); Russell v. State, 155 Ga. App. 555, 271 S.E.2d 689 (1980).

Transaction amounting to mere promise by drawer to pay in future does not warrant conviction. Highsmith v. State, 33 Ga. App. 192, 143 S.E. 445 (1928) (decided under former Ga. L. 1919, p. 212).

Defrauded party must suffer loss resulting from reliance on defendant's wrongful act. — Former Code 1933, § 13-9933 involved a special form of cheating and swindling, and it must be proved that party alleged to have been defrauded suffered loss resulting from its reliance on defendant's wrongful act as charged in indictment. Hamilton v. State, 118 Ga. App. 842, 165 S.E.2d 884 (1968) (decided under former Code 1933, § 13-9933).

Intent to defraud is not shown where credit is extended at time check is given. Barnes v. Gossett Oil Co., 56 Ga. App. 220, 192 S.E. 254, later appeal, 58 Ga. App. 102, 197 S.E. 902 (1937) (decided under former Code 1933, § 13-9933).

Giving bad check to pay antecedent debt does not violate section. — Giving check in payment of antecedent debt with false statement that maker has funds to cover it does not amount to intent to defraud, where maker does not deprive payee of any right or procure anything of value from payee by means of it. There is no evidence of intent to defraud. Berry v. State, 153 Ga. 169, 111 S.E. 669, 35 A.L.R. 370 (1922) (decided under former Ga. L. 1919, p. 220).

When a check was given for past-due indebtedness, and when there was nothing in evidence which either showed, or tended to show, that in giving the check the defendant either deprived, or intended to deprive, the prosecutor of any right, money, property, or other thing of value, intent to defraud was not shown, and the evidence did not support the verdict of guilty under Ga. L. 1924, p. 194 (see now O.C.G.A. § 16-9-20). Driskell v. State, 47 Ga. App. 741, 171 S.E. 389 (1933) (decided under former Ga. L. 1924, p. 194).

Giving of check to pay antecedent or preexisting debt, without funds in the bank, and without obtaining anything of benefit thereby does not constitute a crime. Vasser v. Berry, 85 Ga. App. 435, 69 S.E.2d 701 (1952) (decided under former Code 1933, § 13-9933).

Drawer's conduct in chronically overdrawing the drawer's account and bouncing checks placed drawer on notice that writing a check to defendant store entailed a reckless risk sufficient to support a bad check charge which precluded the drawer's recovery for malicious prosecution. Blackford v. Wal-Mart Stores, Inc., 912 F. Supp. 537 (S.D. Ga. 1996).

It must be shown that in exchange for check the defendant received property of value, that is, present consideration. Brooks v. State, 146 Ga. App. 626, 247 S.E.2d 209 (1978).

Check must be in exchange for something of value. — Wrongful act under O.C.G.A. § 16-9-20 is issuance of worthless check for present consideration. Present consideration in this context means that check must be in exchange for something of value. Griffith v. State, 249 Ga. 19, 287 S.E.2d 187 (1982).

Evidence supported a conviction of deposit account fraud where it showed the

Present Consideration or Wages (Cont'd)

defendant gave a dishonored check in exchange for a present consideration, albeit goods and services rather than wages. Maddox v. State, 236 Ga. App. 209, 511 S.E.2d 294 (1999).

Check given for same day delivery. — Check given in payment for a delivery of the same date is probably present consideration. McNeal v. State, 204 Ga. App. 791, 420 S.E.2d 653 (1992).

Short interval before delivery of check does not preclude finding of present consideration. — When there is a single contemporaneous transaction in which parties expect goods or services and payment to be exchanged as nearly as possible at the same time, a short interval of time preceding the delivery of a check would not preclude a jury from finding, as a matter of fact, that the check was given in exchange for present consideration. Bowers v. State, 248 Ga. 714, 285 S.E.2d 702 (1982); Gilley v. State, 182 Ga. App. 681, 356 S.E.2d 655 (1987).

Requisite of "present consideration" may exist although goods or services are received before a check is delivered in payment when the interval is slight and the exchange can be characterized as a single contemporaneous transaction. Singletary v. State, 192 Ga. App. 653, 385 S.E.2d 791 (1989).

Services rendered more than two months before delivery of check. — Where check is delivered as payment for services rendered more than two months earlier, a rational trier of fact could not find beyond a reasonable doubt that check was in exchange for present consideration within meaning of O.C.G.A. § 16-9-20. Bowers v. State, 248 Ga. 714, 285 S.E.2d 702 (1982).

When the delivery of goods or services is followed more than two months later by delivery of a check as payment, the interval precludes, as a matter of law, any finding that the check was given in exchange for a present consideration. McNeal v. State, 204 Ga. App. 791, 420 S.E.2d 653 (1992).

Check issued by a partner's wife was not for a present consideration inasmuch as the check was not part of a single contemporaneous transaction since the partnership ordinarily issued a check to the payee in the middle of the month for services performed in the preceding month, and the check in question was issued on August 9 for work performed in June and July. Hutto v. State, 198 Ga. App. 325, 401 S.E.2d 339 (1991).

It must be proved that alleged defrauded party suffered loss resulting from reliance on defendant's wrongful act as charged in indictment. Bowers v. State, 248 Ga. 714, 285 S.E.2d 702 (1982).

Agreement to forgive portion of amount represented by check not shown. — Evidence was sufficient to find the defendant guilty of deposit account fraud for delivering a bad check on a bank account containing insufficient funds. Although the defendant argued that the defendant had paid a supplier part of the amount due on the check and that the supplier had forgiven the remainder in exchange for the defendant's agreement to forgive damage caused by an employee of the supplier, a representative of the supplier denied that there were any such agreements. Dougherty v. State, 292 Ga. App. 188, 664 S.E.2d 258 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Commencement of prosecution. — Prosecution for a violation of O.C.G.A. § 16-9-20 is commenced within the meaning of the statute of limitations on misdemeanors, O.C.G.A. § 17-3-1-(d), when a citation meets the requirements contained in O.C.G.A. § 15-10-202(b) and (c), including the signature of the judge or clerk of the magistrate court and personal service of the citation by a law enforcement officer. 1998 Op. Att'y Gen. No. 98-1.

Ceiling on service charge for returned check. — O.C.G.A. § 16-9-20 establishes a ceiling on the service charge for a returned check which may be imposed by a financial institution or by a merchant who takes the check for purposes other than a full or partial repay-

ment of an extension of credit. 1984 Op. Att'y Gen. No. 84-54.

Service charge limitation on a returned check established by O.C.G.A. § 16-9-20(a)(2) (now subsection (j)) is applicable only to the holder of the returned check. 1985 Op. Att'y Gen. No. 85-31.

Collection company may procure arrest warrant. — Magistrate judge may issue an arrest warrant for someone charged with the offense of deposit account fraud based on the affidavit of a person working for a company in the business of collecting worthless checks for merchants. 1995 Op. Att'y Gen. No. U95-20.

ADVISORY OPINIONS OF THE STATE BAR

Actions by attorney demanding payment on check. — Is it not ethically improper for a lawyer to send a statutory notice to the drawer of a bad check that states that unless the drawer pays the amount of the check in full within a specified period the drawer will be subject to criminal prosecution. Adv. Op. No. 80-26 (November 21, 1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 10 Am. Jur. 2d, Banks; Banks and Financial Institutions, §§ 429, 430, 432. 32 Am. Jur. 2d, False Pretenses, §§ 16, 67 et seq. 37 Am. Jur. 2d, Fraud and Deceit, §§ 192, 465.

C.J.S. — 9 C.J.S., Banks and Banking, §§ 152, 213. 32A C.J.S., Evidence, § 1016. 35 C.J.S., False Pretenses, §§ 7, 8, 40 et seq., 74 et seq., 83.

ALR. — False pretense or confidence game through means of worthless check or draft, 35 A.L.R. 344; 174 A.L.R. 173.

Construction, application, and effect of criminal statutes directed specifically against use of worthless, false, or bogus check or draft, 35 A.L.R. 375; 43 A.L.R. 49; 95 A.L.R. 486; 29 A.L.R.2d 1181; 59 A.L.R.2d 1159; 9 A.L.R.3d 719.

Statute of limitations applicable to action on check, 139 A.L.R. 1280.

Variance between charge that fraudulent check was given in payment of an obligation and evidence that it was delivered as a cash payment, or vice versa, 143 A.L.R. 1076.

Dishonor of check as proximate cause of arrest or criminal prosecution of depositor, 153 A.L.R. 1035.

Discharge of drawer by delay in presenting check as affected by insufficiency of funds during time within which check should have been presented, or subsequent insufficiency occasioned by their withdrawal, 160 A.L.R. 1069.

Construction and effect of "bad check" statute with respect to postdated checks, 29 A.L.R.2d 1181; 59 A.L.R.2d 1159; 9 A.L.R.3d 719.

Construction and effect of "bad check" statute with respect to check in payment of preexisting debt, 59 A.L.R.2d 1159.

Criminal liability of corporate officer who issues worthless checks in corporate name, 68 A.L.R.2d 1269.

Propriety of jury, or court sitting as trier of facts, making a comparison of a disputed writing with a standard produced in court, without the aid of an expert witness, 80 A.L.R.2d 272.

Right and remedy of drawer of check against collecting bank which receives it on forged indorsement and collects it from drawee bank, 99 A.L.R.2d 637.

Reasonable expectation of payment as affecting offense under "worthless check" statutes, 9 A.L.R.3d 719.

Application of "bad check" statute with respect to postdated checks, 52 A.L.R.3d 464.

Cashing check at bank at which account is maintained as violation of bad check statutes, 75 A.L.R.3d 1080.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes, 77 A.L.R.3d 689.

Constitutionality of "bad check" statute, 16 A.L.R.4th 631.

16-9-21. Printing, executing, or negotiating checks, drafts, orders, or debit card sales drafts knowing information thereon to be in error, fictitious, or assigned to another account holder.

(a) It shall be unlawful for any person to print or cause to be printed checks, drafts, orders, or debit card sales drafts, drawn upon any financial institution or to execute or negotiate any check, draft, order, or debit card sales draft knowing that the account number, routing number, or other information printed on such check, draft, order, or debit card sales draft is in error, fictitious, or assigned to another account holder or financial institution.

(b) Any person who violates subsection (a) of this Code section shall be punished by a fine of not more than $5,000.00 or by imprisonment for not less than one year nor more than five years, or both. (Code 1981, § 16-9-21, enacted by Ga. L. 1989, p. 1570, § 2; Ga. L. 1994, p. 1787, § 4.)

JUDICIAL DECISIONS

Lesser included offense of forgery. — Offense of negotiating a fictitious check is a lesser included offense of forgery, and, in a prosecution for forgery, the trial court's failure to give a charge on negotiating fictitious checks constituted reversible error. Adams v. State, 217 Ga. App. 759, 458 S.E.2d 918 (1995).

Jury instruction on negotiating fictitious check not required. — In a trial for first-degree forgery, the trial court did not err in refusing to give a requested charge on negotiating a fictitious check under O.C.G.A. § 16-9-21 because it was not adjusted to the facts. No evidence was presented at trial that the defendant printed or caused to be printed the check in question. Wilkes v. State, 293 Ga. App. 724, 667 S.E.2d 705 (2008), overruled on other grounds, Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012).

ARTICLE 3

ILLEGAL USE OF FINANCIAL TRANSACTION CARDS

RESEARCH REFERENCES

ALR. — Criminal liability for unauthorized use of credit card, 24 A.L.R.3d 986.

Credit card issuer's liability, under state laws, for wrongful billing, cancellation, dishonor, or disclosure, 53 A.L.R.4th 231.

16-9-30. Definitions.

As used in this article, the term:

(1) "Acquirer" means a business organization, government, financial institution, or an agent of a business organization, government, or financial institution that authorizes a merchant to accept payment

by financial transaction card for money, goods, services, or anything else of value.

(2) "Automated banking device" means any machine which when properly activated by a financial transaction card and personal identification code may be used for any of the purposes for which a financial transaction card may be used.

(3) "Cardholder" means the person, government, or organization to whom or for whose benefit the financial transaction card is issued by an issuer.

(4) "Expired financial transaction card" means a financial transaction card which is no longer valid because the term for which it was issued has elapsed.

(5) "Financial transaction card" or "FTC" means any instrument or device, whether known as a credit card, credit plate, bank services card, banking card, check guarantee card, debit card, or by any other name, issued with or without fee by an issuer for the use of the cardholder:

(A) In obtaining money, goods, services, or anything else of value;

(B) In certifying or guaranteeing to a person or business the availability to the cardholder of funds on deposit that are equal to or greater than the amount necessary to honor a draft or check payable to the order of such person or business; or

(C) In providing the cardholder access to a demand deposit account, savings account, or time deposit account for the purpose of:

(i) Making deposits of money or checks therein;

(ii) Withdrawing funds in the form of money, money orders, or traveler's checks therefrom;

(iii) Transferring funds from any demand deposit account, savings account, or time deposit account to any other demand deposit account, savings account, or time deposit account;

(iv) Transferring funds from any demand deposit account, savings account, or time deposit account to any credit card accounts, overdraft privilege accounts, loan accounts, or any other credit accounts in full or partial satisfaction of any outstanding balance owed existing therein;

(v) For the purchase of goods, services, or anything else of value; or

(vi) Obtaining information pertaining to any demand deposit account, savings account, or time deposit account.

(5.1) "Financial transaction card account number" means a number, numerical code, alphabetical code, or alphanumeric code assigned by the issuer to a particular financial transaction card and which identifies the cardholder's account with the issuer.

(5.2) "Government" means:

(A) Every state department, agency, board, bureau, commission, and authority;

(B) Every county, municipal corporation, school system, or other political subdivision of this state;

(C) Every department, agency, board, bureau, commission, authority, or similar body of each such county, municipal corporation, school system, or other political subdivision of this state;

(D) Every city, county, regional, or other authority established pursuant to the laws of this state; and

(E) Every locally elected clerk of superior court, judge of the probate court, sheriff, tax receiver, tax collector, or tax commissioner.

(6) "Issuer" means the business organization or financial institution or its duly authorized agent which issues a financial transaction card.

(7) "Personal identification code" means a numeric or alphabetical code, signature, photograph, fingerprint, or any other means of electronic or mechanical confirmation used by the cardholder of a financial transaction card to permit authorized electronic use of that financial transaction card.

(8) "Presenting" means those actions taken by a cardholder or any person to introduce a financial transaction card into an automated banking device with or without utilization of a personal identification code or merely displaying or showing, with intent to defraud, a financial transaction card to the issuer or to any person or organization providing money, goods, services, or anything else of value or to any other entity.

(8.1) "Purchasing card," "PCard," or "P-Card" means a type of financial transaction card allowing persons, governments, or business organizations to use financial transaction infrastructure.

(9) "Receives" or "receiving" means acquiring possession of or control of or accepting a financial transaction card as security for a loan.

(10) "Revoked financial transaction card" means a financial transaction card which is no longer valid because permission to use it has been suspended or terminated by the issuer. (Ga. L. 1960, p. 1113, § 1; Code 1933, § 26-1705, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 128, § 1; Ga. L. 1970, p. 529, §§ 1, 2; Ga. L. 1980, p. 1083, § 1; Ga. L. 1990, p. 304, § 1; Ga. L. 1996, p. 371, § 1; Ga. L. 2015, p. 266, § 1/HB 192; Ga. L. 2016, p. 558, § 1/HB 949.)

The 2016 amendment, effective July 1, 2016, deleted "and" at the end of subparagraph (5.2)(C); added "; and" at the end of subparagraph (5.2)(D); and added subparagraph (5.2)(E).

JUDICIAL DECISIONS

Word "cardholder" can refer only to person named on card. Rowland v. State, 124 Ga. App. 495, 184 S.E.2d 495 (1971).

Wife of cardholder is not a "cardholder" although issuer may have mailed duplicate credit cards to cardholder and logical inference may be drawn from this fact that it impliedly consented for him to turn over one of the cards to his wife or such other person as he might desire to have access to his credit. Rowland v. State, 124 Ga. App. 495, 184 S.E.2d 495 (1971).

Cards fell within statute. — There was sufficient evidence to support a conviction for financial transaction card (FTC) theft, in violation of O.C.G.A. § 16-9-31(a)(1), when cards, bank documents, and other physical evidence were found upon execution of a search warrant at the defendant's residence, and the cards fit within the definition of a FTC, pursuant to O.C.G.A. § 16-9-30(5); at trial, the cards were introduced into evidence and the owners testified as to what type of cards they were and that the defendant and the codefendant had not been given permission to possess the cards. Brown v. State, 277 Ga. App. 514, 627 S.E.2d 136 (2006).

State did not fail to prove that a victim's credit card was a financial transaction card as defined by O.C.G.A. § 16-9-30(5) because the trial evidence established that the card was a credit card as described under the statute, and the credit card was introduced into evidence at trial and, thus, was identifiable by the jury as a card included in the statute; the state was not required to show that a credit card was used or could have been used in order to establish the defendant's commission of the offense of financial transaction card theft because O.C.G.A. § 16-9-31(a)(1) did not distinguish between valid, revoked, or unrevoked cards in proscribing the offense. Amaechi v. State, 306 Ga. App. 333, 702 S.E.2d 680 (2010).

Cited in Allen v. State, 293 Ga. App. 439, 667 S.E.2d 215 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Credit Cards and Charge Accounts, § 1 et seq.

16-9-31. Financial transaction card theft.

(a) A person commits the offense of financial transaction card theft when:

(1) He takes, obtains, or withholds a financial transaction card from the person, possession, custody, or control of another without the

cardholder's consent; or who, with knowledge that it has been so taken, obtained, or withheld, receives the financial transaction card with intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder;

(2) He receives a financial transaction card that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder and he retains possession with intent to use it or sell it or to transfer it to a person other than the issuer or the cardholder;

(3) He, not being the issuer, sells a financial transaction card or buys a financial transaction card from a person other than the issuer; or

(4) He, not being the issuer, during any 12 month period receives two or more financial transaction cards in the names of persons which he has reason to know were taken or retained under circumstances which constitute a violation of paragraph (3) of subsection (a) of Code Section 16-9-33 and paragraph (3) of this subsection.

(b) Taking, obtaining, or withholding a financial transaction card without consent of the cardholder or issuer is included in conduct defined in Code Section 16-8-2 as the offense of theft by taking.

(c) Conviction of the offense of financial transaction card theft is punishable as provided in subsection (b) of Code Section 16-9-38.

(d) When a person has in his possession or under his control two or more financial transaction cards issued in the names of persons other than members of his immediate family or without the consent of the cardholder, such possession shall be prima-facie evidence that the financial transaction cards have been obtained in violation of subsection (a) of this Code section. (Code 1933, § 26-1705.2, enacted by Ga. L. 1969, p. 128, § 1; Code 1933, § 26-1705.1, enacted by Ga. L. 1980, p. 1083, § 1; Ga. L. 1992, p. 6, § 16.)

Law reviews. — For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 16-9-31(d), providing that the possession of two or more financial transaction cards issued to someone other than a member of the possessor's immediate family, without the consent of the person to whom the cards were issued, is prima facie evidence that the cards were obtained as the result of the theft of financial transaction cards, creates an unconstitutional mandatory presumption shifting the burden of proof to a defendant, but it is severable from the remainder of the statute prohibiting financial transaction card theft. Mohamed v. State, 276 Ga. 706, 583 S.E.2d 9 (2003).

Severing the unconstitutional mandatory burden-shifting presumption of O.C.G.A. § 16-9-31(d) from the remainder of § 16-9-31, prohibiting financial transaction card theft, did not affect the legislative purpose of the statute, and the remainder of § 16-9-31 was to be given full effect. Mohamed v. State, 276 Ga. 706, 583 S.E.2d 9 (2003).

Defendant's conviction of financial transaction card theft was proper, because while O.C.G.A. § 16-9-31(d) had been found to unconstitutionally shift the burden of proof, the remainder of the statute was ruled to be effective, and the defendant was charged with a violation of O.C.G.A. § 16-9-31(a). Middlebrooks v. State, 277 Ga. App. 551, 627 S.E.2d 154 (2006).

Construction with federal provisions. — In a case in which the defendant appealed the 18-month sentence for violating 8 U.S.C. § 1326(a) and (b)(2), since the defendant's prior conviction for financial transaction card theft, in violation of O.C.G.A. § 16-9-31, was an aggravated felony under 8 U.S.C. § 1101(a)(43)(G), the district court did not err by applying 8-level enhancement under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(C). United States v. De La O-Gallegos, 663 Fed. Appx. 827 (11th Cir. 2016) (Unpublished).

Whether or not the card has been revoked when discovered in defendant's possession is not an element of the offense of card theft. Thomas v. State, 176 Ga. App. 771, 337 S.E.2d 344 (1985).

Not lesser included offense of financial transaction card fraud. — Financial transaction card theft is not a lesser included offense of financial transaction card fraud, O.C.G.A. § 16-9-33; thus, defendant's prior conviction for the former offense did not preclude prosecution for the latter. Sword v. State, 232 Ga. App. 497, 502 S.E.2d 334 (1998).

Proper venue. — Venue was proper for a conviction of financial transaction card theft, O.C.G.A. § 16-9-31(a), as jurisdiction was proper in the county where the offense occurred, Ga. Const. 1983, Art. VI, Sec. II, Para. VI, and the trial was held in the country in which the defendant resided and the site where the stolen cards were found. Middlebrooks v. State, 277 Ga. App. 551, 627 S.E.2d 154 (2006).

Improper venue. — State failed to prove venue as to a financial transaction card theft, where defendant was charged with unlawfully "obtaining" cards in Gwinnett County, but the testimony showed that the cards were taken or obtained in a county other than Gwinnett and there was no evidence that defendant obtained the credit cards in Gwinnett County. Coursey v. State, 196 Ga. App. 135, 395 S.E.2d 574 (1990).

Showing that the defendant used the card is not necessary to establish a wrongful withholding although that showing may be sufficient to establish the offense. Thomas v. State, 176 Ga. App. 771, 337 S.E.2d 344 (1985).

An inference of guilt would not arise from unexplained possession of a credit card absent any further showing since, unlike a general theft situation, the original acquisition of the card need not be wrongful. Thomas v. State, 176 Ga. App. 771, 337 S.E.2d 344 (1985).

Fact that cardholder cancelled card after discovering its loss did not mean that state had to show issuer's lack of consent for defendant to use card, since O.C.G.A. § 16-9-31(a)(1) clearly provides that the withholding be done "without the cardholder's consent." Thomas v. State, 176 Ga. App. 771, 337 S.E.2d 344 (1985).

No distinction between valid, revoked, or unrevoked cards. — State did not fail to prove that a victim's credit card was a financial transaction card as defined by O.C.G.A. § 16-9-30(5) because the trial evidence established that the card was a credit card as described under the statute, and the credit card was introduced into evidence at trial and, thus, was identifiable by the jury as a card included in the statute; the state was not required to show that a credit card was used or could have been used in order to establish the defendant's commission of the offense of financial transaction card theft because O.C.G.A. § 16-9-31(a)(1) did not distinguish between valid, revoked, or unrevoked cards in proscribing the offense. Amaechi v. State, 306 Ga. App. 333, 702 S.E.2d 680 (2010).

Evidence sufficient for conviction of financial transaction card theft

and forgery. — See Alexander v. State, 186 Ga. App. 787, 368 S.E.2d 550 (1988); Wilson v. State, 212 Ga. App. 325, 441 S.E.2d 808 (1994), overruled on other grounds, Mohamed v. State, 276 Ga. 706, 583 S.E.2d 9 (2003); Edwards v. State, 216 Ga. App. 225, 453 S.E.2d 806 (1995); Johnson v. State, 246 Ga. App. 239, 539 S.E.2d 914 (2000).

Videotapes of the defendant taking the victim's purse and using the victim's credit card, the defendant's company photograph, and the ID testimony of a clerk at the store where the purse was stolen was sufficient evidence to convict the defendant for a violation of O.C.G.A. § 16-9-31. Green v. State, 223 Ga. App. 467, 477 S.E.2d 895 (1996).

Evidence sufficient for conviction. — Evidence was sufficient to support defendant's convictions under O.C.G.A. §§ 16-9-31 and 16-9-33(a) since defendant took a bank card from defendant's sibling that was in the sibling's ex-spouse's name, defendant checked into a hotel and used it to guarantee the room, and while at the hotel, someone attempted to use the card, but the transaction was denied. Rogers v. State, 259 Ga. App. 516, 578 S.E.2d 169 (2003).

Evidence was sufficient to sustain conviction for financial transaction card theft, where the evidence showed, inter alia, that the victim's handbag containing three credit cards was found in defendant's car and that even if the jury found that defendant's children took the handbag, defendant was aware of it, hid it, or even directed the theft. Blance v. State, 261 Ga. App. 224, 582 S.E.2d 191 (2003).

Evidence that defendant, on two different dates, approached cashiers at the same store, gave them a credit card that was falsified in that it had the account numbers from another person's account superimposed over the credit card's original numbers, that the cashiers punched in the card's numbers manually when they could not get the card to scan properly, and that defendant was able to obtain store merchandise because the sales were then approved was sufficient to support defendant's conviction for financial transaction card theft. Epps v. State, 262 Ga. App. 113, 584 S.E.2d 701 (2003).

Defendant's conviction for credit card theft was supported by the evidence where defendant was painting in the victim's house, the victim fell asleep for part of the time that defendant was working there, and when the victim woke up the victim discovered that the victim's safe had been broken into and that credit cards and other information was missing from the victim's handbag. Defendant had the credit cards and a prescription medicine of the victim's in the victim's wallet when the police examined the contents thereof. Maddox v. State, 268 Ga. App. 610, 602 S.E.2d 326 (2004).

Testimony from the victim that on the day the victim's wallet disappeared, the defendant entered the victim's business, refused assistance, looked around and then sat down at a table near the location where the victim's purse was stored, provided sufficient circumstances for a jury to conclude that the defendant took the victim's wallet from the victim's workplace and was deliberately withholding the victim's financial transaction cards in opposition to the victim's possessory rights when the defendant was apprehended in Douglas County. Leonard v. State, 281 Ga. App. 184, 635 S.E.2d 795 (2006).

Defendant's convictions on various counts of financial transaction card theft and theft by taking were upheld on appeal as sufficient evidence established that, with regard to the two victims, the defendant was the only possible person to have taken the money and/or credit cards and/or identification cards from one victim's purse and the other victim's center car console. However, one conviction for theft by taking currency was reversed on appeal as the victim who alleged that the defendant stole the victim's wallet testified that the victim never kept cash in the wallet, and the indictment specifically stated that currency was taken. Allen v. State, 293 Ga. App. 439, 667 S.E.2d 215 (2008).

Evidence was sufficient to convict the defendant as a party to the crimes of financial transaction card theft and identity fraud because the defendant obtained a financial transaction card from a victim without the victim's consent as the state introduced evidence that the individual

that the defendant gave transaction cards to used both transaction cards, and the state introduced the receipts evidencing the use and attempted use of the cards; and the defendant, without authorization, possessed a victim's financial transaction card information with the intent to use the card fraudulently. Daniel v. State, 342 Ga. App. 448, 803 S.E.2d 603 (2017).

Denial of motion for directed verdict proper. — Trial court did not err in denying the defendant's motion for a directed verdict on the charge of financial transaction card theft because the victim was in constructive possession of the victim's credit card, which was sufficient to establish the allegation set forth in the accusation; because the victim was the cardholder on the account, the victim had the authority to exercise dominion and control over the credit card that had been issued in the victim's name. Amaechi v. State, 306 Ga. App. 333, 702 S.E.2d 680 (2010).

Jury was authorized to find that the defendant acted with guilty knowledge and intent to commit credit card theft in violation of O.C.G.A. § 16-9-31(a)(1) because the evidence established that the defendant had obtained unauthorized possession of the victim's credit card, and there was circumstantial evidence from which an inference could be drawn that the defendant had knowledge that the defendant was accepting the credit card without authority and as part of an unlawful scheme; when the defendant was confronted by police officers, the defendant fled, and the defendant maintained unauthorized possession of a different credit card, along with additional items that could be used to engage in fraudulent credit transactions. Amaechi v. State, 306 Ga. App. 333, 702 S.E.2d 680 (2010).

Conviction on multiple counts proper. — Defendant was properly convicted of nine counts of financial transaction card theft under O.C.G.A. § 16-9-31(a)(1), as each card was distinct and bore a different number or expiration date, and it was not error to charge the defendant with a separate count of financial transaction card theft, i.e. withholding a financial transaction card, for each card withheld. Middlebrooks v. State, 277 Ga. App. 551, 627 S.E.2d 154 (2006).

There was sufficient evidence to support a conviction for financial transaction card (FTC) theft, in violation of O.C.G.A. § 16-9-31(a)(1), where cards, bank documents, and other physical evidence were found upon execution of a search warrant at the defendant's residence, and the cards fit within the definition of a FTC, pursuant to O.C.G.A. § 16-9-30(5); at trial, the cards were introduced into evidence and the owners testified as to what type of cards they were and that the defendant and the codefendant had not been given permission to possess the cards. Brown v. State, 277 Ga. App. 514, 627 S.E.2d 136 (2006).

Because each of three financial transaction cards found in a defendant's possession was unique and each bore a different number and expiration date, the defendant's conviction on three counts of financial transaction card theft under O.C.G.A. § 16-9-31 was proper. Leonard v. State, 281 Ga. App. 184, 635 S.E.2d 795 (2006).

Jury charge erroneously shifted burden of proof. — When a jury charge on financial transaction card theft included the O.C.G.A. § 16-9-31(d) presumption of guilt, which had subsequently been declared unconstitutional, the charge erroneously shifted the burden of proof; thus, the defendant's conviction was reversed. Cade v. State, 264 Ga. App. 52, 589 S.E.2d 870 (2003).

Jury instruction. — Jury instruction which stated the unconstitutional mandatory burden-shifting presumption in O.C.G.A. § 16-9-31(d) was not harmless beyond a reasonable doubt as the evidence of defendant's guilt was not overwhelming. Mohamed v. State, 276 Ga. 706, 583 S.E.2d 9 (2003).

Trial court did not err in failing to give the defendant's requested jury charge on mere presence because the defendant was not entitled to the instruction since the evidence showed that the defendant was an active participant in the financial transaction card theft. Amaechi v. State, 306 Ga. App. 333, 702 S.E.2d 680 (2010).

Cited in Rozier v. State, 259 Ga. 399, 383 S.E.2d 113 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 32 Am. Jur. 2d, False Pretenses, §§ 11, 23. 37 Am. Jur. 2d, Fraud and Deceit, § 1 et seq.

C.J.S. — 35 C.J.S, False Pretenses, § 13.

ALR. — May offense of obtaining money or property by false pretenses or confidence game be predicated on obtaining loan or renewal thereof, 52 A.L.R. 1167.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes, 77 A.L.R.3d 689.

Validity, construction, and application of state statutes relating to offense of identity theft, 125 A.L.R.5th 537.

Criminal liability for unauthorized use of credit card under state credit card statutes, 68 A.L.R.6th 527.

16-9-32. Forgery of financial transaction card.

(a) A person commits the offense of financial transaction card forgery when:

(1) With intent to defraud a purported issuer; a person or organization providing money, goods, services, or anything else of value; or any other person, he falsely makes or falsely embosses a purported financial transaction card;

(2) With intent to defraud a purported issuer; a person or organization providing money, goods, services, or anything else of value; or any other person, he falsely encodes, duplicates, or alters existing encoded information on a financial transaction card or utters such a financial transaction card; or

(3) He, not being the cardholder or a person authorized by him, with intent to defraud the issuer; a person or organization providing money, goods, services, or anything else of value; or any other person, signs a financial transaction card.

(b) A person falsely makes a financial transaction card when he makes or draws in whole or in part a device or instrument which purports to be the financial transaction card of a named issuer but which is not such a financial transaction card because the issuer did not authorize the making or drawing or when he alters a financial transaction card which was validly issued.

(c) A person falsely embosses a financial transaction card when without authorization of the named issuer he completes a financial transaction card by adding any of the matter other than the signature of the cardholder, which an issuer requires to appear on the financial transaction card before it can be used by a cardholder.

(d) A person falsely encodes a financial transaction card when without authorization of the purported issuer he records, erases, or otherwise alters magnetically, electronically, electromagnetically, or by any other means whatsoever information on a financial transaction

card which will permit acceptance of that card by any automated banking device.

(e) Conviction of the offense of financial transaction card forgery shall be punishable as provided in subsection (b) of Code Section 16-9-38.

(f) When a person other than the purported issuer possesses two or more financial transaction cards which are falsely made, falsely encoded, or falsely embossed, such possession shall be prima-facie evidence that said cards were obtained in violation of paragraph (1) or (2) of subsection (a) of this Code section. (Code 1933, § 26-1705.3, enacted by Ga. L. 1969, p. 128, § 1; Code 1933, § 26-1705.2, enacted by Ga. L. 1980, p. 1083, § 1.)

JUDICIAL DECISIONS

O.C.G.A. § 16-9-32 is violated when an individual comes into possession of a credit card, without having actually stolen the credit card, and without consent "withholds" the card from the possession, custody or control of the owner. Slack v. State, 159 Ga. App. 185, 283 S.E.2d 64 (1981).

It is not necessary to negate that the defendant had been entrusted with credit cards. Dudley v. State, 228 Ga. 551, 186 S.E.2d 875 (1972).

Evidence of burglary admissible. — Evidence that card in question was discovered missing from the card's normal location following a burglary is admissible. McKenzey v. State, 125 Ga. App. 508, 188 S.E.2d 116, later appeal, 127 Ga. App. 304, 193 S.E.2d 226 (1972).

Intention required by former Code 1933, § 26-1705.2 (see now O.C.G.A. § 16-9-32) was for jury determination based on the defendant's actions and conduct. McKenzey v. State, 125 Ga. App. 508, 188 S.E.2d 116, later appeal, 127 Ga. App. 304, 193 S.E.2d 226 (1972).

Recent unexplained possession and use of stolen credit card is sufficient to support conviction under O.C.G.A. § 16-9-32 for theft by "withholding" the credit card from the card's rightful owner. Slack v. State, 159 Ga. App. 185, 283 S.E.2d 64 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Credit Cards and Charge Accounts, § 1 et seq.

ALR. — Liability of holder of credit card or plate for purchases made thereon by another person, 15 A.L.R.3d 1086.

16-9-33. Financial transaction card fraud.

(a) A person commits the offense of financial transaction card fraud when, with intent to defraud the issuer; a person or organization providing money, goods, services, or anything else of value; or any other person; or cardholder, such person:

(1) Uses for the purpose of obtaining money, goods, services, or anything else of value:

(A) A financial transaction card obtained or retained or which was received with knowledge that it was obtained or retained in violation of Code Section 16-9-31 or 16-9-32;

(B) A financial transaction card which he or she knows is forged, altered, expired, revoked, or was obtained as a result of a fraudulent application in violation of subsection (d) of this Code section; or

(C) The financial transaction card account number of a financial transaction card which he or she knows has not in fact been issued or is forged, altered, expired, revoked, or was obtained as a result of a fraudulent application in violation of subsection (d) of this Code section;

(2) Obtains money, goods, services, or anything else of value by:

(A) Representing without the consent of the cardholder that he or she is the holder of a specified card;

(B) Presenting the financial transaction card without the authorization or permission of the cardholder or issuer;

(C) Falsely representing that he or she is the holder of a card and such card has not in fact been issued; or

(D) Giving, orally or in writing, a financial transaction card account number to the provider of the money, goods, services, or other thing of value for billing purposes without the authorization or permission of the cardholder or issuer for such use;

(3) Obtains control over a financial transaction card as security for debt;

(4) Deposits into his or her account or any account by means of an automated banking device a false, fictitious, forged, altered, or counterfeit check, draft, money order, or any other such document not his or her lawful or legal property; or

(5) Receives money, goods, services, or anything else of value as a result of a false, fictitious, forged, altered, or counterfeit check, draft, money order, or any other such document having been deposited into an account via an automated banking device, knowing at the time of receipt of the money, goods, services, or item of value that the document so deposited was false, fictitious, forged, altered, or counterfeit or that the above-deposited item was not his lawful or legal property.

(b) A person who is authorized by an issuer to furnish money, goods, services, or anything else of value upon presentation of a financial transaction card by the cardholder or any agent or employee of such person commits the offense of financial transaction card fraud when, with intent to defraud the issuer or the cardholder, he or she:

(1) Furnishes money, goods, services, or anything else of value upon presentation of a financial transaction card obtained or retained in violation of Code Section 16-9-31 or a financial transaction card which he or she knows is forged, expired, or revoked;

(2) Alters a charge ticket or purchase ticket to reflect a larger amount than that approved by the cardholder; or

(3) Fails to furnish money, goods, services, or anything else of value which he or she represents in writing to the issuer that he or she has furnished.

(c) Conviction of the offense of financial transaction card fraud as provided in subsection (a) or (b) of this Code section is punishable as provided in subsection (a) of Code Section 16-9-38 if the value of all money, goods, services, and other things of value furnished in violation of this Code section or if the difference between the value actually furnished and the value represented to the issuer to have been furnished in violation of this Code section does not exceed $100.00 in any six-month period. Conviction of the offense of financial transaction card fraud as provided in subsection (a) or (b) of this Code section is punishable as provided in subsection (b) of Code Section 16-9-38 if such value exceeds $100.00 in any six-month period.

(d) A person commits the offense of financial transaction card fraud when, upon application for a financial transaction card to an issuer, he or she knowingly makes or causes to be made a false statement or report relative to his or her name, occupation, employer, financial condition, assets, or liabilities or willfully and substantially overvalues any assets or willfully omits or substantially undervalues any indebtedness for the purpose of influencing the issuer to issue a financial transaction card. Financial transaction card fraud as provided in this subsection is punishable as provided in subsection (b) of Code Section 16-9-38.

(e) A cardholder commits the offense of financial transaction card fraud when he or she willfully, knowingly, and with an intent to defraud the issuer; a person or organization providing money, goods, services, or anything else of value; or any other person submits verbally or in writing to the issuer or any other person any false notice or report of the theft, loss, disappearance, or nonreceipt of his or her financial transaction card and personal identification code. Conviction of the offense of financial transaction card fraud as provided in this subsection is punishable as provided in subsection (b) of Code Section 16-9-38.

(f) A person authorized by an acquirer to furnish money, goods, services, or anything else of value upon presentation of a financial transaction card or a financial transaction card account number by a cardholder or any agent or employee of such person, who, with intent to

defraud the issuer, acquirer, or cardholder, remits to an issuer or acquirer, for payment, a financial transaction card record of a sale, which sale was not made by such person, agent, or employee, commits the offense of financial transaction card fraud. Conviction of the offense of financial transaction card fraud as provided in this subsection shall be punishable as provided in subsection (b) of Code Section 16-9-38.

(g) Reserved.

(h) For purposes of this Code section, revocation shall be construed to include either notice given in person or notice given in writing to the person to whom the financial transaction card and personal identification code was issued. Notice of revocation shall be immediate when notice is given in person. The sending of a notice in writing by registered or certified mail or statutory overnight delivery in the United States mail, duly stamped and addressed to such person at his or her last address known to the issuer, shall be prima-facie evidence that such notice was duly received after seven days from the date of deposit in the mail. If the address is located outside the United States, Puerto Rico, the Virgin Islands, the Canal Zone, and Canada, notice shall be presumed to have been received ten days after mailing by registered or certified mail or statutory overnight delivery. (Code 1933, §§ 26-1705.1, 26-1705.4, enacted by Ga. L. 1969, p. 128, § 1; Code 1933, § 26-1705.3, enacted by Ga. L. 1980, p. 1083, § 1; Ga. L. 1990, p. 304, § 2; Ga. L. 1992, p. 6, § 16; Ga. L. 1996, p. 371, §§ 2, 3; Ga. L. 2000, p. 1589, § 3; Ga. L. 2015, p. 266, § 2/HB 192.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the 2000 amendment to this section is applicable with respect to notices delivered on or after July 1, 2000.

JUDICIAL DECISIONS

Monetary loss not required. — Although there was evidence that credit card company honored transaction and paid inn for the charge on the room, there was no requirement under the circumstances to show that the inn sustained a monetary loss; it was sufficient to prove that, by use of the credit card, defendant obtained valuable services from the inn. Hale v. State, 214 Ga. App. 899, 449 S.E.2d 520 (1994).

Financial transaction card theft not lesser included offense. — Financial transaction card theft, O.C.G.A. § 16-9-31, is not a lesser included offense of financial transaction card fraud, O.C.G.A. § 16-9-33; thus, defendant's prior conviction for the former offense did not preclude prosecution for the latter. Sword v. State, 232 Ga. App. 497, 502 S.E.2d 334 (1998).

Venue improper. — Defendant's conviction on 20 counts of financial transaction card fraud were not authorized, where the evidence on each count created the inference that the financial transaction card was presented and goods were received in a county other than that in which defendant was prosecuted. Newsom v. State, 183 Ga. App. 339, 359 S.E.2d 11 (1987).

Evidence sufficient for conviction. — Defendant's conviction of financial transaction card fraud was affirmed, where evidence that a VISA card was used without its owner's authorization to ob-

tain goods and money established the corpus delicti, and the owner's testimony that defendant had access to the owner's mail and that the signatures on the charge slips closely paralleled defendant's handwriting provided sufficient corroboration of defendant's confession. Goswick v. State, 201 Ga. App. 799, 412 S.E.2d 293 (1991).

Videotapes of the defendant taking the victim's purse and using the victim's credit card, the defendant's company photograph and the ID testimony of a clerk at the store where the purse was stolen, were sufficient evidence to convict defendant for a violation of O.C.G.A. § 16-9-33. Green v. State, 223 Ga. App. 467, 477 S.E.2d 895 (1996).

Proof that defendant used an alias on business account credit card applications was sufficient to authorize the jury's verdicts that defendant committed financial transaction card fraud in violation of O.C.G.A. § 16-9-33(d). Jordan v. State, 242 Ga. App. 547, 528 S.E.2d 858 (2000).

Evidence was sufficient to support defendant's convictions under O.C.G.A. §§ 16-9-31 and 16-9-33(a) since defendant took a bank card from defendant's sibling that was in the sibling's ex-spouse's name, defendant checked into a hotel and used it to guarantee the room, and while at the hotel, someone attempted to use the card, but the transaction was denied. Rogers v. State, 259 Ga. App. 516, 578 S.E.2d 169 (2003).

Evidence that defendant, on two different dates, approached cashiers at the same store, gave them a credit card that was falsified in that it had the account numbers from another man's account superimposed over the credit card's original numbers, that the cashiers punched in the card's numbers manually when they could not get the card to scan properly, and that defendant was able to obtain store merchandise because the sales were then approved was sufficient to support defendant's conviction for financial transaction card fraud. Epps v. State, 262 Ga. App. 113, 584 S.E.2d 701 (2003).

Evidence was sufficient to support defendant's convictions for malice murder, theft by taking, and financial transaction card fraud, as the evidence authorized any rational trier of fact to find defendant guilty of those crimes beyond a reasonable doubt; the evidence showed that defendant struck the victim multiple times with a wrench, causing the victim's death, that the defendant was in possession of a laptop computer that had been missing from the victim's office, and that defendant had used the victim's credit, posing as the victim's wife, on the day the victim died. Baugh v. State, 276 Ga. 736, 585 S.E.2d 616 (2003).

When the evidence showed the defendant's family participated in a scheme whereby the family obtained credit cards in the names of non-existent businesses and used the cards to buy goods for the family's own use with no intention of repayment, even though the defendant did not personally sign for these purchases, a jury could conclude that the defendant aided and abetted the fraudulent use of the card in light of evidence showing the defendant agreed to the defendant's adult step-child's offer to obtain one of the fictitious business credit cards for defendant's use, that the defendant was aware of a scheme to commit fraud through the use of credit cards, and that the defendant was seen often in the store where the fraudulent purchases occurred. Stuart v. State, 267 Ga. App. 463, 600 S.E.2d 629 (2004).

Evidence supported the defendant's convictions of armed robbery, kidnapping, possession of a firearm during the commission of a crime, and financial transaction card fraud. Shortly after a man called the store where the victim worked to see if the store was open, a masked man with a gun came into the store, ordered the victim to the back, and then robbed the store and took the victim's credit cards; soon afterward that same morning, the defendant bought sneakers with the victim's credit card; the clerk who sold the defendant the sneakers identified the defendant at trial and in a photographic lineup and testified that the clerk knew the defendant because the defendant was a regular customer; and the defendant's cell phone records showed that just before the robbery, the defendant called the victim's store and blocked the defendant's number. Anderson v. State, 297 Ga. App. 733, 678

S.E.2d 498 (2009), aff'd, 287 Ga. 159, 695 S.E.2d 26 (Ga. 2010).

Evidence was sufficient to convict the defendant of identity fraud, financial-transaction-card fraud, and exploitation of an elder person and the defendant's convictions for those predicate acts was sufficient to convict the defendant of violating the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., because the defendant participated in a scheme, in which the defendant and the defendant's cohorts obtained elderly victims' credit card, banking, and other financial and personal information by telephoning the victims and informing the victims that the victims' power would be cut off if the victims did not immediately provide such information; and the defendant used the cards or the account numbers to make purchases and to obtain cash advances. Roberts v. State, 344 Ga. App. 324, 810 S.E.2d 169 (2018).

New trial mandated. — Because the state never filed a motion to take a material witness's deposition as required by former O.C.G.A. § 24-10-130 (see now O.C.G.A. § 24-13-130), the trial court never held a hearing, never found grounds for the deposition, and never ordered that the deposition be taken during a particular time period; therefore, the defendant's conviction for financial transaction card fraud under O.C.G.A. § 16-9-33(a) was reversed and the case was remanded for a new trial. Evans v. State, 275 Ga. App. 621, 621 S.E.2d 584 (2005).

Cited in Harris v. State, 166 Ga. App. 202, 303 S.E.2d 534 (1983); Thomas v. State, 176 Ga. App. 771, 337 S.E.2d 344 (1985); Cisco v. State, 285 Ga. 656, 680 S.E.2d 831 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Credit Cards and Charge Accounts, § 1 et seq. 36 Am. Jur. 2d, Forgery, § 1 et seq.

C.J.S. — 37 C.J.S., Forgery, § 15.

ALR. — Invalid instrument as subject of forgery, 174 A.L.R. 1300.

Liability of holder of credit card or plate for purchases made thereon by another person, 15 A.L.R.3d 1086.

What statute of limitations governs action arising out of transaction consummated by the use of credit card, 2 A.L.R.4th 677.

Successful negotiation of commercial transaction as element of state offense of credit card fraud or false pretense in use of credit card, 106 A.L.R.5th 701.

Validity, construction, and application of state statutes relating to offense of identity theft, 125 A.L.R.5th 537.

Criminal liability for unauthorized use of credit card under state credit card statutes, 68 A.L.R.6th 527.

16-9-34. Criminal possession of financial transaction card forgery devices.

(a) A person commits the offense of criminal possession of financial transaction card forgery devices when:

(1) He is a person other than the cardholder and possesses two or more incomplete financial transaction cards with intent to complete them without the consent of the issuer; or

(2) With knowledge of its character, he possesses machinery, plates, or any other contrivance designed to reproduce instruments purporting to be financial transaction cards of an issuer who has not consented to the preparation of such financial transaction cards.

(b) A financial transaction card is incomplete if part of the matter, other than the signature of the cardholder, which an issuer requires to appear on the financial transaction card before it can be used by a cardholder has not yet been stamped, embossed, imprinted, encoded, or written upon.

(c) Conviction of the offense of criminal possession of financial transaction card forgery devices is punishable as provided in subsection (b) of Code Section 16-9-38. (Code 1933, § 26-1705.5, enacted by Ga. L. 1969, p. 128, § 1; Code 1933, § 26-1705.4, enacted by Ga. L. 1980, p. 1083, § 1; Ga. L. 1982, p. 3, § 16.)

JUDICIAL DECISIONS

Cited in Rowland v. State, 124 Ga. App. 495, 184 S.E.2d 495 (1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Credit Cards and Charge Accounts, § 1 et seq. 32 Am. Jur. 2d, False Pretenses, § 28 et seq.

C.J.S. — 35 C.J.S., False Pretenses, § 19.

ALR. — Signing credit charge or credit sales slip, as forgery, 90 A.L.R.2d 822.

Liability of holder of credit card or plate for purchases made thereon by another person, 15 A.L.R.3d 1086.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes, 77 A.L.R.3d 689.

16-9-35. Criminal receipt of goods and services fraudulently obtained.

A person commits the offense of criminally receiving goods and services fraudulently obtained when he receives money, goods, services, or anything else of value obtained in violation of subsection (a) of Code Section 16-9-33 with the knowledge or belief that the same were obtained in violation of subsection (a) of Code Section 16-9-33. Conviction of the offense of criminal receipt of goods and services fraudulently obtained is punishable as provided in subsection (a) of Code Section 16-9-38 if the value of all money, goods, services, and anything else of value obtained in violation of this Code section does not exceed $100.00 in any six-month period. Conviction of the offense of criminal receipt of goods and services fraudulently obtained is punishable as provided in subsection (b) of Code Section 16-9-38 if such value exceeds $100.00 in any six-month period. (Code 1933, § 26-1705.6, enacted by Ga. L. 1969, p. 128, § 1; Code 1933, § 26-1705.5, enacted by Ga. L. 1980, p. 1083, § 1.)

RESEARCH REFERENCES

ALR. — Liability of holder of credit card or plate for purchases made thereon by another person, 15 A.L.R.3d 1086.

What statute of limitations governs action arising out of transaction consummated by use of credit card, 2 A.L.R.4th 677.

16-9-36. Rebuttable presumption of criminal receipt of goods and services fraudulently obtained.

A person who obtains at a discount price a ticket issued by an airline, railroad, steamship, or other transportation company from other than an authorized agent of such company, which ticket was acquired in violation of subsection (a) of Code Section 16-9-33 without reasonable inquiry to ascertain that the person from whom it was obtained had a legal right to possess it shall be rebuttably presumed to know that such ticket was acquired under circumstances constituting a violation of subsection (a) of Code Section 16-9-33 if the ticket shows on its face that it was issued through the use of a financial transaction card or that it is otherwise nonrefundable. (Code 1933, § 26-1705.7, enacted by Ga. L. 1969, p. 128, § 1; Code 1933, § 26-1705.6, enacted by Ga. L. 1980, p. 1083, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d, Receiving and Transporting Stolen Property, § 7.

C.J.S. — 76 C.J.S., Receiving or Tranferring Stolen Goods, § 4.

ALR. — Signing credit charge or credit sales slip, as forgery, 90 A.L.R.2d 822.

Liability of holder of credit card or plate for purchases made thereon by another person, 15 A.L.R.3d 1086.

16-9-36.1. Criminal factoring of financial transaction card records.

Any person who, without the acquirer's express authorization, employs or solicits an authorized merchant or any agent or employee of such merchant to remit to an issuer or acquirer, for payment, a financial transaction card record of a sale, which sale was not made by such merchant, agent, or employee, commits the offense of criminal factoring of financial transaction card records. Conviction of criminal factoring of financial transaction card records shall be punishable as provided in subsection (b) of Code Section 16-9-38. (Code 1981, § 16-9-36.1, enacted by Ga. L. 1990, p. 304, § 3.)

16-9-37. Unauthorized use of financial transaction card; misuse of government issued cards.

(a) Any person who has been issued or entrusted with a financial transaction card for specifically authorized purposes, provided such

authorization is in writing stating a maximum amount charges that can be made with the financial transaction card, and who uses the financial transaction card in a manner and for purposes not authorized in order to obtain or purchase money, goods, services, or anything else of value shall be punished as provided in subsection (a) of Code Section 16-9-38.

(b) Any person who has been issued or entrusted with a financial transaction card by a government for specifically limited and specifically authorized purposes, provided such limitations and authorizations are in writing, and who uses the financial transaction card in a manner and for purposes not authorized shall be punished as provided in subsection (b) of Code Section 16-9-38. (Code 1933, § 26-1705.8, enacted by Ga. L. 1969, p. 128, § 1; Code 1933, § 26-1705.7, enacted by Ga. L. 1980, p. 1083, § 1; Ga. L. 2015, p. 266, § 3/HB 192.)

Cross references. — Limitation on elected official's use of government issued purchasing or credit cards, § 36-80-24.

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 198 et seq. 66 Am. Jur. 2d, Receiving and Transporting Stolen Property, §§ 28, 29.

ALR. — What statute of limitations governs action arising out of transaction consummated by use of credit card, 2 A.L.R.4th 677.

16-9-38. Punishment and penalties.

(a) A person who is subject to the punishment and penalties of this subsection shall be fined not more than $1,000.00 or imprisoned not less than one year nor more than two years, or both.

(b) A person subject to punishment under this subsection shall be guilty of a felony and shall be punished by a fine of not more than $5,000.00 or imprisonment for not less than one year nor more than three years, or both. (Code 1933, § 26-1705.9, enacted by Ga. L. 1969, p. 128, § 1; Ga. L. 1972, p. 861, § 1; Code 1933, § 26-1705.8, enacted by Ga. L. 1980, p. 1083, § 1.)

JUDICIAL DECISIONS

Cited in Dudley v. State, 228 Ga. 551, 186 S.E.2d 875 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Credit Cards and Charge Accounts, § 1 et seq.

ALR. — Liability of holder of credit card or plate for purchases made thereon

by another person, 15 A.L.R.3d 1086.

16-9-39. Publication of information regarding schemes, devices, means, or methods for financial transaction card fraud or theft of telecommunication services.

(a) As used in this Code section, "publish" means the communication or dissemination of information to any one or more persons either orally, in person, by telephone, radio or television, or in a writing of any kind, including without limitation a letter, memorandum, circular, handbill, newspaper or magazine article, or book.

(b) A person who publishes the number or code of any existing, canceled, revoked, or nonexistent telephone number, credit number, or other credit device, or method of numbering or coding which is employed in the issuance of telephone numbers, credit numbers, or other credit devices with knowledge or reason to believe that it may be used to avoid the payment of any lawful telephone or telegraph toll charge under circumstances evidencing an intent to have such telephone number, credit number, credit device, or method of numbering or coding so used shall be punished as provided in subsection (a) of Code Section 16-9-38.

(c) An offense under this Code section may be deemed to have been committed at either the place at which the publication was initiated, at which publication was received, or at which the information so published was utilized to avoid or attempt to avoid payment of any lawful telephone or telegraph charge. (Code 1933, § 26-1705.10, enacted by Ga. L. 1972, p. 473, § 1; Code 1933, § 26-1705.9, enacted by Ga. L. 1980, p. 1083, § 1.)

Cross references. — Theft of telecommunication services generally, § 46-5-2 et seq.

16-9-40. Venue determinations.

(a) In any prosecution for a violation of this article, the state is not required to establish that all of the acts constituting the crime occurred in this state or within one city, county, or local jurisdiction, and it is no defense that some of the acts constituting the crime did not occur in this state or within one city, county, or local jurisdiction. Except as otherwise provided by Code Section 17-2-2, for purposes of venue, the crime defined by this Code section shall be considered as having been committed in the county where the commission of the crime commenced.

(b) In any prosecution for a violation of this article by a public official or government employee, using government funds or a financial transaction card issued to such official or government employee by or on behalf of government, the crime shall be considered to have been committed in the county in which such public official holds office or such government employee is employed. (Code 1981, § 16-9-40, enacted by Ga. L. 2015, p. 266, § 4/HB 192.)

ARTICLE 4

FRAUD AND RELATED OFFENSES

Cross references. — Fraudulent practices pertaining to voter registration and elections, § 21-2-560 et seq. Insurance fraud, § 33-1-9. Fraud in obtaining public assistance, food stamps, or Medicaid, § 49-4-15.

RESEARCH REFERENCES

ALR. — Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 A.L.R.4th 971.

Offense of obtaining telephone services by unauthorized use of another's telephone number — state cases, 61 A.L.R.4th 1197.

16-9-50. Deceptive business practices.

(a) A person commits the offense of using a deceptive business practice when in the regular course of business he knowingly:

(1) Uses or possesses for use a false weight or measure or any other device for falsely determining or recording any quality or quantity;

(2) Sells, offers, or exposes for sale or delivers less than the represented quality or quantity of any commodity; or

(3) Takes or attempts to take more than the represented quantity of any commodity when as buyer he furnishes the weight or measure.

(b) Any person who commits the offense of using a deceptive business practice shall be guilty of a misdemeanor. (Code 1933, § 26-1706, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Deceptive or unfair trade practices or consumer transactions, § 10-1-370 et seq. Misrepresentation of quantity of commodities in commercial transactions, and misrepresentation or deception in pricing by weight, measure, or count, §§ 10-2-7, 10-2-8.

Law reviews. — For article discussing available remedies in this state for deceptive trade practices, in light of the model Unfair Trade Practices and Consumer Protection Law proposed in Georgia in 1973, see 10 Ga. St. B.J. 281 (1973). For article explaining the Unfair Trade Practices and Consumer Protection Act, proposed in Georgia in 1973, see 10 Ga. St. B.J. 409 (1974).

For note discussing criminal penalty for deceptive business practices, see 25 Emory L.J. 445 (1976).

JUDICIAL DECISIONS

Corporate liability. — Although O.C.G.A. § 16-9-50 defining the crime of deceptive business practices does not contain in the statute's definition any indication of a legislative purpose to impose liability on a corporation, the state is not required to allege the provisions of O.C.G.A. § 16-2-22 in accusations under § 16-9-50, but only to prove that the defendant corporation or managerial agent authorized deceptive practices. State v. Military Circle Pet Ctr. No. 94, Inc., 257 Ga. 388, 360 S.E.2d 248 (1987).

Cited in State ex rel. Ryles v. Meredith Chevrolet, Inc., 145 Ga. App. 8, 244 S.E.2d 15 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Weights and Measures, § 40 et seq.

C.J.S. — 35 C.J.S., False Pretenses, § 14. 94 C.J.S., Weights and Measures, § 28 et seq.

ALR. — Genuine making of instrument for purpose of defrauding as constituting forgery, 41 A.L.R. 229; 46 A.L.R. 1529; 51 A.L.R. 568.

False representation in business transaction as within statute relating to "confidence game," 56 A.L.R. 727.

Criminal responsibility for fraud or false pretenses in connection with home repairs or installations, 99 A.L.R.2d 925.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes, 77 A.L.R.3d 689.

Fraud actions: right to recover for mental or emotional distress, 11 A.L.R.5th 88.

Use of fraud or trick as "constructive breaking" for purpose of burglary or breaking and entering offense, 17 A.L.R.5th 125.

16-9-51. Destruction, removal, concealment, encumbrance, or transfer of property subject to security interest.

(a) Except as provided in subsection (b) of this Code section, a person who destroys, removes, conceals, encumbers, transfers, or otherwise deals with property subject to a security interest with intent to hinder enforcement of that interest shall be guilty of a misdemeanor.

(b) A person who destroys, removes, conceals, encumbers, transfers, or otherwise deals with property subject to a security interest with intent to hinder enforcement of that security interest and in so doing does damage to such property in an amount greater than $500.00 shall be guilty of a misdemeanor of a high and aggravated nature.

(c) In a prosecution under this Code section the crime shall be considered as having been committed in any county where any act in furtherance of the criminal scheme was done or caused to be done. (Code 1933, § 26-1707, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1988, p. 299, § 1.)

JUDICIAL DECISIONS

Misdemeanor offense under O.C.G.A. § 16-9-51 does not require proof of "intent to defraud," but requires only proof that one has dealt with property subject to a security interest with intent to hinder enforcement of that interest. Worth v. State, 179 Ga. App. 207, 346 S.E.2d 82 (1986).

Cited in Garrett v. State, 133 Ga. App. 503, 211 S.E.2d 441 (1974); Sowards v. State, 137 Ga. App. 423, 224 S.E.2d 85 (1976); Trogdon v. State, 176 Ga. App. 246, 335 S.E.2d 481 (1985).

RESEARCH REFERENCES

C.J.S. — 35 C.J.S., False Pretenses, §§ 21, 33. 37 C.J.S., Fraud, §§ 123, 124.

ALR. — Duty of senior encumbrancer on sale under judicial decree, or under power of sale, to observe equities of subsequent encumbrancers or purchasers as to marshaling assets or sale in inverse order of alienation, 35 A.L.R. 1307; 131 A.L.R. 4.

May offense of obtaining money or property by false pretenses or confidence game be predicated on obtaining loan or renewal thereof, 52 A.L.R. 1167.

Elements and proof of crime of improper sale, removal, concealment, or disposal of property subject to security interest under UCC, 48 A.L.R.4th 819.

16-9-52. Improper solicitation of money.

(a) A person commits the offense of improper solicitation of money when he solicits payment of money by another by means of a statement or invoice or any writing that could reasonably be interpreted as a statement or invoice for goods not yet ordered or for services not yet performed and not yet ordered, unless there appears on the face of the statement or invoice or writing in 30 point boldface type the following warning:

> "This is a solicitation for the order of goods or services and you are under no obligation to make payment unless you accept the offer contained herein."

(b) Any person who violates subsection (a) of this Code section shall be guilty of a misdemeanor.

(c) In addition to other remedies, any person damaged by noncompliance with subsection (a) of this Code section is entitled to damages in the amount equal to three times the sum solicited. (Code 1933, § 26-1708, enacted by Ga. L. 1968, p. 322, §§ 1-3; Ga. L. 1969, p. 857, § 7; Ga. L. 1985, p. 149, § 16.)

Cross references. — Regulation of retail installment and home solicitation sales, § 10-1-1 et seq.

RESEARCH REFERENCES

C.J.S. — 35 C.J.S., False Pretenses, § 33.

16-9-53. Damaging, destroying, or secreting property to defraud another.

(a) A person commits the offense of damaging, destroying, or secreting property to defraud another person when he knowingly and with intent to defraud another person damages, destroys, or secretes any property of whatever class or character, whether the property of himself or of another person.

(b) A person convicted of the offense of damaging, destroying, or secreting property to defraud another person shall be punished by imprisonment for not less than one nor more than five years. (Code 1933, § 26-1504, enacted by Ga. L. 1968, p. 1249, § 1.)

JUDICIAL DECISIONS

O.C.G.A. § 16-9-53 requires "secreting" property which means to hide or conceal; however, the statute does not mandate that the property be hidden in the literal sense of being unable to view the property but only that the property be placed where the property is unlikely to be discovered. Jarrett v. State, 161 Ga. App. 285, 287 S.E.2d 746 (1982).

Burning property to defraud insurer is not a lesser included offense of third-degree arson. — Burning to defraud an insurer is not a lesser offense included in greater one of third-degree arson under former Code 1933, § 26-2210 (see now O.C.G.A. § 16-9-32) because each was a separate and distinct offense. Powell v. State, 121 Ga. App. 57, 172 S.E.2d 455 (1970).

Cited in Powell v. State, 123 Ga. App. 795, 182 S.E.2d 677 (1971); Garrett v. State, 133 Ga. App. 503, 211 S.E.2d 441 (1974); Powell v. State, 142 Ga. App. 641, 236 S.E.2d 779 (1977); United States v. Peacock, 654 F.2d 339 (5th Cir. 1981); McKee v. State, 163 Ga. App. 430, 294 S.E.2d 689 (1982); Green v. State, 265 Ga. 263, 454 S.E.2d 466 (1995).

16-9-54. False statements by telephone solicitors.

(a) In making a telephone solicitation for the purpose of the sale of goods or services or for the purpose of seeking charitable contributions, it shall be unlawful for any person to make false statements regarding the purpose of the solicitation, the person or persons represented by the solicitor, or the person or persons benefiting from the solicitation.

(b) Any person who violates subsection (a) of this Code section shall be guilty of a misdemeanor. (Code 1933, § 26-1710, enacted by Ga. L. 1977, p. 601, § 1.)

Cross references. — Regulation of professional fund raisers and professional solicitors, T. 43, C. 17. Use of telephone to transmit obscene, lewd, or other inappropriate communications for commercial purposes, § 46-5-22.

RESEARCH REFERENCES

ALR. — When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes, 77 A.L.R.3d 689.

Validity, construction, and application of state statute or law pertaining to telephone solicitation, 44 A.L.R.5th 619.

16-9-55. Fraudulently obtaining or attempting to obtain public housing or reduction in public housing rent.

(a) Any person who obtains or attempts to obtain or who establishes or attempts to establish eligibility for, and any person who knowingly or intentionally aids or abets such person in obtaining or attempting to obtain or in establishing or attempting to establish eligibility for, any public housing or a reduction in public housing rental charges or any rent subsidy or payment from a tenant in connection with public housing to which such person would not otherwise be entitled, by means of a false statement, failure to disclose information, impersonation, or other fraudulent scheme or device shall be guilty of a misdemeanor.

(b) As used in this Code section, "public housing" means housing which is constructed, operated, maintained, financed, or subsidized by the state, a county, a municipal corporation, the Georgia Housing and Finance Authority, a housing authority, or by any other political subdivision or public corporation of the state or its subdivisions.

(c) Notice of subsection (a) of this Code section shall be printed on the application form for public housing and shall be displayed in the office where such application is made. (Code 1933, § 26-1710, enacted by Ga. L. 1977, p. 1332, §§ 1, 2; Code 1933, § 26-1710.1, as redesignated by Ga. L. 1980, p. 405, § 2; Ga. L. 1989, p. 1242, § 1; Ga. L. 1991, p. 1653, § 2-3.)

Cross references. — Qualifications for tenants of public housing accommodations, § 8-3-12.

Law reviews. — For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

JUDICIAL DECISIONS

Subsidized private housing. — Private housing for which defendants received subsidies from the county housing authority constituted "public housing" for the purposes of O.C.G.A. § 16-9-55. Robertson v. State, 210 Ga. App. 834, 437 S.E.2d 816 (1993).

Charging violation. — Variances were not fatal between accusations charging the defendants with fraudulently obtaining public housing and the evidence which showed that the defendants were entitled to some public housing benefits but not as great a benefit as the defendants actually received. Robertson v. State, 210 Ga. App. 834, 437 S.E.2d 816 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 32 Am. Jur. 2d, False Pretenses, §§ 10, 25.

C.J.S. — 35 C.J.S., False Pretenses, §§ 13, 38.

ALR. — When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes, 77 A.L.R.3d 689.

16-9-56. Fraudulent attempts to obtain refunds.

(a) It shall be unlawful for any person to give a false or fictitious name, address, or telephone number as that person's own or to give the name, address, or telephone number of any other person without that other person's knowledge and approval for the purpose of obtaining or attempting to obtain a refund for merchandise returned to a business establishment or a refund on a ticket or other document which is evidence of a service purchased from a business establishment, which service is yet to be performed.

(b) Any person who violates this Code section shall be guilty of a misdemeanor. (Code 1933, § 26-1709, enacted by Ga. L. 1974, p. 490, § 1; Ga. L. 1978, p. 1985, § 1; Ga. L. 1994, p. 850, § 1.)

Law reviews. — For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 114 (1994).

JUDICIAL DECISIONS

Cited in Finley v. State, 139 Ga. App. 495, 229 S.E.2d 6 (1976).

RESEARCH REFERENCES

ALR. — Admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempts on other occasions, 78 A.L.R.2d 1359.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes, 77 A.L.R.3d 689.

16-9-57. False representation as representative of peace officer organization or fire service organization.

(a) It shall be unlawful for any person to solicit or accept a fee, consideration, or donation or to offer for sale or to sell advertising as a representative of a peace officer organization or fire service organization or under the guise of representing a peace officer organization or fire service organization unless such person is employed by, is acting pursuant to the authority of, or is a member of such organization.

(b) As used in this Code section, the term:

(1) "Fire service" shall include any person duly elected, appointed, or employed to engage in fire fighting.

(2) "Peace officer" shall include any person duly elected, appointed, or employed to engage in public law enforcement work.

(c) Any person, firm, association, or corporation violating subsection (a) of this Code section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $500.00 or by imprisonment for not more than 30 days, or both.

(d) Any person, firm, association, or corporation violating subsection (a) of this Code section through the use of some form of communication across the boundaries of the state, whether such communication is by mail, by the use of any electronic device including but not limited to the use of a telephone or telegraph, or by any other means, shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than three years or by a fine of not less than $1,000.00 nor more than $5,000.00, or both. (Ga. L. 1974, p. 1221, §§ 1-3; Ga. L. 1985, p. 411, § 1.)

Cross references. — Criminal penalty for impersonation of public officer or employee, § 16-10-23.

16-9-58. Failing to pay for natural products or chattels.

Any person, either on his or her own account or for others, who with fraudulent intent shall buy cotton, corn, rice, crude turpentine, spirits of turpentine, rosin, pitch, tar, timber, pulpwood, Christmas trees, pine needles, horticultural crops, poultry and poultry products, cattle, hogs, sheep, goats, ratites, horses, mules, pecans, peaches, apples, watermelons, cantaloupes, or other products or chattels and fail or refuse to pay therefor within 20 days following receipt of such products or chattels or by such other payment due date explicitly stated in a written contract agreed to by the buyer and seller, whichever is later, shall be guilty of a misdemeanor; except that if the value of the products or chattels exceeded $500.00 such person shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one year nor more than five years. (Ga. L. 1884-5, pp. 45, 52; Code 1933 § 5-9914 enacted by Code 1981, § 16-9-58, enacted by Ga. L. 1983, p. 485, § 2; Ga. L. 1995, p. 244, § 11; Ga. L. 2003, p. 369, § 1.)

Editor's notes. — The provisions of this Code section were previously enacted in substantially similar form by Ga. L. 1884-5, pp. 45 and 52. However, those provisions were not enacted as part of the original Code by the Code enactment Act (Ga. L. 1981, Ex. Sess., p. 8).

JUDICIAL DECISIONS

Construction. — Plain language of O.C.G.A. § 16-9-58 criminalizes acting with fraudulent intent to buy the enumerated items and failing or refusing to pay for those items within a certain time, and the crime is not complete until the failure or refusal to pay occurs. Babbitt v. State, 314 Ga. App. 115, 723 S.E.2d 10 (2012).

Prosecution under former provision, repealed in 1982, properly dismissed. — Enactment of the Official Code of Georgia Annotated in 1982 repealed the statute governing the offense of failing to pay for agriculture products; thus, in the absence of a saving provision, the prosecution for such an offense which had not reached final judgment was properly dismissed. State v. Fordham, 172 Ga. App. 853, 324 S.E.2d 796 (1984).

Parties convicted under former provisions pardoned. — Parties convicted of failure to pay for agricultural products, in violation of former Code 1933, § 5-9914, were pardoned when the state legislature acted to repeal the statute without an express saving provision applicable to such prior misconduct, notwithstanding the fact that the legislature at the next session reenacted verbatim § 5-9914 as O.C.G.A. § 16-9-58. Davis v. State, 172 Ga. App. 893, 325 S.E.2d 926 (1984).

Venue. — Trial court did not err in denying the defendant's motion to dismiss an indictment charging the defendant with arranging to buy cattle and failing or refusing to pay the seller in violation of O.C.G.A. § 16-9-58 on the ground that venue did not lie in Laurens County because there was some evidence that the place of payment was at the seller's location in Laurens County and that the defendant wrongfully failed or refused to pay the seller in Laurens County for the cattle; even if the defendant's fraudulent intent arose in Kansas sometime after the cattle were shipped, the crime was not consummated until the defendant failed or refused to pay. Babbitt v. State, 314 Ga. App. 115, 723 S.E.2d 10 (2012).

Trial court did not err in denying the defendant's motion to dismiss an indictment charging the defendant with arranging to buy cattle and failing or refusing to pay the seller in violation of O.C.G.A. § 16-9-58 because the stipulated facts did not include that the transaction at issue included an explicit due date under the terms of a written contract; O.C.G.A. § 16-9-58 does not specify that it pertains only to "cash sales," nor does it turn on when title passes to the buyer because the statute was specifically revised to extend its application to "all sales," and payment must be made within 20 days following receipt of such products or chattels or by such other payment due date explicitly stated in a written contract, whichever is later. Babbitt v. State, 314 Ga. App. 115, 723 S.E.2d 10 (2012).

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No crime between November 1, 1982 and July 1, 1983. — Failure to pay for natural products or chattels was not a crime in Georgia between November 1, 1982 and July 1, 1983. 1983 Op. Att'y Gen. No. U83-75.

16-9-59. Operation of credit repair services organization.

(a) As used in this Code section, the term:

(1) "Buyer" means any individual who is solicited to purchase or who purchases the services of a credit repair services organization.

(2)(A) "Credit repair services organization" means any person who, with respect to the extension of credit to a buyer by others, sells, provides, or performs, or represents that he can or will sell, provide,

or perform, in return for the payment of money or other valuable consideration any of the following services:

(i) Improving a buyer's credit record, history, or rating;

(ii) Obtaining an extension of credit for a buyer;

(iii) Providing advice or assistance to a buyer with regard to either division (i) or (ii) of this subparagraph.

(B) "Credit repair services organization" does not include:

(i) Any person authorized to make loans or extensions of credit under the laws of this state or the United States who is subject to regulation and supervision by this state or the United States;

(ii) Any bank or savings and loan institution whose deposits or accounts are eligible for insurance by the Federal Deposit Insurance Corporation or the Savings Association Insurance Fund of the Federal Deposit Insurance Corporation;

(iii) Any nonprofit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986;

(iv) Any person licensed as a real estate broker by this state if the person is acting within the course and scope of that license;

(v) Any person licensed to practice law in this state if the person renders services within the course and scope of his or her practice as an attorney;

(vi) Any broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission if the broker-dealer is acting within the course and scope of those regulatory agencies; or

(vii) Any consumer reporting agency as defined in the federal Fair Credit Reporting Act (15 U.S.C. 1681-1681t).

(3) "Extension of credit" means the right to defer payment of debt or to incur debt and defer its payment, offered or granted primarily for personal, family, or household purposes.

(b) A person commits the offense of operating a credit repair services organization when he or she owns, operates, or is affiliated with a credit repair services organization.

(c) Any person who commits the offense of operating a credit repair services organization shall be guilty of a misdemeanor. (Code 1981, § 16-9-59, enacted by Ga. L. 1987, p. 1413, § 1; Ga. L. 1988, p. 13, § 16.)

Cross references. — Debt adjustment, § 18-5-1 et seq.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, in division (a)(2)(B)(ii), "Savings Association Insurance Fund of the Federal Deposit Insurance Corporation" was substituted for "Federal Savings and Loan Insurance Corporation".

Law reviews. — For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

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Fingerprintable offense. — Operation of a credit repair services organization is an offense for which those charged with a violation are to be fingerprinted. 1987 Op. Att'y Gen. No. 87-21.

Organizations exempt from taxation under § 501(3)(c) of the Internal Revenue Code, although exempt from O.C.G.A. § 16-9-59, are prohibited from engaging in activities proscribed by the debt adjustment law, O.C.G.A. § 18-5-1 et seq. 1997 Op. Att'y Gen. No. U97-6.

16-9-60. "Foreclosure fraud" construed; penalty.

(a) For purposes of this Code section, the term "foreclosure fraud" shall include any of the following: knowingly or willfully representing that moneys provided to or on behalf of a debtor, as defined in Code Section 44-14-162.1 in connection with property used as a dwelling place by said debtor, are a loan if in fact they are used to purchase said property or such debtor's interest therein; or knowingly or willfully making fraudulent representation to a debtor about assisting the debtor in connection with said property.

(b) Any person who by foreclosure fraud purchases or attempts to purchase residential property by means of such fraudulent scheme shall be guilty of a felony.

(c) A person who violates subsection (b) of this Code section shall be punished by imprisonment for not less than one year nor more than three years or by a fine of not less than $1,000.00 nor more than $5,000.00, or both. (Code 1981, § 16-9-60, enacted by Ga. L. 1988, p. 1469, § 1; Ga. L. 1989, p. 12, § 1.)

16-9-61. Misrepresenting the origin or ownership of timber or agricultural commodities.

(a) A person commits the crime of misrepresenting the origin or ownership of timber or agricultural commodities when, in the course of a sale, attempted sale, delivery, or other completed or attempted transaction regarding timber or agricultural commodities, he or she knowingly, willfully, and with criminal intent to defraud makes a false statement or knowingly, willfully, and with criminal intent to defraud causes a false statement to be made with regard to any specific ownership of the timber or agricultural commodities or with regard to the location or ownership of the land where the timber was cut or the agricultural commodities were harvested.

(b) Misrepresenting the origin of timber or agricultural commodities shall be punished, upon conviction, as for a misdemeanor; except that if the property which was the subject of the misrepresentation exceeded $500.00 in value, it shall be a felony offense punishable upon conviction by a sentence of imprisonment of not less than one year and not exceeding five years. (Code 1981, § 16-9-61, enacted by Ga. L. 1996, p. 943, § 1.)

16-9-62. Crimes utilizing automated sales suppression devices, zapper, or phantom-ware; penalties.

(a) As used in this Code section, the term:

(1) "Automated sales suppression device" or "zapper" means a software program, carried on a memory stick or removable compact disc, accessed through an Internet link, or accessed through any other means, that falsifies the electronic records of electronic cash registers and other point-of-sale systems, including, but not limited to, transaction data and transaction reports.

(2) "Electronic cash register" means a device that keeps a register or supporting documents through the means of an electronic device or computer system designed to record transaction data for the purpose of computing, compiling, or processing retail sales transaction data in whatever manner.

(3) "Phantom-ware" means a hidden, preinstalled, or installed at a later time programming option embedded in the operating system of an electronic cash register or hardwired into the electronic cash register that can be used to create a virtual second till or may eliminate or manipulate transaction records that may or may not be preserved in digital formats to represent the true or manipulated record of transactions in the electronic cash register.

(4) "Transaction data" includes items purchased by a customer, the price for each item, a taxability determination for each item, a segregated tax amount for each of the taxed items, the amount of cash or credit tendered, the net amount returned to the customer in change, the date and time of the purchase, the name, address, and identification number of the vendor, and the receipt or invoice number of the transaction.

(5) "Transaction reports" means a report documenting, but not limited to, the sales, taxes collected, media totals, and discount voids at an electronic cash register that is printed on cash register tape at the end of a day or shift, or a report documenting every action at an electronic cash register that is stored electronically.

(b) It shall be unlawful to willfully and knowingly sell, purchase, install, transfer, or possess in this state any automated sales suppression device or zapper or phantom-ware.

(c) Any person convicted of a violation of subsection (b) of this Code section shall be guilty of a felony and shall be punished by imprisonment of not less than one nor more than five years, a fine not to exceed $100,000.00, or both.

(d) Any person violating subsection (b) of this Code section shall be liable for all taxes and penalties due the state as the result of the fraudulent use of an automated sales suppression device or phantom-ware and shall disgorge all profits associated with the sale or use of an automated sales suppression device or phantom-ware.

(e) An automated sales suppression device or phantom-ware and any device containing such device or software shall be contraband. (Code 1981, § 16-9-62, enacted by Ga. L. 2011, p. 59, § 2-1/HB 415.)

Editor's notes. — Ga. L. 2011, p. 59, § 4-1/HB 415, not codified by the General Assembly, provides, in part, that the enactment of this Code section by that Act shall apply to all offenses occurring on and after July 1, 2011.

16-9-63. False representation as veteran.

(a) As used in this Code section, the term:

(1) "Armed forces of the United States" means the army, navy, air force, marine corps, or coast guard and the reserve components thereof and the uniformed components of the Public Health Service or the National Oceanic and Atmospheric Administration.

(2) "Military decoration" means:

(A) A medal, decoration, badge, or ribbon authorized by law, executive order, or regulation to be awarded to a member of the armed forces of the United States by the President of the United States, Congress, the United States Department of Defense, or the United States Department of Homeland Security;

(B) A medal, decoration, badge, or ribbon authorized by law, executive order, or regulation to be awarded to members of the organized militia; or

(C) A rosette or metal lapel button depicting a medal, decoration, badge, or ribbon described in subparagraph (A) or (B) of this paragraph which is authorized by law, executive order, or regulation to be worn on civilian clothing.

(3) "Military medal award" shall have the same meaning as provided for under Code Section 40-2-85.1.

(4) "Military veteran" means a current, former, or retired member of the armed forces of the United States, the organized militia, or a state military force of another state.

(5) "Organized militia" means the Army National Guard, the Air National Guard, the Georgia Naval Militia, and the State Defense Force.

(6) "Tangible benefit" means:

(A) A benefit, preference, service, or other thing of value offered to a military veteran which is enhanced or offered at a reduced rate or free of charge by an agency of this state, or any political subdivision or authority thereof, based on such military veteran's service or the award of a military decoration;

(B) Employment or promotion in an individual's employment; or

(C) Election to public office.

(b) It shall be unlawful for any individual, with the intent to secure a tangible benefit for himself or herself, to make a false, fictitious, or fraudulent statement or representation that such individual is a military veteran or recipient of a military decoration.

(c) It shall be unlawful for any individual, with the intent to deceive, to appear in a court of this state while wearing:

(1) The uniform of the armed forces of the United States or of the organized militia of this state if such individual is not authorized to wear such uniform; or

(2) Any military decoration which such individual has not, in fact, been awarded.

(d) Any person who violates this Code section shall be guilty of a misdemeanor; provided, however, that if such violation involves a military medal award, such person shall be guilty of a misdemeanor of a high and aggravated nature.

(e) Any violation of this Code section shall be considered a separate offense and shall not merge with any other offense. If an individual is convicted of a violation of Code Section 16-10-20 and this Code section arising out of the same incident, any penalty imposed for a violation of this Code section shall be served consecutively to any sentence that may be imposed for a violation of Code Section 16-10-20. (Code 1981, § 16-9-63, enacted by Ga. L. 2016, p. 608, § 1/SB 270.)

Effective date. — This Code section became effective May 3, 2016.

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising under O.C.G.A. § 16-9-63 are designated as offenses for which those charged are to be fingerprinted. 2017 Op. Att'y Gen. No. 17-1.

ARTICLE 5

REMOVAL OR ALTERATION OF IDENTIFICATION FROM PROPERTY

16-9-70. Criminal use of an article with an altered identification mark.

(a) As used in this Code section, the term "firearm" shall have the same meaning as set forth in division (a)(6)(A)(iii) of Code Section 16-8-12.

(b) A person commits the offense of criminal use of an article with an altered identification mark when he or she buys, sells, receives, disposes of, conceals, or has in his or her possession a radio, piano, phonograph, sewing machine, washing machine, typewriter, adding machine, comptometer, bicycle, firearm, safe, vacuum cleaner, dictaphone, watch, watch movement, watch case, or any other mechanical or electrical device, appliance, contrivance, material, vessel as defined in Code Section 52-7-3, or other piece of apparatus or equipment, other than a motor vehicle as defined in Code Section 40-1-1, from which he or she knows the manufacturer's name plate, serial number, or any other distinguishing number or identification mark has been removed for the purpose of concealing or destroying the identity of such article.

(c)(1) A person convicted of the offense of criminal use of an article, other than a firearm, with an altered identification mark shall be guilty of a felony and upon conviction shall be punished by imprisonment for not less than one year nor more than five years.

(2) A person convicted of the offense of criminal use of a firearm with an altered identification mark shall be guilty of a felony and upon conviction shall be punished by imprisonment for not less than one year nor more than ten years; provided, however, that upon a second or subsequent conviction, by imprisonment for not less than five nor more than ten years.

(d) This Code section shall not apply to those cases or instances when any of the changes or alterations enumerated in subsection (b) of this Code section have been customarily made or done as an established practice in the ordinary and regular conduct of business by the original manufacturer or by its duly appointed direct representative or under specific authorization from the original manufacturer. (Code 1933,

§ 26-1506, enacted by Ga. L. 1974, p. 434, § 1; Ga. L. 2006, p. 96, § 2/HB 1490; Ga. L. 2018, p. 550, § 4-2/SB 407.)

The 2018 amendment, effective July 1, 2018, added subsection (a); redesignated former subsections (a) through (c) as present subsections (b) through (d), respectively; designated the existing provisions of subsection (c) as paragraph (c)(1), and, in paragraph (c)(1), inserted ", other than a firearm," near the middle, inserted "guilty of a felony and upon conviction shall be" in the middle, and inserted "year" near the end; added paragraph (c)(2); and, in subsection (d), substituted "shall not apply to those cases or instances when" for "does not apply to those cases or instances where" near the beginning, substituted "subsection (b)" for "subsection (a)" near the middle, and substituted "its duly" for "his duly" in the middle.

JUDICIAL DECISIONS

Former Code 1933, § 26-1506 (see now O.C.G.A. § 16-9-70) was not unconstitutional as being too vague to be capable of enforcement. Brooks v. State, 238 Ga. 643, 235 S.E.2d 144 (1977).

Former Code 1933, § 26-1506 required both proof of possession and guilty knowledge. — Former Code 1933, § 26-1506 (see now O.C.G.A. § 16-9-70) required proof that the appellant not only have possession of an article the serial number of which had been removed, but also that appellant knew the serial number had been removed for the purpose of concealing the identity of such article. Rogers v. State, 139 Ga. App. 656, 229 S.E.2d 132 (1976).

Applicability. — In view of the plain language of O.C.G.A. § 16-9-70, the statute applied only to a manufacturer's number or identification information; a saddle is not one of the items specified in the statute and is not mechanical or electrical in nature. Waters v. State, 252 Ga. App. 194, 555 S.E.2d 859 (2001).

Defendant must know identification mark has been removed for purpose of concealing or destroying identity. Blair v. State, 144 Ga. App. 118, 240 S.E.2d 319 (1977).

Proof of knowledge by circumstantial evidence. — Knowledge required under O.C.G.A. § 16-9-70 may be established by circumstantial evidence. Rogers v. State, 139 Ga. App. 656, 229 S.E.2d 132 (1976).

Charge of criminal use of article with altered identification mark includes knowledge that mark was removed to conceal identity of the article, but such knowledge may be proved by circumstantial evidence. GaDonna v. State, 164 Ga. App. 582, 298 S.E.2d 556 (1982).

Knowledge that the identification mark has been removed for purposes of concealing the identity of the article is an essential element of the crime, which may be proved by circumstantial evidence. Power v. State, 260 Ga. 101, 390 S.E.2d 47 (1990).

Evidence that the defendant and the codefendants were arrested in possession of seven weapons, the serial numbers on each having been removed immediately after confronting their victims, constituted circumstantial evidence of the offense sufficient to authorize a jury charge concerning the criminal use of an article with an altered identification mark. Thurman v. State, 249 Ga. App. 390, 547 S.E.2d 715 (2001).

Inference of guilty knowledge. — That identification mark has been removed may, under certain circumstances, authorize inference of guilty knowledge. Blair v. State, 144 Ga. App. 118, 240 S.E.2d 319 (1977).

Jury's verdict of guilty as to possession of a firearm by a convicted felon was not mutually exclusive of its verdict of not guilty regarding criminal use of an article with an altered identification mark. Fulton v. State, 232 Ga. App. 898, 503 S.E.2d 54 (1998).

Evidence sufficient for conviction. — See Carter v. State, 180 Ga. App. 173, 348 S.E.2d 715 (1986).

Trial court should have granted defendant's motion for directed verdict, where, although the evidence showed that defendant was aware the serial number on a rifle had been removed, there was no evidence, direct or circumstantial, to show that defendant knew the serial number had been removed for the purpose of concealing the identity of the rifle. Power v. State, 260 Ga. 101, 390 S.E.2d 47 (1990).

Cited in Abrams v. State, 144 Ga. App. 874, 242 S.E.2d 756 (1978); Patterson v. State, 247 Ga. 736, 280 S.E.2d 836 (1981); Patterson v. State, 161 Ga. App. 85, 289 S.E.2d 270 (1982); Gunn v. State, 163 Ga. App. 906, 296 S.E.2d 221 (1982); Martin v. State, 165 Ga. App. 802, 302 S.E.2d 717 (1983); Lane v. State, 169 Ga. App. 63, 311 S.E.2d 240 (1983); Nichols v. State, 210 Ga. App. 134, 435 S.E.2d 502 (1993).

RESEARCH REFERENCES

C.J.S. — 37 C.J.S., Fraud, §§ 87, 123, 124.

ALR. — Constitutionality of statute making possession of an automobile from which identifying marks have been removed a crime, 42 A.L.R. 1149.

16-9-71. Removal of collars or identifying items or marks on animals.

(a) It shall be unlawful for any person without the express permission of the owner or lessee of an animal to remove a collar, tag, tattoo, or any identification mark artificially attached to or imprinted on an animal for the purposes of identification which causes or is likely to cause the loss of the animal to the owner thereof.

(b) Any person who violates subsection (a) of this Code section shall be guilty of a misdemeanor. (Code 1933, § 26-2802.1, enacted by Ga. L. 1980, p. 1062, § 1.)

ARTICLE 6

COMPUTER SYSTEMS PROTECTION

Editor's notes. — This article, formerly consisting of Code Sections 16-9-90 through 16-9-95, and based on Ga. L. 1981, p. 947, §§ 1-6, Ga. L. 1982, p. 3, § 16, and Ga. L. 1989, p. 14, § 16, was repealed and reenacted effective July 1, 1991.

Law reviews. — For article, "Corporate Software Piracy: Is Your Client (or Your Firm) Liable," see 22 Ga. St. B.J. 30 (1985). For article, "Computer Viruses and the Criminal Law: A Diagnosis and a Prescription," see 7 Ga. St. U.L. Rev. 455 (1991).

RESEARCH REFERENCES

ALR. — Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 A.L.R.4th 971.

What is computer "trade secret" under state law, 53 A.L.R.4th 1046.

PART 1

COMPUTER CRIMES

Editor's notes. — Ga. L. 2005, p. 199, § 4/SB 62, not codified by the General Assembly, redesignated the former provisions of Article 6 as Part 1.

Law reviews. — For article, "Intellectual Property Checklist for Marketing the Recording Artist Online," see 18 J. Intell. Prop. L. 541 (2011).

16-9-90. Short title.

This article shall be known and may be cited as the "Georgia Computer Systems Protection Act." (Code 1981, § 16-9-90, enacted by Ga. L. 1991, p. 1045, § 1; Ga. L. 1996, p. 6, § 16.)

Administrative rules and regulations. — The Georgia Protective Order Registry, Official Compilation of the Rules and Regulations of the State of Georgia, Practice and Procedure, Georgia Crime Information Center Council, § 140-2-.19.

Sanctions, Official Compilation of the Rules and Regulations of the State of Georgia, Practice and Procedure, Georgia Crime Information Center Council, § 140-2-.20.

Law reviews. — For survey article on law relating to intellectual property, see 42 Mercer L. Rev. 295 (1990). For annual survey article on Intellectual Property law, see 56 Mercer L. Rev. 1305 (2005).

RESEARCH REFERENCES

ALR. — Disclosure or use of computer application software as misappropriation of trade secret, 30 A.L.R.4th 1250.

Computer fraud, 70 A.L.R.5th 647.

Validity, construction, and application of state computer crime and fraud laws, 87 A.L.R.6th 1.

16-9-91. Legislative findings.

The General Assembly finds that:

(1) Computer related crime is a growing problem in the government and in the private sector;

(2) Such crime occurs at great cost to the public, since losses for each incident of computer crime tend to be far greater than the losses associated with each incident of other white collar crime;

(3) The opportunities for computer related crimes in state programs, and in other entities which operate within the state, through the introduction of fraudulent records into a computer system, unauthorized use of computer facilities, alteration or destruction of computerized information files, and stealing of financial instruments, data, or other assets are great;

(4) Computer related crime operations have a direct effect on state commerce;

(5) Liability for computer crimes should be imposed on all persons, as that term is defined in this title; and

(6) The prosecution of persons engaged in computer related crime is difficult under previously existing Georgia criminal statutes. (Code 1981, § 16-9-91, enacted by Ga. L. 1991, p. 1045, § 1.)

16-9-92. Definitions.

As used in this article, the term:

(1) "Computer" means an electronic, magnetic, optical, hydraulic, electrochemical, or organic device or group of devices which, pursuant to a computer program, to human instruction, or to permanent instructions contained in the device or group of devices, can automatically perform computer operations with or on computer data and can communicate the results to another computer or to a person. The term includes any connected or directly related device, equipment, or facility which enables the computer to store, retrieve, or communicate computer programs, computer data, or the results of computer operations to or from a person, another computer, or another device. This term specifically includes, but is not limited to, mail servers and e-mail networks. This term does not include a device that is not used to communicate with or to manipulate any other computer.

(2) "Computer network" means a set of related, remotely connected computers and any communications facilities with the function and purpose of transmitting data among them through the communications facilities.

(3) "Computer operation" means computing, classifying, transmitting, receiving, retrieving, originating, switching, storing, displaying, manifesting, measuring, detecting, recording, reproducing, handling, or utilizing any form of data for business, scientific, control, or other purposes.

(4) "Computer program" means one or more statements or instructions composed and structured in a form acceptable to a computer that, when executed by a computer in actual or modified form, cause the computer to perform one or more computer operations. The term "computer program" shall include all associated procedures and documentation, whether or not such procedures and documentation are in human readable form.

(5) "Data" includes any representation of information, intelligence, or data in any fixed medium, including documentation, computer printouts, magnetic storage media, punched cards, storage in a computer, or transmission by a computer network.

(6) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system that affects interstate or foreign commerce, but does not include:

(A) Any wire or oral communication;

(B) Any communication made through a tone-only paging device;

(C) Any communication from a tracking device; or

(D) Electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

(7) "Electronic communication service" means any service which provides to its users the ability to send or receive wire or electronic communications.

(8) "Electronic communications system" means any wire, radio, electromagnetic, photoelectronic, photo-optical, or facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications.

(9) "Electronic means" is any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than:

(A) Any telephone or telegraph instrument, equipment, or facility, or any component thereof,

(i) Furnished to the subscriber or user by a provider of electronic communication service in the ordinary course of its business and used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or

(ii) Used by a provider of electronic communication service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of his or her duties; or

(B) A hearing aid or similar device being used to correct subnormal hearing to better than normal.

(10) "Electronic storage" means:

(A) Any temporary, intermediate storage of wire or electronic communication incidental to its electronic transmission; and

(B) Any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

(11) "Financial instruments" includes any check, draft, money order, note, certificate of deposit, letter of credit, bill of exchange, credit or debit card, transaction-authorizing mechanism, or marketable security, or any computer representation thereof.

(12) "Law enforcement unit" means any law enforcement officer charged with the duty of enforcing the criminal laws and ordinances of the state or of the counties or municipalities of the state who is employed by and compensated by the state or any county or municipality of the state or who is elected and compensated on a fee basis. The term shall include, but not be limited to, members of the Department of Public Safety, municipal police, county police, sheriffs, deputy sheriffs, and agents and investigators of the Georgia Bureau of Investigation.

(13) "Property" includes computers, computer networks, computer programs, data, financial instruments, and services.

(14) "Remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system.

(15) "Services" includes computer time or services or data processing services.

(16) "Use" includes causing or attempting to cause:

(A) A computer or computer network to perform or to stop performing computer operations;

(B) The obstruction, interruption, malfunction, or denial of the use of a computer, computer network, computer program, or data; or

(C) A person to put false information into a computer.

(17) "Victim expenditure" means any expenditure reasonably and necessarily incurred by the owner to verify that a computer, computer network, computer program, or data was or was not altered, deleted, damaged, or destroyed by unauthorized use.

(18) "Without authority" includes the use of a computer or computer network in a manner that exceeds any right or permission granted by the owner of the computer or computer network. (Code 1981, § 16-9-92, enacted by Ga. L. 1991, p. 1045, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 2005, p. 199, § 3/SB 62.)

Editor's notes. — Ga. L. 2005 p. 199, § 1/SB 62, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia Slam Spam E-mail Act.'"

Ga. L. 2005 p. 199, § 2/SB 62, not codified by the General Assembly, provides that: "The General Assembly finds and declares that electronic mail has become an important and popular means of communication, relied on by millions of Georgians on a daily basis for personal and commercial purposes. The low cost and global reach of electronic mail make it convenient and efficient. Electronic mail serves as a catalyst for economic development and frictionless commerce. The General Assembly further finds that the convenience and efficiency of electronic mail is threatened by an ever-increasing glut of deceptive commercial electronic mail. The senders of these electronic messages engage in a variety of fraudulent and deceptive practices to hide their identities, to disguise the true source of their electronic mail, and to evade the criminal and civil consequences of their actions. Deceptive commercial electronic mail imposes costs upon its ultimate recipients who are forced to receive, review, and delete unwanted messages and upon the electronic mail service providers forced to carry the messages. The General Assembly further finds that our state has a paramount interest in protecting its businesses and citizens from the deleterious effects of deceptive commercial electronic mail, including the impermissible shifting of cost and economic burden that results from the false and fraudulent nature of deceptive commercial electronic mail. Georgia's enforcement of this interest imposes no additional burden upon the senders of such electronic mails in relation to the laws of any other state, in that such enforcement requires nothing more than the senders' forbearance from active deception."

Law reviews. — For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 39 (2005).

JUDICIAL DECISIONS

Without authority. — Defendant was properly convicted of computer theft under O.C.G.A. § 16-9-93 because the defendant copied homeowner association data from the computer of the defendant's employer without authority under O.C.G.A. § 16-9-92(18), and the defendant had the intent of appropriating that information for the defendant's own use in the defendant's new business. DuCom v. State, 288 Ga. App. 555, 654 S.E.2d 670 (2007), cert. denied, No. S08C0598, 2008 Ga. LEXIS 383 (Ga. 2008).

Trial court did not err in denying a former employee's claims under the Georgia Computer Systems Protection Act, O.C.G.A. § 16-9-93, because the actions of a former employer's president in perusing the employee's email on the computer that the employee used in conducting business for the employer were not taken without authority; the president had authority to inspect the employee's computer pursuant to the computer usage policy contained in the employee manual, which the employee had agreed to abide by when the employee started work with the employer, and the president acted in order to obtain evidence in connection with an investigation of improper employee behavior. Sitton v. Print Direction, Inc., 312 Ga. App. 365, 718 S.E.2d 532 (2011).

Damages for computer trespass. — Because the collection agency received the applications to run the agency's business from the independent contractor and the independent contractor provided technical support and maintenance services to the collection agency, the collection agency received value in exchange for the money the agency paid to the independent contractor, and the agency's cost of compensating the independent contractor during that time period was not an element of damages that resulted from the independent contractor's computer trespass for which the agency could receive reimbursement. Ware v. Am. Recovery Solution Servs., 324 Ga. App. 187, 749 S.E.2d 775 (2013).

Independent contractor committed computer trespass because the independent

contractor did not have authorization to use the login and password of the chief financial officer of the collection agency to access the server and to disable an administrative login or alter a program, and the independent contractor's actions first completely shut down the collection agency and then hampered the agency's ability to operate for a significant length of time. Ware v. Am. Recovery Solution Servs., 324 Ga. App. 187, 749 S.E.2d 775 (2013).

Cited in Fugarino v. State, 243 Ga. App. 268, 531 S.E.2d 187 (2000).

16-9-93. Computer crimes defined; exclusivity of article; civil remedies; criminal penalties.

(a) **Computer theft.** Any person who uses a computer or computer network with knowledge that such use is without authority and with the intention of:

(1) Taking or appropriating any property of another, whether or not with the intention of depriving the owner of possession;

(2) Obtaining property by any deceitful means or artful practice; or

(3) Converting property to such person's use in violation of an agreement or other known legal obligation to make a specified application or disposition of such property

shall be guilty of the crime of computer theft.

(b) **Computer Trespass.** Any person who uses a computer or computer network with knowledge that such use is without authority and with the intention of:

(1) Deleting or in any way removing, either temporarily or permanently, any computer program or data from a computer or computer network;

(2) Obstructing, interrupting, or in any way interfering with the use of a computer program or data; or

(3) Altering, damaging, or in any way causing the malfunction of a computer, computer network, or computer program, regardless of how long the alteration, damage, or malfunction persists

shall be guilty of the crime of computer trespass.

(c) **Computer Invasion of Privacy.** Any person who uses a computer or computer network with the intention of examining any employment, medical, salary, credit, or any other financial or personal data relating to any other person with knowledge that such examination is without authority shall be guilty of the crime of computer invasion of privacy.

(d) **Computer Forgery.** Any person who creates, alters, or deletes any data contained in any computer or computer network, who, if such person had created, altered, or deleted a tangible document or instru-

ment would have committed forgery under Article 1 of this chapter, shall be guilty of the crime of computer forgery. The absence of a tangible writing directly created or altered by the offender shall not be a defense to the crime of computer forgery if a creation, alteration, or deletion of data was involved in lieu of a tangible document or instrument.

(e) **Computer Password Disclosure.** Any person who discloses a number, code, password, or other means of access to a computer or computer network knowing that such disclosure is without authority and which results in damages (including the fair market value of any services used and victim expenditure) to the owner of the computer or computer network in excess of $500.00 shall be guilty of the crime of computer password disclosure.

(f) **Article not Exclusive.** The provisions of this article shall not be construed to preclude the applicability of any other law which presently applies or may in the future apply to any transaction or course of conduct which violates this article.

(g) **Civil Relief; Damages.**

(1) Any person whose property or person is injured by reason of a violation of any provision of this article may sue therefor and recover for any damages sustained and the costs of suit. Without limiting the generality of the term, "damages" shall include loss of profits and victim expenditure.

(2) At the request of any party to an action brought pursuant to this Code section, the court shall by reasonable means conduct all legal proceedings in such a way as to protect the secrecy and security of any computer, computer network, data, or computer program involved in order to prevent possible recurrence of the same or a similar act by another person and to protect any trade secrets of any party.

(3) The provisions of this article shall not be construed to limit any person's right to pursue any additional civil remedy otherwise allowed by law.

(4) A civil action under this Code section must be brought within four years after the violation is discovered or by exercise of reasonable diligence should have been discovered. For purposes of this article, a continuing violation of any one subsection of this Code section by any person constitutes a single violation by such person.

(h) **Criminal Penalties.**

(1) Any person convicted of the crime of computer theft, computer trespass, computer invasion of privacy, or computer forgery shall be

fined not more than $50,000.00 or imprisoned not more than 15 years, or both.

(2) Any person convicted of computer password disclosure shall be fined not more than $5,000.00 or incarcerated for a period not to exceed one year, or both. (Code 1981, § 16-9-93, enacted by Ga. L. 1991, p. 1045, § 1.)

Law reviews. — For article, "Legal Remedies for Computer Abuse," see 21 Ga. St. B.J. 100 (1985). For annual survey of law on labor and employment law, see 62 Mercer L. Rev. 181 (2010). For annual survey on torts, see 64 Mercer L. Rev. 287 (2012).

JUDICIAL DECISIONS

Evidence sufficient to convict. — Where an employee had the knowledge of the computer system and the access code for the payroll system that gave the employee the opportunity for committing the crime, and the checks were not received by the payees and reflected on their faces that they were cashed, the jury's conclusion that defendant had accessed the system was supportable as a matter of law. Gordon v. State, 206 Ga. App. 450, 425 S.E.2d 906 (1992).

Testimony showing that defendant used a computer owned by the company with the intention of deleting or removing data from that computer was sufficient evidence to allow a reasonable trier of fact to find that a computer trespass had occurred. Fugarino v. State, 243 Ga. App. 268, 531 S.E.2d 187 (2000).

Defendant was properly convicted of computer theft under O.C.G.A. § 16-9-93 because the defendant copied homeowner association data from the computer of the defendant's employer without authority under O.C.G.A. § 16-9-92(18), and the defendant had the intent of appropriating that information for the defendant's own use in the defendant's new business. DuCom v. State, 288 Ga. App. 555, 654 S.E.2d 670 (2007), cert. denied, No. S08C0598, 2008 Ga. LEXIS 383 (Ga. 2008).

Claim did not state a violation. — Customer was granted a summary judgment as to a copyright owner's claims of violations of the Georgia Computer Systems Protection Act, O.C.G.A. § 16-9-90 et seq., because the Act was not broad enough to cover the actions alleged in that there was no allegation that an appropriation of the owner's intellectual property was achieved by unauthorized use of a computer under O.C.G.A. § 16-9-93(a) and the owner did not allege that the customer used the owner's name on the Internet for the purpose of falsely identifying itself to make O.C.G.A. § 16-9-93.1 applicable. SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc., 455 F. Supp. 2d 1347 (N.D. Ga. 2006).

Because the former employer did not allege that the former employees changed the location of the files or otherwise disposed of the files, and the plain language of O.C.G.A. § 16-9-93(b) contemplated a temporary or permanent elimination of files or a temporary or permanent change of the file locations, the employer did not assert a claim for computer trespass under O.C.G.A. § 16-9-93(b). Vurv Tech. LLC v. Kenexa Corp., No. 1:08-cv-3442-WSD, 2009 U.S. Dist. LEXIS 61623 (N.D. Ga. July 20, 2009).

Trial court did not err in denying a former employee's claims under the Georgia Computer Systems Protection Act, O.C.G.A. § 16-9-93, because the actions of a former employer's president in perusing the employee's email on the computer that the employee used in conducting business for the employer were not taken without authority; the president had authority to inspect the employee's computer pursuant to the computer usage policy contained in the employee manual, which the employee had agreed to abide by when the employee started work with the employer, and the

president acted in order to obtain evidence in connection with an investigation of improper employee behavior. Sitton v. Print Direction, Inc., 312 Ga. App. 365, 718 S.E.2d 532 (2011).

Former employee was not guilty of computer theft when the employee accessed clients' tax returns through a client portal, not though the network, using passwords obtained from the clients. Drawdy CPA Servs., P.C. v. N. GA CPA Servs., P.C., 320 Ga. App. 759, 740 S.E.2d 712 (2013).

Damages for computer trespass. — Because the collection agency received the applications to run the agency's business from the independent contractor and the independent contractor provided technical support and maintenance services to the collection agency, the collection agency received value in exchange for the money the agency paid to the independent contractor, and the agency's cost of compensating the independent contractor during that time period was not an element of damages that resulted from the independent contractor's computer trespass for which the agency could receive reimbursement. Ware v. Am. Recovery Solution Servs., 324 Ga. App. 187, 749 S.E.2d 775 (2013).

Punitive damages not authorized. — Georgia Computer Systems Protection Act, O.C.G.A. § 16-9-90 et seq., did not authorize an award of punitive damages as the statement in O.C.G.A. § 16-9-93(g)(1) indicating that a plaintiff may recover "any damages sustained," without more, would not appear to indicate a legislative intent to allow for punitive damages to be recoverable under the statute given that punitive damages are not sustained by a plaintiff but intended to punish, penalize, or deter a defendant. Lyman v. Cellchem International, Inc., 300 Ga. 475, 796 S.E.2d 255 (2017).

Computer trespass. — Independent contractor committed computer trespass because the independent contractor did not have authorization to use the login and password of the chief financial officer of the collection agency to access the server and to disable an administrative login or alter a program, and the independent contractor's actions first completely shut down the collection agency and then hampered the agency's ability to operate for a significant length of time. Ware v. Am. Recovery Solution Servs., 324 Ga. App. 187, 749 S.E.2d 775 (2013).

Computer invasion of privacy. — Defendant's motion for new trial was improperly denied as to the computer invasion of privacy charge because counsel was ineffective for failing to object to the first victim's hearsay testimony as the victim's statement about what the victim learned from an online backup system was introduced to prove that the defendant used the victim's computer to access the victim's financial information and constituted hearsay; counsel provided no reason for not objecting to that testimony; the defendant was prejudiced by counsel's deficiency as that testimony was the only evidence offered to prove the charge; and, but for counsel's deficient performance, a more than reasonable probability existed that the trial's outcome would have been different. Entwisle v. State, 340 Ga. App. 122, 796 S.E.2d 743 (2017).

Insufficient evidence in defamation case from social media. — Judgment notwithstanding the verdict and directed verdicts in a defamation case were affirmed because the plaintiff was properly found to be a public figure in the spheres of running and Christian evangelism and there was no evidence of actual malice as to the social media postings, which alleged that the plaintiff was having multiple affairs with married women and had not completed all of the long distance runs, were true; there was no evidence of violations of O.C.G.A. § 16-9-93 or O.C.G.A. § 16-9-93.1. Bickerstaff v. SunTrust Bank, 299 Ga. 459, 788 S.E.2d 787 (2016), cert. denied, 137 S. Ct. 571, 196 L. Ed. 2d 447 (U.S. 2016).

Cited in Stargate Software Int'l, Inc. v. Rumph, 224 Ga. App. 873, 482 S.E.2d 498 (1997).

OPINIONS OF THE ATTORNEY GENERAL

For an update of crimes and offenses for which the Georgia Crime Information Center is authorized to collect and file identifying data, see 1991 Op. Att'y Gen. No. 91-35.

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraud and Deceit, § 1.

C.J.S. — 37 C.J.S., Fraud, §§ 1, 2.

ALR. — Computer fraud, 70 A.L.R.5th 647.

Invasion of privacy by using or obtaining e-mail or computer files, 68 A.L.R.6th 331.

Validity, construction, and application of state computer crime and fraud laws, 87 A.L.R.6th 1.

16-9-93.1. Misleading transmittal and use of individual name, trade name, registered trademark, logo, legal or official seal, or copyrighted symbol over computer or telephone network; criminal penalty; civil remedies.

(a) It shall be unlawful for any person, any organization, or any representative of any organization knowingly to transmit any data through a computer network or over the transmission facilities or through the network facilities of a local telephone network for the purpose of setting up, maintaining, operating, or exchanging data with an electronic mailbox, home page, or any other electronic information storage bank or point of access to electronic information if such data uses any individual name, trade name, registered trademark, logo, legal or official seal, or copyrighted symbol to falsely identify the person, organization, or representative transmitting such data or which would falsely state or imply that such person, organization, or representative has permission or is legally authorized to use such trade name, registered trademark, logo, legal or official seal, or copyrighted symbol for such purpose when such permission or authorization has not been obtained; provided, however, that no telecommunications company or Internet access provider shall violate this Code section solely as a result of carrying or transmitting such data for its customers.

(b) Any person violating subsection (a) of this Code section shall be guilty of a misdemeanor.

(c) Nothing in this Code section shall be construed to limit an aggrieved party's right to pursue a civil action for equitable or monetary relief, or both, for actions which violate this Code section. (Code 1981, § 16-9-93.1, enacted by Ga. L. 1996, p. 1505, § 1.)

Editor's notes. — Ga. L. 1996, p. 1505, § 2, not codified by the General Assembly, provides that nothing in the Act shall prohibit a member of the General Assembly from using the state seal or the Georgia flag which contains the state seal on a home page that is clearly identified as that of the member.

Law reviews. — For article, "Problems Arising Out of the Use of 'WWW.Trademark.Com': The Application of Principles of Trademark Law to Internet Domain Name Disputes," see 13 Ga. St. U.L. Rev. 455 (1997).

For note, "Tilting at Windmills: Defamation and the Private Person in Cyberspace," see 13 Ga. St. U.L. Rev. 547 (1997). For review of 1996 forgery and fraudulent practices legislation, see 13 Ga. St. U.L. Rev. 112 (1997). For note, "Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy," see 32 Ga. L. Rev. 889 (1998).

JUDICIAL DECISIONS

Internet users had standing. — Internet users challenging the constitutionality of O.C.G.A. § 16-9-93.1 were entitled to a preliminary injunction because they were likely to show that it imposed content-based restrictions not narrowly tailored to achieve a compelling state interest, it was vague and overbroad, there was a substantial threat of irreparable injury, and the balance of hardships weighed heavily in plaintiffs' favor. American Civil Liberties Union v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997).

Internet users had standing to bring an action for declaratory and injunctive relief challenging the constitutionality of O.C.G.A. § 16-9-93.1 because a credible threat of prosecution existed. American Civil Liberties Union v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997).

Insufficient evidence in defamation case from social media. — Judgment notwithstanding the verdict and directed verdicts in a defamation case were affirmed because the plaintiff was properly found to be a public figure in the spheres of running and Christian evangelism and there was no evidence of actual malice as to the social media postings, which alleged that the plaintiff was having multiple affairs with married women and had not completed all of the long distance runs, were true; there was no evidence of violations of O.C.G.A. § 16-9-93 or O.C.G.A. § 16-9-93.1. Bickerstaff v. SunTrust Bank, 299 Ga. 459, 788 S.E.2d 787 (2016), cert. denied, 137 S. Ct. 571, 196 L. Ed. 2d 447 (U.S. 2016).

Claim did not state a violation. — Customer was granted a summary judgment as to a copyright owner's claims of violations of the Georgia Computer Systems Protection Act because the Act was not broad enough to cover the actions alleged in that there was no allegation that an appropriation of the owner's intellectual property was achieved by unauthorized use of a computer under O.C.G.A. § 16-9-93(a) and the owner did not allege that the customer used the owner's name on the Internet for the purpose of falsely identifying itself to make O.C.G.A. § 16-9-93.1 applicable. SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc., 455 F. Supp. 2d 1347 (N.D. Ga. 2006).

RESEARCH REFERENCES

Am. Jur. Trials. — Defense of a Domain Name Dispute, 87 Am. Jur. Trials 75.

ALR. — Validity of state statutes and administrative regulations regulating internet communications under commerce clause and First Amendment of federal constitution, 98 A.L.R.5th 167.

Validity, construction, and application of state computer crime and fraud laws, 87 A.L.R.6th 1.

16-9-94. Venue.

For the purpose of venue under this article, any violation of this article shall be considered to have been committed:

(1) In the county of the principal place of business in this state of the owner of a computer, computer network, or any part thereof;

(2) In any county in which any person alleged to have violated any provision of this article had control or possession of any proceeds of the violation or of any books, records, documents, or property which were used in furtherance of the violation;

(3) In any county in which any act was performed in furtherance of any transaction which violated this article; and

(4) In any county from which, to which, or through which any use of a computer or computer network was made, whether by wires, electromagnetic waves, microwaves, or any other means of communication. (Code 1981, § 16-9-94, enacted by Ga. L. 1991, p. 1045, § 1; Ga. L. 1992, p. 6, § 16.)

Cross references. — Venue generally, Ga. Const. 1983, Art. VI, Sec. II, Para. VI and § 17-2-2.

JUDICIAL DECISIONS

Cited in Pandora Franchising, LLC v. Kingdom Retail Group, LLLP, 299 Ga. 723, 791 S.E.2d 786 (2016).

RESEARCH REFERENCES

C.J.S. — 37 C.J.S., Fraud, § 93.

PART 2

SPAM E-MAIL

Editor's notes. — Ga. L. 2005, p. 199, § 1/SB 62, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia Slam Spam E-mail Act.'"

Ga. L. 2005, p. 199, § 2/SB 62, not codified by the General Assembly, provides that: "The General Assembly finds and declares that electronic mail has become an important and popular means of communication, relied on by millions of Georgians on a daily basis for personal and commercial purposes. The low cost and global reach of electronic mail make it convenient and efficient. Electronic mail serves as a catalyst for economic development and frictionless commerce. The General Assembly further finds that the convenience and efficiency of electronic mail is threatened by an ever-increasing glut of deceptive commercial electronic mail. The senders of these electronic messages engage in a variety of fraudulent and deceptive practices to hide their identities, to disguise the true source of their electronic mail, and to evade the criminal and civil consequences of their actions. Deceptive commercial electronic mail imposes costs upon its ultimate recipients who are forced to receive, review, and delete unwanted messages and upon the electronic mail service providers forced to carry the messages. The General Assembly further finds that our state has a paramount interest in protecting its businesses and citizens from the deleterious effects of

deceptive commercial electronic mail, including the impermissible shifting of cost and economic burden that results from the false and fraudulent nature of deceptive commercial electronic mail. Georgia's enforcement of this interest imposes no additional burden upon the senders of such electronic mails in relation to the laws of any other state, in that such enforcement requires nothing more than the senders' forbearance from active deception."

Law reviews. — For article on 2005 enactment of this part, see 22 Ga. St. U.L. Rev. 39 (2005).

16-9-100. Definitions.

As used in this part, the term:

(1) "Advertiser" means a person or entity that advertises through the use of commercial e-mail.

(2) "Automatic technical process" means the actions performed by an e-mail service provider's or telecommunications carrier's computers or computer network while acting as an intermediary between the sender and the recipient of an e-mail.

(3) "Commercial e-mail" means any e-mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift, offer, or other disposition of any property, services, or extension of credit.

(4) "Direct consent" means that the recipient has expressly consented to receive e-mail advertisements from the advertiser or initiator, either in response to a clear and conspicuous request for direct consent or at the recipient's own initiative.

(5) "Domain" means any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.

(6) "Domain owner" means, in relation to an e-mail address, the actual owner at the time an e-mail is received at that address of a domain that appears in or comprises a portion of the e-mail address. The registrant of a domain is presumed to be the actual owner of that domain.

(7) "E-mail" means an electronic message that is sent to an e-mail address and transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt, viewed upon transmission, or stored for later retrieval. The term includes electronic messages that are transmitted through a local, regional, or global computer network.

(8) "E-mail address" means a destination, commonly expressed as a string of characters, to which e-mail can be sent or delivered. An

e-mail address consists of a user name or mailbox, the "@" symbol, and reference to a domain.

(9) "E-mail service provider" means any person, including an Internet service provider, that is an intermediary in sending or receiving e-mail or that provides to end-users of the e-mail service the ability to send or receive e-mail.

(10) "False or misleading," when used in relation to a commercial e-mail, means that:

(A) The header information includes an originating or intermediate e-mail address, domain name, or Internet protocol address which was obtained by means of false or fraudulent pretenses or representations;

(B) The header information fails to accurately identify the computer used to initiate the e-mail;

(C) The subject line of the e-mail is intended to mislead a recipient about a material fact regarding the content or subject matter of the e-mail;

(D) The header information is altered or modified in a manner that impedes or precludes the recipient of the e-mail or an e-mail service provider from identifying, locating, or contacting the person who initiated the e-mail;

(E) The header information or content of the commercial e-mail, without authorization and with intent to mislead, references a personal name, entity name, trade name, mark, domain, address, phone number, or other personally identifying information belonging to a third party in such manner as would cause a recipient to believe that the third party authorized, endorsed, sponsored, sent, or was otherwise involved in the transmission of the commercial e-mail;

(F) The header information or content of the commercial e-mail contains false or fraudulent information regarding the identity, location, or means of contacting the initiator of the commercial e-mail; or

(G) The commercial e-mail falsely or erroneously states or represents that the transmission of the e-mail was authorized on the basis of:

(i) The recipient's prior direct consent to receive the commercial e-mail; or

(ii) A preexisting or current business relationship between the recipient and either the initiator or advertiser.

(11) "Header information" means those portions of an e-mail message which designate or otherwise identify:

(A) The sender;

(B) All recipients;

(C) An alternative return e-mail address, if any; and

(D) The names or Internet protocol addresses of the computers, systems, or other means used to send, transmit, route, or receive the e-mail message.

The term does not include either the subject line or the content of an e-mail message.

(12) "Incident" means the contemporaneous initiation in violation of this part of one or more commercial e-mails containing substantially similar content.

(13) "Initiate" or "initiator" means to transmit or cause to be transmitted a commercial e-mail, but does not include the routine transmission of the commercial e-mail through the network or system of a telecommunications utility or an e-mail service provider.

(14) "Internet protocol address" means the unique numerical address assigned to and used to identify a specific computer or computer network that is directly connected to the Internet.

(15) "Minor" means any person under the age of 18 years.

(16) "Person" means a person as defined by Code Section 16-1-3 and specifically includes any limited liability company, trust, joint venture, or other legally cognizable entity.

(17) "Preexisting or current business relationship," as used in connection with the sending of a commercial e-mail, means that the recipient has made an inquiry and has provided his or her e-mail address, or has made an application, purchase, or transaction, with or without consideration, regarding products or services offered by the advertiser.

(18) "Protected computer" means any computer that, at the time of an alleged violation of any provision of this part involving that computer, was located within the geographic boundaries of the State of Georgia.

(19) "Recipient" means any addressee of a commercial e-mail advertisement. If an addressee of a commercial e-mail has one or more e-mail addresses to which a commercial e-mail is sent, the addressee shall be deemed to be a separate recipient for each e-mail address to which the e-mail is sent.

(20) "Routine transmission" means the forwarding, routing, relaying, handling, or storing of an e-mail message through an automatic technical process. The term shall not include the sending, or the knowing participation in the sending, of commercial e-mail advertisements. (Code 1981, § 16-9-100, enacted by Ga. L. 2005, p. 199, § 4/SB 62.)

RESEARCH REFERENCES

ALR. — Validity, construction, and application of federal and state statutes regulating unsolicited e-mail or "spam", 10 A.L.R.6th 1.

16-9-101. Initiation of deceptive commercial e-mail.

Any person who initiates a commercial e-mail that the person knew or should have known to be false or misleading that is sent from, passes through, or is received by a protected computer shall be guilty of the crime of initiation of deceptive commercial e-mail. (Code 1981, § 16-9-101, enacted by Ga. L. 2005, p. 199, § 4/SB 62.)

16-9-102. Penalties.

(a) Any person convicted of a violation of Code Section 16-9-101 shall be guilty of a misdemeanor and punished by a fine of not more than $1,000.00 or by imprisonment of not more than 12 months, or both, except:

(1) Where the volume of commercial e-mail transmitted exceeded 10,000 attempted recipients in any 24 hour period;

(2) Where the volume of commercial e-mail transmitted exceeded 100,000 attempted recipients in any 30 day period;

(3) Where the volume of commercial e-mail transmitted exceeded one million attempted recipients in any one-year period;

(4) Where the revenue generated from a specific commercial e-mail exceeded $1,000.00;

(5) Where the total revenue generated from all commercial e-mail transmitted to any e-mail service provider or its subscribers exceeded $50,000.00; or

(6) Where any person knowingly hires, employs, uses, or permits any minor to assist in the transmission of commercial e-mail in violation of Code Section 16-9-101,

the person shall be guilty of a felony and punished by a fine of not more than $50,000.00 or by imprisonment of not more than five years, or both.

(b) For the second conviction of Code Section 16-9-101 within a five-year period, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained, the person shall be guilty of a felony and punished by a fine of not more than $50,000.00 or by imprisonment of not more than five years, or both. For the purpose of this subsection, the term "conviction" shall include a plea of nolo contendere. (Code 1981, § 16-9-102, enacted by Ga. L. 2005, p. 199, § 4/SB 62.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — O.C.G.A. § 16-9-102 is an offense for which those charged with a violation are to be fingerprinted. 2006 Op. Att'y Gen. No. 2006-2.

16-9-103. Venue.

For the purpose of venue under this part, any violation of this part shall be considered to have been committed:

(1) In the county of the principal place of business in this state of the owner of an involved protected computer, computer network, or any part thereof;

(2) In any county in which any person alleged to have violated any provision of this part had control or possession of any proceeds of the violation or of any books, records, documents, or property which were used in furtherance of the violation;

(3) In any county in which any act was performed in furtherance of any transaction which violated this part; and

(4) In any county from which, to which, or through which any use of an involved protected computer or computer network was made, whether by wires, electromagnetic waves, microwaves, or any other means of communication. (Code 1981, § 16-9-103, enacted by Ga. L. 2005, p. 199, § 4/SB 62.)

JUDICIAL DECISIONS

Cited in Pandora Franchising, LLC v. Kingdom Retail Group, LLLP, 299 Ga. 723, 791 S.E.2d 786 (2016).

16-9-104. Jurisdiction for prosecutions.

The Attorney General shall have concurrent jurisdiction with the district attorneys and solicitors-general to conduct the criminal prosecution of violations of this part. (Code 1981, § 16-9-104, enacted by Ga. L. 2005, p. 199, § 4/SB 62.)

16-9-105. Civil actions.

(a) The following persons shall have standing to assert a civil action under this part:

(1) Any e-mail service provider whose protected computer was used to send, receive, or transmit an e-mail that was sent in violation of this part; and

(2) A domain owner of any e-mail address to which a deceptive commercial e-mail is sent in violation of this part, provided that the domain owner also owns a protected computer at which the e-mail was received.

(b) Any person who has standing and who suffers personal, property, or economic damage by reason of a violation of any provision of this part may initiate a civil action for and recover the greater of:

(1) Five thousand dollars plus expenses of litigation and reasonable attorney's fees;

(2) Liquidated damages of $1,000.00 for each offending commercial e-mail, up to a limit of $2 million per incident, plus expenses of litigation and reasonable attorney's fees; or

(3) Actual damages, plus expenses of litigation and reasonable attorney's fees. (Code 1981, § 16-9-105, enacted by Ga. L. 2005, p. 199, § 4/SB 62.)

16-9-106. Violations as separate offenses; construction with other laws; e-mail policies of service providers not limited or restricted.

(a) Any crime committed in violation of this part shall be considered a separate offense.

(b) The provisions of this part shall not be construed as limiting or precluding the application of any other provision of law which applies to any transaction or course of conduct which violates this part.

(c) Nothing in this part shall be construed to limit or restrict the adoption, implementation, or enforcement by an e-mail service provider or Internet service provider of a policy of declining to transmit, receive, route, relay, handle, or store certain types of e-mail. (Code 1981, § 16-9-106, enacted by Ga. L. 2005, p. 199, § 4/SB 62.)

16-9-107. No cause of action against service providers.

There shall be no cause of action under this part against an e-mail service provider on the basis of its routine transmission of any commer-

cial e-mail over its computer network. (Code 1981, § 16-9-107, enacted by Ga. L. 2005, p. 199, § 4/SB 62.)

Part 3

Investigation of Violations

Editor's notes. — Ga. L. 2005, p. 199, § 1/HB 62, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia Slam Spam E-mail Act.'"

Ga. L. 2005, p. 199, § 2/HB 62, not codified by the General Assembly, provides that: "The General Assembly finds and declares that electronic mail has become an important and popular means of communication, relied on by millions of Georgians on a daily basis for personal and commercial purposes. The low cost and global reach of electronic mail make it convenient and efficient. Electronic mail serves as a catalyst for economic development and frictionless commerce. The General Assembly further finds that the convenience and efficiency of electronic mail is threatened by an ever-increasing glut of deceptive commercial electronic mail. The senders of these electronic messages engage in a variety of fraudulent and deceptive practices to hide their identities, to disguise the true source of their electronic mail, and to evade the criminal and civil consequences of their actions. Deceptive commercial electronic mail imposes costs upon its ultimate recipients who are forced to receive, review, and delete unwanted messages and upon the electronic mail service providers forced to carry the messages. The General Assembly further finds that our state has a paramount interest in protecting its businesses and citizens from the deleterious effects of deceptive commercial electronic mail, including the impermissible shifting of cost and economic burden that results from the false and fraudulent nature of deceptive commercial electronic mail. Georgia's enforcement of this interest imposes no additional burden upon the senders of such electronic mails in relation to the laws of any other state, in that such enforcement requires nothing more than the senders' forbearance from active deception."

16-9-108. Investigative and subpoena powers of district attorneys and the Attorney General.

(a) In any investigation of a violation of this article or any investigation of a violation of Code Section 16-12-100, 16-12-100.1, 16-12-100.2, 16-5-90, Article 8 of Chapter 5 of this title, or Article 8 of this chapter involving the use of a computer in furtherance of the act, the Attorney General or any district attorney shall have the power to administer oaths; to call any party to testify under oath at such investigation; to require the attendance of witnesses and the production of books, records, and papers; and to take the depositions of witnesses. The Attorney General or any such district attorney is authorized to issue a subpoena for any witness or a subpoena to compel the production of any books, records, or papers.

(b) In case of refusal to obey a subpoena issued under this Code section to any person and upon application by the Attorney General or district attorney, the superior court in whose jurisdiction the witness is to appear or in which the books, records, or papers are to be produced

may issue to that person an order requiring him or her to appear before the court to show cause why he or she should not be held in contempt for refusal to obey the subpoena. Failure to obey a subpoena may be punished by the court as contempt of court. (Code 1981, § 16-9-108, enacted by Ga. L. 2005, p. 199, § 4/SB 62; Ga. L. 2013, p. 524, § 1-2/HB 78.)

Law reviews. — For article on 2005 enactment of this part, see 22 Ga. St. U.L. Rev. 39 (2005).

JUDICIAL DECISIONS

No expectation of privacy in subscriber information voluntarily conveyed to Internet provider. — Trial court properly denied the defendant's motion to suppress identifying Internet subscriber information obtained by police pursuant to an administrative subpoena issued under O.C.G.A. § 16-9-108(a) because the defendant lacked standing to challenge the search of the defendant's Internet provider (IP) for identifying information since O.C.G.A. § 16-9-109(b) did not grant a defendant a reasonable expectation of privacy in subscriber information voluntarily conveyed to the IP. Courtney v. State, 340 Ga. App. 496, 797 S.E.2d 496 (2017).

16-9-109. Disclosures by service providers pursuant to investigations.

(a) Any law enforcement unit, the Attorney General, or any district attorney who is conducting an investigation of a violation of this article or an investigation of a violation of Code Section 16-12-100, 16-12-100.1, 16-12-100.2, 16-5-90, or 16-11-221, Article 8 of Chapter 5 of this title, or Article 8 of this chapter involving the use of a computer, cellular telephone, or any other electronic device used in furtherance of the act may require the disclosure by a provider of electronic communication service or remote computing service of the contents of a wire or electronic communication that is in electronic storage in an electronic communications system for 180 days or less pursuant to a search warrant issued under the provisions of Article 2 of Chapter 5 of Title 17 by a court with jurisdiction over the offense under investigation. Such court may require the disclosure by a provider of electronic communication service or remote computing service of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than 180 days as set forth in subsection (b) of this Code section.

(b)(1) Any law enforcement unit, the Attorney General, or any district attorney may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service, exclusive of the contents of communications, only when any law enforcement unit, the Attorney General, or any district attorney:

(A) Obtains a search warrant as provided in Article 2 of Chapter 5 of Title 17;

(B) Obtains a court order for such disclosure under subsection (c) of this Code section; or

(C) Has the consent of the subscriber or customer to such disclosure.

(2) A provider of electronic communication service or remote computing service shall disclose to any law enforcement unit, the Attorney General, or any district attorney the:

(A) Name;

(B) Address;

(C) Local and long distance telephone connection records, or records of session times and durations;

(D) Length of service, including the start date, and types of service utilized;

(E) Telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) Means and source of payment for such service, including any credit card or bank account number of a subscriber to or customer of such service when any law enforcement unit, the Attorney General, or any district attorney uses a subpoena authorized by Code Section 16-9-108, 35-3-4.1, or 45-15-17 or a grand jury or trial subpoena when any law enforcement unit, the Attorney General, or any district attorney complies with paragraph (1) of this subsection.

(3) Any law enforcement unit, the Attorney General, or any district attorney receiving records or information under this subsection shall not be required to provide notice to a subscriber or customer. A provider of electronic communication service or remote computing service shall not disclose to a subscriber or customer the existence of any search warrant or subpoena issued pursuant to this article nor shall a provider of electronic communication service or remote computing service disclose to a subscriber or customer that any records have been requested by or disclosed to any law enforcement unit, the Attorney General, or any district attorney pursuant to this article.

(c) A court order for disclosure issued pursuant to subsection (b) of this Code section may be issued by any superior court with jurisdiction over the offense under investigation and shall only issue such court

order for disclosure if any law enforcement unit, the Attorney General, or any district attorney offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of an electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. A court issuing an order pursuant to this Code section, on a motion made promptly by a provider of electronic communication service or remote computing service, may quash or modify such order, if compliance with such order would be unduly burdensome or oppressive on such provider.

(d)(1) Any records supplied pursuant to this part shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

(A) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records;

(B) The copy is a true copy of all the records described in the subpoena, court order, or search warrant and the records were delivered to the attorney, the attorney's representative, or the director of the Georgia Bureau of Investigation or the director's designee;

(C) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event;

(D) The sources of information and method and time of preparation were such as to indicate its trustworthiness;

(E) The identity of the records; and

(F) A description of the mode of preparation of the records.

(2) If the business has none or only part of the records described, the custodian or other qualified witness shall so state in the affidavit.

(3) If the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, the copy of the records shall be admissible in evidence. When more than one person has knowledge of the facts, more than one affidavit shall be attached to the records produced.

(4) No later than 30 days prior to trial, a party intending to offer such evidence produced in compliance with this subsection shall provide written notice of such intentions to the opposing party or parties. A motion opposing the admission of such evidence shall be filed within ten days of the filing of such notice, and the court shall hold a hearing and rule on such motion no later than ten days prior to trial. Failure of a party to file such motion opposing admission

prior to trial shall constitute a waiver of objection to such records and affidavit. However, the court, for good cause shown, may grant relief from such waiver. (Code 1981, § 16-9-109, enacted by Ga. L. 2005, p. 199, § 4/SB 62; Ga. L. 2006, p. 72, § 16/SB 465; Ga. L. 2007, p. 283, § 1/SB 98; Ga. L. 2013, p. 524, § 1-3/HB 78; Ga. L. 2017, p. 536, § 3-3/HB 452; Ga. L. 2018, p. 1112, § 16/SB 365.)

The 2017 amendment, effective July 1, 2017, substituted "16-12-100.2, 16-5-90, or 16-11-221," for "16-12-100.2, or 16-5-90," in the first sentence of subsection (a).

The 2018 amendment, effective May 8, 2018, part of an Act to revise, modernize, and correct the Code, revised punctuation in subparagraph (b)(2)(C).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2017, "long distance" was substituted for "long-distance" in subparagraph (b)(2)(C).

Law reviews. — For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 17 (2017).

JUDICIAL DECISIONS

No expectation of privacy in subscriber information voluntarily conveyed to Internet provider. — Trial court properly denied the defendant's motion to suppress identifying Internet subscriber information obtained by police pursuant to an administrative subpoena issued under O.C.G.A. § 16-9-108(a) because the defendant lacked standing to challenge the search of the defendant's Internet provider (IP) for identifying information since O.C.G.A. § 16-9-109(b) did not grant a defendant a reasonable expectation of privacy in subscriber information voluntarily conveyed to the IP. Courtney v. State, 340 Ga. App. 496, 797 S.E.2d 496 (2017).

Part 4

Internet and E-Mail Fraud

16-9-109.1. Fraudulent business practices using Internet or e-mail; definitions; penalties and sanctions; immunity.

(a) As used in this part, the term:

(1) "E-mail message" means a message sent to a unique destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox, commonly referred to as the "local part," and a reference to an Internet domain, commonly referred to as the "domain part," whether or not displayed, to which an electronic message can be sent or delivered.

(2) "Employer" includes a business entity's officers, directors, parent corporation, subsidiaries, affiliates, and other corporate entities under common ownership or control within a business enterprise.

(3) "Identifying information" means, with respect to an individual, any of the following:

(A) Social security number;

(B) Driver's license number;

(C) Bank account number;

(D) Credit card or debit card number;

(E) Personal identification number or PIN;

(F) Automated or electronic signature;

(G) Unique biometric data;

(H) Account password; or

(I) Any other piece of information that can be used to access an individual's financial accounts or to obtain goods or services.

(4) "Internet" shall have the meaning set forth in paragraph (10) of Code Section 16-9-151.

(5) "Web page" means a location that has a single uniform resource locator or other single location with respect to the Internet.

(b)(1) It shall be unlawful for any person with intent to defraud, by means of a web page, e-mail message, or otherwise through use of the Internet, to solicit, request, or take any action to induce another person to provide identifying information by representing himself, herself, or itself to be a business without the authority or approval of such business.

(2) It shall be unlawful for any person, with actual knowledge, conscious avoidance of actual knowledge, or willfully, to possess with intent to use in a fraudulent manner, sell, or distribute any identifying information obtained in violation of paragraph (1) of this subsection.

(c) Any person who intentionally violates subsection (b) of this Code section shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than 20 years, a fine of not less than $1,000.00 nor more than $500,000.00, or both.

(d)(1) No employer shall be held criminally liable under this Code section as a result of any actions taken:

(A) With respect to computer equipment used by its employees, contractors, subcontractors, agents, leased employees, or other staff which the employer owns, leases, or otherwise makes available or allows to be connected to the employer's network or other computer facilities when such equipment is used for an illegal purpose without the employer's knowledge, consent, or approval; or

(B) By employees, contractors, subcontractors, agents, leased employees, or other staff who misuse an employer's computer equipment for an illegal purpose without the employer's knowledge, consent, or approval.

(2) No person shall be held criminally liable under this Code section when its protected computers, computer equipment, or software product has been used by unauthorized users to violate this Code section without such person's knowledge, consent, or approval.

(e) This Code section shall not apply to a telecommunications provider's or Internet service provider's good faith transmission or routing of, or intermediate temporary storing or caching of, identifying information.

(f) No provider of an interactive computer service may be held liable in a civil action under any law of this state, or any of its political subdivisions, for removing or disabling access to content on an Internet website or other online location controlled or operated by such provider, when such provider believes in good faith that such content has been used to engage in a violation of this part. (Code 1981, § 16-9-109.1, enacted by Ga. L. 2008, p. 442, § 1/SB 24; Ga. L. 2011, p. 752, § 16/HB 142.)

RESEARCH REFERENCES

Am. Jur. 2d. — Am. Jur. 2d New Topic Service, Computers and the Internet, § 91 et seq.

ARTICLE 7

MOTOR VEHICLE SALES AND TRANSFERS

16-9-110. Sale or transfer of new motor vehicles not manufactured in compliance with federal standards.

(a) It shall be unlawful for any person, firm, or corporation knowingly to sell, transfer, or otherwise convey any motor vehicle which was not manufactured to comply with federal emission and safety standards applicable to new motor vehicles as required by 42 U.S.C. Section 7401 through Section 7642, known as the federal Clean Air Act, as amended, and as required by 15 U.S.C. Section 1381 through Section 1431, known as the National Traffic and Motor Vehicle Safety Act of 1966, as amended, unless and until the United States Customs Service or the United States Department of Transportation and the United States Environmental Protection Agency have certified that the motor vehicle complies with such applicable federal standards.

(b) Any person convicted of violating subsection (a) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 16-9-110, enacted by Ga. L. 1985, p. 692, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1996, p. 6, § 16.)

JUDICIAL DECISIONS

O.C.G.A. § 16-9-110 is violative of the preemption clause of the Clean Air Act, 42 U.S.C. § 7543(a), although the statute does not preempt 15 U.S.C. § 1392(d) of the National Traffic and Motor Vehicle Safety Act, nor does the statute violate the Commerce Clause and nor is the statute unconstitutionally vague. Georgia Auto. Importers Compliance Ass'n v. Bowers, 639 F. Supp. 352 (N.D. Ga. 1986).

16-9-111. Importation, manufacture, selling, offering for sale, installation, or reinstallation of counterfeit, nonfunctional, and such other types of air bags.

(a) As used in this Code section, the term:

(1) "Air bag" means a device that is part of a motor vehicle inflatable occupant restraint system, and all component parts, that operate in the event of a collision and is designed in accordance with federal motor vehicle safety standards for the specific make, model, and year of the motor vehicle, including, but not limited to, the cushion material, cover, sensors, controllers, inflators, wiring, and seat belt systems.

(2) "Counterfeit air bag" means a replacement device that is part of a motor vehicle inflatable occupant restraint system, and any replacement component parts, that are intended to operate in the event of a collision, including, but not limited to, the cushion material, cover, sensors, controllers, inflators, wiring, and seat belt systems that bear, without authorization, a mark identical or substantially similar to the genuine mark of the manufacturer for the specific motor vehicle or a supplier of parts to the manufacturer of the specific motor vehicle.

(3) "Nonfunctional air bag" means a replacement device that is part of a motor vehicle inflatable occupant restraint system, and any replacement component parts, including, but not limited to, the cushion material, cover, sensors, controllers, inflators, wiring, and seat belt systems that:

(A) Has been deployed or damaged;

(B) Has an electric fault that is detected by the vehicle's diagnostic system after the installation procedure is completed; or

(C) Includes any object, including, but not limited to, a counterfeit air bag or repaired air bag, air bag component, or other

component intended to deceive a vehicle owner or operator into believing that it is a functional air bag.

(b) A person shall not knowingly and intentionally:

(1) Import, manufacture, sell, offer for sale, install, or reinstall in a motor vehicle a counterfeit air bag, nonfunctional air bag, or other device intended to replace a motor vehicle inflatable occupant restraint system, or any component parts, that are intended to operate in the event of a collision, including, but not limited to, the cushion material, cover, sensors, controllers, inflators, wiring, and seat belt systems, that such person knows was not designed to comply with federal motor vehicle safety standards for the specific make, model, and year of such motor vehicle; or

(2) Sell, offer for sale, install, or reinstall in a motor vehicle any device that causes such motor vehicle's diagnostic system to inaccurately indicate that such motor vehicle is equipped with a properly functioning air bag.

(c) Any person who is convicted of violating this Code section shall be guilty of and punished as for a misdemeanor of a high and aggravated nature. (Code 1981, § 16-9-111, enacted by Ga. L. 2002, p. 629, § 1; Ga. L. 2017, p. 717, § 1/HB 320.)

The 2017 amendment, effective July 1, 2017, added subsections (a) and (b); designated the existing provisions of this Code section as subsection (c); and substituted the present provisions of subsection (c) for the former provisions, which read: "Any person who knowingly installs or reinstalls any object in lieu of and other than an air bag which was designed in accordance with federal safety regulations for the make, model, and year of the vehicle as part of a vehicle inflatable restraint system shall be guilty of a misdemeanor of a high and aggravated nature.".

Law reviews. — For note on the 2002 enactment of this Code section, see 19 Ga. St. U.L. Rev. 101 (2002).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising under O.C.G.A. § 16-9-111 require fingerprinting. 2002 Op. Att'y Gen. No. 2002-7.

ARTICLE 8

IDENTITY FRAUD

Cross references. — Identity theft, T. 10, C. 1, A. 34.

Editor's notes. — Ga. L. 1998, p. 865, § 1, not codified by the General Assembly, provides that this article may be cited as the "Personal Financial Security Act."

JUDICIAL DECISIONS

Construction with Financial Identity Fraud Act. — Immunity under O.C.G.A. § 16-9-20(h)(1) of the Financial Identity Fraud Act applies only to suits by

those who "made, drew, uttered, executed, or delivered such instrument," and not to persons who were the victims of "financial identity fraud." Nicholl v. Great Atl. & Pac. Tea Co., 238 Ga. App. 30, 517 S.E.2d 561 (1999).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Identity Theft and Other Misuses of Credit and Debit Cards, 81 POF3d 113.

16-9-120. Definitions.

As used in this article, the term:

(1) "Attorney General" means the Attorney General or his or her designee.

(2) "Business victim" means any individual or entity that provided money, credit, goods, services, or anything of value to someone other than the intended recipient where the intended recipient has not given permission for the actual recipient to receive it and the individual or entity that provided money, credit, goods, services, or anything of value has suffered financial loss as a direct result of the commission or attempted commission of a violation of this article.

(3) "Consumer victim" means any individual whose personal identifying information has been obtained, compromised, used, or recorded in any manner without the permission of that individual.

(4) "Health care records" means records however maintained and in whatever form regarding an individual's health, including, but not limited to, doctors' and nurses' examinations and other notes, examination notes of other medical professionals, hospital records, rehabilitation facility records, nursing home records, assisted living facility records, results of medical tests, X-rays, CT scans, MRI scans, vision examinations, pharmacy records, prescriptions, hospital charts, surgical records, mental health treatments and counseling, dental records, and physical therapy notes and evaluations.

(5) "Identifying information" shall include, but not be limited to:

(A) Current or former names;

(B) Social security numbers;

(C) Driver's license numbers;

(D) Checking account numbers;

(E) Savings account numbers;

(F) Credit and other financial transaction card numbers;

(G) Debit card numbers;

(H) Personal identification numbers;

(I) Electronic identification numbers;

(J) Digital or electronic signatures;

(K) Medical identification numbers;

(L) Birth dates;

(M) Mother's maiden name;

(N) Selected personal identification numbers;

(O) Tax identification numbers;

(P) State identification card numbers issued by state departments;

(Q) Veteran and military medical identification numbers; and

(R) Any other numbers or information which can be used to access a person's or entity's resources or health care records.

(6) "Resources" includes, but is not limited to:

(A) A person's or entity's credit, credit history, credit profile, and credit rating;

(B) United States currency, securities, real property, and personal property of any kind;

(C) Credit, charge, and debit accounts;

(D) Loans and lines of credit;

(E) Documents of title and other forms of commercial paper recognized under Title 11;

(F) Any account, including a safety deposit box, with a financial institution as defined by Code Section 7-1-4, including a national bank, federal savings and loan association, or federal credit union or a securities dealer licensed by the Secretary of State or the federal Securities and Exchange Commission;

(G) A person's personal history, including, but not limited to, records of such person's driving records; criminal, medical, or insurance history; education; or employment; and

(H) A person's health insurance, health savings accounts, health spending accounts, flexible spending accounts, medicare accounts, Medicaid accounts, dental insurance, vision insurance, and other forms of health insurance and health benefit plans. (Code 1981, § 16-9-120, enacted by Ga. L. 1998, p. 865, § 2; Ga. L. 2002, p. 551,

§ 2; Ga. L. 2013, p. 1059, § 1/SB 170; Ga. L. 2015, p. 1088, § 13/SB 148.)

Cross references. — Disposal by business of personal identification data, § 10-15-1 et seq. Use of personally identifiable data in court documentation, § 15-10-54. Fraudulent driver's license or identification, § 40-5-125. Fraudulent identification card for persons with disabilities, § 40-5-179.

Law reviews. — For article, "The Growing Threat of Identity Theft and Its Implications for Employers," see 11 Ga. St. B.J. 27 (2006).

For note on the 2002 amendments of §§ 16-9-120 to 16-9-127 and enactment of §§ 16-9-128 to 16-9-132 in this article, see 19 Ga. St. U.L. Rev. 81 (2002).

RESEARCH REFERENCES

C.J.S. — 37 C.J.S., Forgery, § 1 et seq.

JUDICIAL DECISIONS

Resources. — Evidence was sufficient to convict a defendant of identity fraud because for purposes of O.C.G.A. § 16-9-121, the United States Treasury, the nation's foremost banking institution, fell within the ambit of O.C.G.A. § 16-9-120(5)(F); thus, when the defendant used a victim's social security number to obtain a job, the defendant accessed the victim's Internal Revenue Account, and thereby the United States Treasury, which was an illegal action under O.C.G.A. § 16-9-121. Hernandez v. State, 281 Ga. 559, 639 S.E.2d 473 (2007).

Construction with O.C.G.A. § 16-9-121. — Because the state's evidence failed to demonstrate that the defendant accessed the resources of another by using identifying information to procure a cell phone, and a service contract for the cell phone, and failed to establish that the defendant either knew that a store clerk: (1) could not issue a phone without accessing the resources of a specific individual; (2) would need to use the identifying information of that individual to access such resources; or (3) in fact used such identifying information to access the resources of another for the purpose of providing the defendant with a cell phone, the evidence was insufficient to sustain the defendant's conviction of financial identity fraud. Jones v. State, 285 Ga. App. 822, 648 S.E.2d 133 (2007).

Conviction upheld. — Defendant's identity fraud conviction was upheld on appeal as: (1) a jury charge under O.C.G.A. § 16-9-120(2) was not supported by the evidence; (2) an additional charge on the dictionary definition of fraud as a false representation of a matter of fact did not result in any prejudice; (3) the indictment was sufficient and plainly tracked the language of the identity fraud statute, laid out the elements of the offense, and allowed the defendant to prepare a defense; (4) the trial court's imposition of the maximum 10-year sentence was not unlawful; and (5) nothing in the record supported the defendant's claim that the state engaged in illegal plea bargaining tactics. Lee v. State, 283 Ga. App. 826, 642 S.E.2d 876 (2007).

Defendant's identity fraud conviction was upheld on appeal because the state presented sufficient evidence that the defendant attempted to open a bank account using the identity of another person, recording that person's social security number in doing so, with the intent to obtain that person's resources in one way or another. Vicks v. State, 289 Ga. App. 495, 657 S.E.2d 876 (2008).

Trial court properly denied a defendant's motion for a directed verdict of acquittal with regard to the defendant's conviction for identity fraud as sufficient evidence supported the conviction based on the state establishing that the defendant used the victim's personal information and credit to purchase a car by having another person use the victim's personal

information and represent themselves as the defendant's relative and serve as the defendant's co-signer for the vehicle. Powell v. State, 293 Ga. App. 442, 667 S.E.2d 213 (2008).

Defendant was properly convicted of financial identity fraud in violation of O.C.G.A. § 16-9-120 because the circumstantial evidence was sufficient to authorize a jury to find that the defendant, either directly or as a party to a crime under O.C.G.A. § 16-2-20, committed financial identity fraud by accessing the resources of the victims through the use of identifying information without the authorization or permission of the victims, with the intent to unlawfully appropriate their resources to the defendant's own use; the federal tax identification number of either victim was required as part of the credit card application to obtain temporary charge passes, which the defendant used to purchase thousands of dollars worth of merchandise in a short period of time. Zachery v. State, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

16-9-121. Elements of offense.

(a) A person commits the offense of identity fraud when he or she willfully and fraudulently:

(1) Without authorization or consent, uses or possesses with intent to fraudulently use identifying information concerning a person;

(2) Uses identifying information of an individual under 18 years old over whom he or she exercises custodial authority;

(3) Uses or possesses with intent to fraudulently use identifying information concerning a deceased individual;

(4) Creates, uses, or possesses with intent to fraudulently use any counterfeit or fictitious identifying information concerning a fictitious person with intent to use such counterfeit or fictitious identification information for the purpose of committing or facilitating the commission of a crime or fraud on another person; or

(5) Without authorization or consent, creates, uses, or possesses with intent to fraudulently use any counterfeit or fictitious identifying information concerning a real person with intent to use such counterfeit or fictitious identification information for the purpose of committing or facilitating the commission of a crime or fraud on another person.

(b) A person commits the offense of identity fraud by receipt of fraudulent identification information when he or she willingly accepts for identification purposes identifying information which he or she knows to be fraudulent, stolen, counterfeit, or fictitious. In any prosecution under this subsection it shall not be necessary to show a conviction of the principal thief, counterfeiter, or fraudulent user.

(c) The offenses created by this Code section shall not merge with any other offense.

(d) This Code section shall not apply to a person under the age of 21 who uses a fraudulent, counterfeit, or other false identification card for

the purpose of obtaining entry into a business establishment or for purchasing items which he or she is not of legal age to purchase. (Code 1981, § 16-9-121, enacted by Ga. L. 1998, p. 865, § 2; Ga. L. 1999, p. 81, § 16; Ga. L. 2002, p. 551, § 2; Ga. L. 2007, p. 450, § 4/SB 236; Ga. L. 2010, p. 568, § 1/HB 1016.)

Editor's notes. — Ga. L. 2007, p. 450, § 1/SB 236, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Georgia Personal Identity Protection Act.'"

Ga. L. 2007, p. 450, § 7/SB 236, not codified by the General Assembly, provides that the amendment to this Code section shall apply to all offenses occurring on or after May 24, 2007.

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 16-9-125 complies with Ga. Const. 1983, Art. VI, Sec. II, Para. VI; since the crime of identity fraud, as defined by O.C.G.A. §§ 16-9-121 and 16-9-125 when read in para materia, takes place in the county where the victim and his or her personal information are located, there is no constitutional bar to trying the defendant in that county. State v. Mayze, 280 Ga. 5, 622 S.E.2d 836 (2005).

Trial court erred in sustaining defendant's demurrer to the identity fraud charges against him as O.C.G.A. § 16-9-125 did not violate Ga. Const. 1983, Art. VI, Sec. II, Para. VI, since identity fraud was a continuing offense, which extended into the county where the victim resided or was located. State v. Mayze, 280 Ga. 5, 622 S.E.2d 836 (2005).

O.C.G.A. § 16-9-121 expressly prohibited the improper access of another's account at a financial institution such that the defendant was placed on notice that the use of a victim's social security number to obtain a job and thus access the victim's Internal Revenue Service account was illegal; thus, § 16-9-121 was not unconstitutionally vague as applied to the defendant. Hernandez v. State, 281 Ga. 559, 639 S.E.2d 473 (2007).

Failure to prove venue. — Defendant's conviction of identity fraud, O.C.G.A. § 16-9-121, was reversed because the state failed to establish the victim's place of residence or the site where a credit card was stolen, and thus venue was not properly established as required by O.C.G.A. § 16-9-125. Middlebrooks v. State, 277 Ga. App. 551, 627 S.E.2d 154 (2006).

Evidence sufficient for conviction. — Evidence that the defendant, on two different dates, approached cashiers at the same store, gave the cashiers a credit card that was falsified in that the credit card had the account numbers from another person's account superimposed over the credit card's original numbers, that the cashiers punched in the card's numbers manually when the cashiers could not get the card to scan properly, and that the defendant was able to obtain store merchandise because the sales were then approved was sufficient to support the defendant's conviction for financial identity fraud. Epps v. State, 262 Ga. App. 113, 584 S.E.2d 701 (2003).

Evidence was sufficient to convict a defendant of identity fraud because for purposes of O.C.G.A. § 16-9-121, the United States Treasury, the nation's foremost banking institution, fell within the ambit of O.C.G.A. § 16-9-120(5)(F); thus, when the defendant used a victim's social security number to obtain a job, the defendant accessed the victim's Internal Revenue Account, and thereby the United States Treasury, which was an illegal action under § 16-9-121. Hernandez v. State, 281 Ga. 559, 639 S.E.2d 473 (2007).

Defendant's identity fraud conviction was upheld on appeal as: (1) a jury charge under O.C.G.A. § 16-9-120(2) was not supported by the evidence; (2) an additional charge on the dictionary definition of fraud as a false representation of a matter of fact did not result in any prejudice; (3) the indictment was sufficient and plainly tracked the language of the identity fraud statute, laid out the elements of

the offense, and allowed the defendant to prepare a defense; (4) the trial court's imposition of the maximum 10-year sentence was not unlawful; and (5) nothing in the record supported the defendant's claim that the state engaged in illegal plea bargaining tactics. Lee v. State, 283 Ga. App. 826, 642 S.E.2d 876 (2007).

Defendant's identity fraud conviction was upheld on appeal because the state presented sufficient evidence that the defendant attempted to open a bank account using the identity of another person, recording that person's social security number in doing so, with the intent to obtain that person's resources in one way or another. Vicks v. State, 289 Ga. App. 495, 657 S.E.2d 876 (2008).

Trial court properly denied a defendant's motion for a directed verdict of acquittal with regard to the defendant's conviction for identity fraud as sufficient evidence supported the conviction based on the state establishing that the defendant used the victim's personal information and credit to purchase a car by having another person use the victim's personal information and represent themselves as the defendant's relative and serve as the defendant's co-signer for the vehicle. Powell v. State, 293 Ga. App. 442, 667 S.E.2d 213 (2008).

Evidence that a niece stole, forged, and cashed over 20 checks totaling $425,000 from the law firm where she worked with the assistance of her aunt and six other women was sufficient to find the niece and aunt guilty of 20 counts of identity fraud in violation of O.C.G.A. § 16-9-121. Under O.C.G.A. § 16-9-125, venue was proper in the county where the law firm's office was located. McKenzie v. State, 300 Ga. App. 469, 685 S.E.2d 333 (2009).

Defendant was properly convicted of financial identity fraud in violation of O.C.G.A. § 16-9-120 because the circumstantial evidence was sufficient to authorize a jury to find that the defendant, either directly or as a party to a crime under O.C.G.A. § 16-2-20, committed financial identity fraud by accessing the resources of the victims through the use of identifying information without the authorization or permission of the victims, with the intent to unlawfully appropriate the victim's resources to the defendant's own use; the federal tax identification number of either victim was required as part of the credit card application to obtain temporary charge passes, which the defendant used to purchase thousands of dollars worth of merchandise in a short period of time. Zachery v. State, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

Evidence that the defendant, as a police officer, had access to a nationwide database that included people's personal information such as social security numbers; that the taxpayer identification number that the defendant provided to the cellular telephone company belonged to a Pennsylvania woman, who had not given the defendant permission to use it; and that each of the defendant's businesses were registered with the state under federal identification numbers that did not match the disputed social security number was sufficient to support the defendant's conviction for financial identity fraud. Gaskins v. State, 318 Ga. App. 8, 733 S.E.2d 338 (2012).

Evidence was sufficient to support the codefendant's conviction on 12 counts of identity fraud, in violation of O.C.G.A. § 16-9-121(a)(1), based on the codefendant's admission that the codefendant provided the identifying information of several current and former tenants of the apartment complex the codefendant worked at to a third party and, even though the codefendant did not know the identity of the other persons involved in the scheme nor the details of the operation, the codefendant was concerned in the commission of the crime and intentionally aided or abetted in the commission of the crime by providing the information. Manhertz v. State, 317 Ga. App. 856, 734 S.E.2d 406 (2012).

Testimony from the victims that the account numbers used belonged to the victims and the victims did not give the defendant, or anyone else, permission to use or possess those numbers was sufficient to support the defendant's conviction for identity fraud. Smith v. State, 322 Ga. App. 433, 745 S.E.2d 683 (2013).

Evidence was sufficient to convict the defendant as a party to the crimes of financial transaction card theft and iden-

tity fraud because the defendant obtained a financial transaction card from a victim without the victim's consent as the state introduced evidence that the individual that the defendant gave transaction cards to used both transaction cards, and it introduced the receipts evidencing the use and attempted use of the cards; and the defendant, without authorization, possessed a victim's financial transaction card information with the intent to use the card fraudulently. Daniel v. State, 342 Ga. App. 448, 803 S.E.2d 603 (2017).

Evidence was sufficient to convict the defendant of identity fraud, financial-transaction-card fraud, and exploitation of an elder person and the defendant's convictions for those predicate acts was sufficient to convict the defendant of violating the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., because the defendant participated in a scheme, in which the defendant and the defendant's cohorts obtained elderly victims' credit card, banking, and other financial and personal information by telephoning the victims and informing the victims that the victims' power would be cut off if the victims did not immediately provide such information; and the defendant used the cards or the account numbers to make purchases and to obtain cash advances. Roberts v. State, 344 Ga. App. 324, 810 S.E.2d 169 (2018).

Evidence insufficient for conviction. — Because the state's evidence failed to demonstrate that the defendant accessed the resources of another by using identifying information to procure a cell phone, and a service contract for the cell phone, and failed to establish that the defendant either knew that a store clerk: (1) could not issue a phone without accessing the resources of a specific individual; (2) would need to use the identifying information of that individual to access such resources; or (3) in fact used such identifying information to access the resources of another for the purpose of providing the defendant with a cell phone, the evidence was insufficient to sustain the defendant's conviction of financial identity fraud. Jones v. State, 285 Ga. App. 822, 648 S.E.2d 133 (2007).

Evidence was not sufficient to support defendant's conviction for identity fraud, because the applicable version O.C.G.A. § 16-9-121(a)(1), did not make fraudulent use of the identifying information of a corporation punishable as identity fraud, but only protected an individual person's information. Martinez v. State, 325 Ga. App. 267, 750 S.E.2d 504 (2013).

Successive prosecution for the same conduct. — Trial court correctly rejected the defendant's plea in bar and denied defendant's motion in autrefois convict because the defendant did not show that defendant's prosecution for two counts of financial identity fraud under O.C.G.A. § 16-9-121 was barred as an impermissible successive prosecution for the same conduct in another county by defendant's earlier conviction in that county of 33 counts of financial identity fraud. Summers v. State, 263 Ga. App. 338, 587 S.E.2d 768 (2003).

Hearsay testimony was harmless error. — With regard to the charge of first-degree forgery and charge of identity fraud involving checks taken from the company checkbook of defendant's employer, the deputy's improper hearsay testimony that a driver's license number written on the checks matched the defendant's driver's license number was harmless error given the overwhelming evidence of guilt, including all of the stolen checks having been made payable to the defendant by someone other than the employer, the defendant's endorsement appearing on all of the checks, and the defendant's image captured on a bank security camera cashing one check. Archer v. State, 291 Ga. App. 175, 661 S.E.2d 230 (2008).

Preemption. — O.C.G.A. § 16-9-21 is not preempted by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324c. Hernandez v. State, 281 Ga. 559, 639 S.E.2d 473 (2007).

Sentence upheld. — Defendant's complaint on appeal that a 10-year sentence was unlawful was specious as the charge in the indictment was not attempted identity fraud under O.C.G.A. § 16-9-122, but was for the completed offense of identity fraud under O.C.G.A. § 16-9-121. Lee v. State, 283 Ga. App. 826, 642 S.E.2d 876 (2007).

Cited in Davis v. State, 319 Ga. App. 501, 736 S.E.2d 160 (2012).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state statutes relating to offense of identity theft, 125 A.L.R.5th 537.

Criminal liability for unauthorized use of credit card under state credit card statutes, 68 A.L.R.6th 527.

16-9-121.1. Offense of aggravated identity fraud.

(a) A person commits the offense of aggravated identity fraud when he or she willfully and fraudulently uses any counterfeit or fictitious identifying information concerning a real, fictitious, or deceased person with intent to use such counterfeit or fictitious identifying information for the purpose of obtaining employment.

(b) The offense created by this Code section shall not merge with any other offense. (Code 1981, § 16-9-121.1, enacted by Ga. L. 2011, p. 794, § 4/HB 87.)

Editor's notes. — Ga. L. 2011, p. 794, § 1/HB 87, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Illegal Immigration Reform and Enforcement Act of 2011.'"

Ga. L. 2011, p. 794, § 21/HB 87, not codified by the General Assembly, provides for severability, and provides, in part, that: "(b) The terms of this Act regarding immigration shall be construed to have the meanings consistent with such terms under federal immigration law.

"(c) The provisions of this Act shall be implemented in a manner consistent with federal laws governing immigration and civil rights."

Ga. L. 2011, p. 794, § 22/HB 87, not codified by the General Assembly, provides, in part, that this Code section shall apply to offenses and violations occurring on or after July 1, 2011.

Law reviews. — For article on the 2011 enactment of this Code section, see 28 Ga. St. U.L. Rev. 35 (2011). For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U.L. Rev. 51 (2011).

OPINIONS OF THE ATTORNEY GENERAL

Enforcement by investigators of Enforcement Division of the State Board of Workers' Compensation. — Investigators of the Enforcement Division who are certified as peace officers may enforce the aggravated identity fraud statute, O.C.G.A. § 16-9-121.1, by arrest and the execution of search warrants provided that the arrest and search is the result of a criminal investigation of an alleged violation of the workers' compensation laws of O.C.G.A. Ch. 9, T. 34. 2012 Op. Att'y Gen. No. 12-3.

RESEARCH REFERENCES

Am. Jur. 2d. — 32 Am. Jur. 2d, False Personation, § 1 et seq. 32 Am. Jur. 2d, False Pretenses, § 1 et seq. 37 Am. Jur. 2d, Fraud and Deceit, §§ 50, 51.

16-9-122. Attempting or conspiring to commit offense; penalty.

It shall be unlawful for any person to attempt or conspire to commit any offense prohibited by this article. Any person convicted of a violation of this Code section shall be punished by imprisonment or community service, by a fine, or by both such punishments not to exceed the maximum punishment prescribed for the offense the commission of which was the object of the attempt or conspiracy. (Code 1981, § 16-9-122, enacted by Ga. L. 2002, p. 551, § 2.)

Editor's notes. — Ga. L. 2002, p. 551, § 2, effective May 2, 2002, redesignated the former provisions of this Code section as Code Section 16-9-123.

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state statutes relating to offense of identity theft, 125 A.L.R.5th 537.

JUDICIAL DECISIONS

Sentence upheld. — Defendant's complaint on appeal that a 10-year sentence was unlawful was specious as the charge in the indictment was not attempted identity fraud under O.C.G.A. § 16-9-122, but was for the completed offense of identity fraud under O.C.G.A. § 16-9-121. Lee v. State, 283 Ga. App. 826, 642 S.E.2d 876 (2007).

16-9-123. Investigations.

The Attorney General shall have the authority to investigate any complaints of consumer victims regarding identity fraud. In conducting such investigations the Attorney General shall have all investigative powers which are available to the Attorney General under Part 2 of Article 15 of Chapter 1 of Title 10, the "Fair Business Practices Act of 1975." If, after such investigation, the Attorney General determines that a person has been a consumer victim of identity fraud in this state, the Attorney General shall, at the request of the consumer victim, provide the consumer victim with certification of the findings of such investigation. Copies of any and all complaints received by any law enforcement agency of this state regarding potential violations of this article shall be transmitted to the Georgia Bureau of Investigation. The Georgia Bureau of Investigation shall maintain a repository for all complaints in the State of Georgia regarding identity fraud. Information contained in such repository shall not be subject to public disclosure. The information in the repository may be transmitted to any other appropriate investigatory agency or entity. Consumer victims of identity fraud may file complaints directly with the office of the Attorney General, the Georgia Bureau of Investigation, or with local law enforcement. Any and all transmissions authorized under this Code section

may be transmitted electronically, provided that such transmissions are made through a secure channel for the transmission of such electronic communications or information, the sufficiency of which is acceptable to the Attorney General. Nothing in this Code section shall be construed to preclude any otherwise authorized law enforcement or prosecutorial agencies from conducting investigations and prosecuting offenses of identity fraud. (Code 1981, § 16-9-122, enacted by Ga. L. 1998, p. 865, § 2; Code 1981, § 16-9-123, as redesignated by Ga. L. 2002, p. 551, § 2; Ga. L. 2008, p. 601, § 1/SB 388; Ga. L. 2015, p. 1088, § 14/SB 148.)

Editor's notes. — Ga. L. 2002, p. 551, § 2, effective May 2, 2002, redesignated the former provisions of this Code section as Code Section 16-9-124.

16-9-124. Prosecutions.

The Attorney General and prosecuting attorneys shall have the authority to conduct the criminal prosecution of all cases of identity fraud. (Code 1981, § 16-9-123, enacted by Ga. L. 1998, p. 865, § 2; Code 1981, § 16-9-124, as redesignated by Ga. L. 2002, p. 551, § 2.)

Editor's notes. — Ga. L. 2002, p. 551, § 2, effective May 2, 2002, redesignated the former provisions of this Code section as Code Section 16-9-125.

16-9-125. County of offense.

The General Assembly finds that identity fraud involves the use of identifying information which is uniquely personal to the consumer or business victim of that identity fraud and which information is considered to be in the lawful possession of the consumer or business victim wherever the consumer or business victim currently resides or is found. Accordingly, the fraudulent use of that information involves the fraudulent use of information that is, for the purposes of this article, found within the county where the consumer or business victim of the identity fraud resides or is found. Accordingly, in a proceeding under this article, the crime will be considered to have been committed in any county where the person whose means of identification or financial information was appropriated resides or is found, or in any county in which any other part of the offense took place, regardless of whether the defendant was ever actually in such county. (Code 1981, § 16-9-124, enacted by Ga. L. 1998, p. 865, § 2; Code 1981, § 16-9-125, as redesignated by Ga. L. 2002, p. 551, § 2.)

Editor's notes. — Ga. L. 2002, p. 551, § 2, effective May 2, 2002, redesignated the former provisions of this Code section as Code Section 16-9-126.

JUDICIAL DECISIONS

Constitutionality. — Trial court erred in sustaining the defendant's demurrer to the identity fraud charges against the defendant as O.C.G.A. § 16-9-125 did not violate Ga. Const. 1983, Art. VI, Sec. II, Para. VI, since identity fraud was a continuing offense, which extended into the county where the victim resided or was located. State v. Mayze, 280 Ga. 5, 622 S.E.2d 836 (2005).

Failure to prove venue. — Defendant's conviction of identity fraud, O.C.G.A. § 16-9-121, was reversed because the state failed to establish the victim's place of residence or the site where a credit card was stolen, and thus venue was not properly established as required by O.C.G.A. § 16-9-125. Middlebrooks v. State, 277 Ga. App. 551, 627 S.E.2d 154 (2006).

Successive prosecution for financial identity fraud in two counties. — Trial court correctly rejected the defendant's plea in bar and denied defendant's motion in autrefois convict because the defendant did not show that defendant's prosecution for two counts of financial identity fraud under O.C.G.A. § 16-9-121 was barred as an impermissible successive prosecution for the same conduct in another county by defendant's earlier conviction in that county of 33 counts of financial identity fraud. Summers v. State, 263 Ga. App. 338, 587 S.E.2d 768 (2003).

O.C.G.A. § 16-9-125 complies with Ga. Const. 1983, Art. VI, Sec. II, Para. VI; since the crime of identity fraud, as defined by O.C.G.A. §§ 16-9-121 and 16-9-125 when read in para materia, takes place in the county where the victim and his or her personal information are located, there is no constitutional bar to trying the defendant in that county. State v. Mayze, 280 Ga. 5, 622 S.E.2d 836 (2005).

Venue proper where victim's office located. — Evidence that a niece stole, forged, and cashed over 20 checks totaling $425,000 from the law firm where she worked with the assistance of her aunt and six other women was sufficient to find the niece and aunt guilty of 20 counts of identity fraud in violation of O.C.G.A. § 16-9-121. Under O.C.G.A. § 16-9-125, venue was proper in the county where the law firm's office was located. McKenzie v. State, 300 Ga. App. 469, 685 S.E.2d 333 (2009).

Venue established. — State established venue under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. §§ 16-9-125 and 17-2-2(a) because a reasonable trier of fact was authorized to find beyond a reasonable doubt that the victims resided or were found in Forsyth County at the time the offense of financial identity fraud was committed as alleged in the indictment; the victim testified that the victim had been a resident of Forsyth County for twelve years and that the victim's company had been located there for seventeen years. Zachery v. State, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

Evidence was sufficient to support the codefendant's conviction on 12 counts of identity fraud, in violation of O.C.G.A. § 16-9-121(a)(1), based on the state introducing evidence that the victims' identifying information was found in the Henry County, Georgia, residence of the defendant, and twelve of the victims testified at trial that the defendants did not authorize any such use of the defendant's identifying information, and the codefendant admitted in the codefendant's statement that the codefendant was a party to the crime in that the codefendant provided the victims' identifying information to an unauthorized third party, thus, the evidence was sufficient to allow the jury to find that at least part of the identity fraud took place in Henry County, regardless of whether the codefendant was ever actually in that county. Manhertz v. State, 317 Ga. App. 856, 734 S.E.2d 406 (2012).

16-9-125.1. Victim's right to file report.

(a) A person who has learned or reasonably believes that he or she has been the victim of identity fraud may contact the local law enforcement agency with jurisdiction over his or her actual residence for the purpose of making an incident report. The law enforcement agency having jurisdiction over the complainant's residence shall make a report of the complaint and provide the complainant with a copy of the report. Where jurisdiction for the investigation and prosecution of the complaint lies with another agency, the law enforcement agency making the report shall forward a copy to the agency having such jurisdiction and shall advise the complainant that the report has been so forwarded.

(b) Nothing in this Code section shall be construed so as to interfere with the discretion of a law enforcement agency to allocate resources for the investigation of crimes. A report created pursuant to this Code section is not required to be counted as an open case file. (Code 1981, § 16-9-125.1, enacted by Ga. L. 2007, p. 450, § 5/SB 236.)

Editor's notes. — Ga. L. 2007, p. 450, § 1/SB 236, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Georgia Personal Identity Protection Act.'"

16-9-126. Penalty for violations.

(a) A violation of this article, other than a violation of Code Section 16-9-121.1 or 16-9-122, shall be punishable by imprisonment for not less than one nor more than ten years or a fine not to exceed $100,000.00, or both. Any person who commits such a violation for the second or any subsequent offense shall be punished by imprisonment for not less than three nor more than 15 years, a fine not to exceed $250,000.00, or both.

(a.1) A violation of Code Section 16-9-121.1 shall be punishable by imprisonment for not less than one nor more than 15 years, a fine not to exceed $250,000.00, or both, and such sentence shall run consecutively to any other sentence which the person has received.

(b) A violation of this article which does not involve the intent to commit theft or appropriation of any property, resource, or other thing of value that is committed by a person who is less than 21 years of age shall be punishable by imprisonment for not less than one nor more than three years or a fine not to exceed $5,000.00, or both.

(c) Any person found guilty of a violation of this article may be ordered by the court to make restitution to any consumer victim or any business victim of such fraud.

(d) Each violation of this article shall constitute a separate offense.

(e) Upon a conviction of a violation of this article, the court may issue any order necessary to correct a public record that contains false information resulting from the actions which resulted in the conviction. (Code 1981, § 16-9-125, enacted by Ga. L. 1998, p. 865, § 2; Code 1981, § 16-9-126, as redesignated by Ga. L. 2002, p. 551, § 2; Ga. L. 2007, p. 450, § 6/SB 236; Ga. L. 2011, p. 794, § 5/HB 87.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2007, in subsection (b), a comma was inserted following "resource" and a comma was deleted following "21 years of age".

Editor's notes. — Ga. L. 2002, p. 551, § 2, effective May 2, 2002, redesignated the former provisions of this Code section as Code Section 16-9-127.

Ga. L. 2007, p. 450, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Georgia Personal Identity Protection Act.'"

Ga. L. 2011, p. 794, § 1/HB 87, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Illegal Immigration Reform and Enforcement Act of 2011.'"

Ga. L. 2011, p. 794, § 21/HB 87, not codified by the General Assembly, provides for severability, and provides, in part, that: "(b) The terms of this Act regarding immigration shall be construed to have the meanings consistent with such terms under federal immigration law.

"(c) The provisions of this Act shall be implemented in a manner consistent with federal laws governing immigration and civil rights."

Ga. L. 2011, p. 794, § 22/HB 87, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to offenses and violations occurring on or after July 1, 2011.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 35 (2011).

JUDICIAL DECISIONS

Imposition of maximum sentence upheld. — Defendant's identity fraud conviction was upheld on appeal as: (1) a jury charge under O.C.G.A. § 16-9-120(2) was not supported by the evidence; (2) an additional charge on the dictionary definition of fraud as a false representation of a matter of fact did not result in any prejudice; (3) the indictment was sufficient and plainly tracked the language of the identity fraud statute, laid out the elements of the offense, and allowed the defendant to prepare a defense; (4) the trial court's imposition of the maximum 10-year sentence was not unlawful; and (5) nothing in the record supported the defendant's claim that the state engaged in illegal plea bargaining tactics. Lee v. State, 283 Ga. App. 826, 642 S.E.2d 876 (2007).

Cited in Summers v. State, 263 Ga. App. 338, 587 S.E.2d 768 (2003).

16-9-127. Authority of Attorney General.

The Attorney General shall have authority to initiate any proceedings and to exercise any power or authority in the same manner as if he or she were acting under Part 2 of Article 15 of Chapter 1 of Title 10, as regards violations or potential violations of this article. (Code 1981, § 16-9-126, enacted by Ga. L. 1998, p. 865, § 2; Code 1981, § 16-9-127, as redesignated by Ga. L. 2002, p. 551, § 2; Ga. L. 2015, p. 1088, § 15/SB 148.)

Editor's notes. — Ga. L. 2002, p. 551, § 2, effective May 2, 2002, redesignated the former provisions of this Code section as Code Section 16-9-128.

16-9-128. Exemptions.

(a) The prohibitions set forth in Code Sections 16-9-121, 16-9-121.1, and 16-9-122 shall not apply to nor shall any cause of action arise under Code Sections 16-9-129 and 16-9-131 for:

(1) The lawful obtaining of credit information in the course of a bona fide consumer or commercial transaction;

(2) The lawful, good faith exercise of a security interest or a right to offset by a creditor or a financial institution;

(3) The lawful, good faith compliance by any party when required by any warrant, levy, garnishment, attachment, court order, or other judicial or administrative order, decree, or directive; or

(4) The good faith use of identifying information with the permission of the affected person.

(b) The exemptions provided in subsection (a) of this Code section shall not apply to a person intending to further a scheme to violate Code Section 16-9-121, 16-9-121.1, or 16-9-122.

(c) It shall not be necessary for the state to negate any exemption or exception in this article in any complaint, accusation, indictment, or other pleading or in any trial, hearing, or other proceeding under this article involving a business victim. In such cases, the burden of proof of any exemption or exception is upon the business victim claiming it. (Code 1981, § 16-9-128, enacted by Ga. L. 2002, p. 551, § 2; Ga. L. 2010, p. 568, § 2/HB 1016; Ga. L. 2011, p. 794, § 6/HB 87.)

Editor's notes. — Ga. L. 2011, p. 794, § 1/HB 87, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Illegal Immigration Reform and Enforcement Act of 2011.'"

Ga. L. 2011, p. 794, § 21/HB 87, not codified by the General Assembly, provides for severability, and provides, in part, that: "(b) The terms of this Act regarding immigration shall be construed to have the meanings consistent with such terms under federal immigration law.

"(c) The provisions of this Act shall be implemented in a manner consistent with federal laws governing immigration and civil rights."

Ga. L. 2011, p. 794, § 22/HB 87, not codified by the General Assembly, provides that the amendment of this Code section shall apply to offenses and violations occurring on or after July 1, 2011.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 35 (2011).

16-9-129. Actual and punitive damages available to business victim.

Any business victim who is injured by reason of any violation of this article shall have a cause of action for the actual damages sustained and, where appropriate, punitive damages. Such business victim may also recover attorney's fees in the trial and appellate courts and the costs of investigation and litigation reasonably incurred. (Code 1981, § 16-9-129, enacted by Ga. L. 2002, p. 551, § 2.)

16-9-130. Damages available to consumer victim; no defense that others engage in comparable practices; service of complaint.

(a) Any consumer victim who suffers injury or damages as a result of a violation of this article may bring an action individually or as a representative of a class against the person or persons engaged in such violations under the rules of civil procedure to seek equitable injunctive relief and to recover general and punitive damages sustained as a consequence thereof in any court having jurisdiction over the defendant; provided, however, that punitive damages shall be awarded only in cases of intentional violation. A claim under this article may also be asserted as a defense, setoff, cross-claim, or counterclaim or third-party claim against such person.

(b) A court shall award three times actual damages for an intentional violation.

(c) If the court finds in any action that there has been a violation of this article, the consumer victim injured by such violation shall, in addition to other relief provided for in this Code section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and expenses of litigation incurred in connection with said action.

(d) It shall not be a defense in any action under this article that others were, are, or will be engaged in like practices.

(e) In any action brought under this article the Attorney General shall be served by certified or registered mail or statutory overnight delivery with a copy of the initial complaint and any amended complaint within 20 days of the filing of such complaint. The Attorney General shall be entitled to be heard in any such action, and the court where such action is filed may enter an order requiring any of the parties to serve a copy of any other pleadings in an action upon the Attorney General. (Code 1981, § 16-9-130, enacted by Ga. L. 2002, p. 551, § 2; Ga. L. 2015, p. 1088, § 16/SB 148; Ga. L. 2017, p. 774, § 16/HB 323.)

The 2017 amendment, effective May 9, 2017, part of an Act to revise, modernize, and correct the Code, substituted "provided, however, that punitive damages" for "provided, however, punitive damages" near the middle of the first sentence of subsection (a).

Law reviews. — For article, "Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?," see 62 Mercer L. Rev. 449 (2011).

JUDICIAL DECISIONS

Construed with other statutes and rules. — Fact that class actions were authorized for identity fraud claims under O.C.G.A. § 16-9-130(a) did not obviate the need to comply with the requirements of O.C.G.A. § 9-11-23(b), such that class certification was properly denied in a former employee's suit alleging identity fraud and other matters due to the former employer's submission of subagent license applications without employee authorization; individualized issues regarding employee signatures and authorizations predominated over common issues. Perez v. Atlanta Check Cashers, Inc., 302 Ga. App. 864, 692 S.E.2d 670 (2010).

Civil liability not proven. — Employee pointed to no evidence creating a reasonable inference that the three former coworkers willfully and fraudulently used the employee's identifying information in violation of Georgia law because the employee only speculated that the type of information used in the identity theft may have come from the employment application. Wells v. Gen. Dynamics Info. Tech. Inc., 571 Fed. Appx. 732 (11th Cir. July 1, 2014) (Unpublished).

16-9-131. Criminal prosecution.

Whenever an investigation has been conducted by the Attorney General under this article and such investigation reveals conduct which constitutes a criminal offense, the Attorney General shall have the authority to prosecute such cases or forward the results of such investigation to any other prosecuting attorney of this state who shall commence any criminal prosecution that he or she deems appropriate. (Code 1981, § 16-9-131, enacted by Ga. L. 2002, p. 551, § 2; Ga. L. 2015, p. 1088, § 17/SB 148.)

16-9-132. Article cumulative and not exclusive.

This article is cumulative with other laws and is not exclusive. The rights or remedies provided for in this article shall be in addition to any other procedures, rights, remedies, or duties provided for in any other law or in decisions of the courts of this state dealing with the same subject matter. (Code 1981, § 16-9-132, enacted by Ga. L. 2002, p. 551, § 2.)

ARTICLE 9
COMPUTER SECURITY

RESEARCH REFERENCES

Am. Jur. 2d. — Am. Jur. 2d New Topic Service, Computers and the Internet, § 91 et seq.

16-9-150. Short title.

This article shall be known and may be cited as the "Georgia Computer Security Act of 2005." (Code 1981, § 16-9-150, enacted by Ga. L. 2005, p. 1241, § 1/SB 127.)

16-9-151. Definitions.

As used in this article, the term:

(1) "Advertisement" means a communication, the primary purpose of which is the commercial promotion of a commercial product or service, including content on an Internet website operated for a commercial purpose.

(2) "Authorized user," with respect to a computer, means a person who owns or is authorized by the owner or lessee to use the computer.

(3) "Cause to be copied" means to distribute or transfer computer software or any component thereof. Such term shall not include providing:

(A) Transmission, routing, provision of intermediate temporary storage, or caching of software;

(B) A storage medium, such as a compact disk, website, or computer server, through which the software was distributed by a third party; or

(C) An information location tool, such as a directory, index, reference, pointer, or hypertext link, through which the user of the computer located the software.

(4) "Computer software" means a sequence of instructions written in any programming language that is executed on a computer. Such term shall not include a text or data file, a web page, or a data component of a web page that is not executable independently of the web page.

(5) "Computer virus" means a computer program or other set of instructions that is designed to degrade the performance of or disable a computer or computer network and is designed to have the ability to replicate itself on other computers or computer networks without the authorization of the owners of those computers or computer networks.

(6) "Consumer" means an individual who resides in this state and who uses the computer in question primarily for personal, family, or household purposes.

(6.1) "Covered file-sharing program" means a computer program, application, or software that enables the computer on which such program, application, or software is installed to designate files as available for searching by and copying to one or more other computers, to transmit such designated files directly to one or more other computers, and to request the transmission of such designated files directly from one or more other computers. Covered file-sharing program does not mean a program, application, or software designed primarily to operate as a server that is accessible over the Internet using the Internet Domain Name System, to transmit or receive e-mail messages, instant messaging, real-time audio or video communications, or real-time voice communications, to provide network or computer security, network management, hosting and backup services, maintenance, diagnostics, or technical support or repair, or to detect or prevent fraudulent activities.

(7) "Damage" means any significant impairment to the integrity or availability of data, software, a system, or information.

(8) "Execute," when used with respect to computer software, means the performance of the functions or the carrying out of the instructions of the computer software.

(9) "Intentionally deceptive" means any of the following:

(A) By means of an intentionally and materially false or fraudulent statement;

(B) By means of a statement or description that intentionally omits or misrepresents material information in order to deceive the consumer; or

(C) By means of an intentional and material failure to provide any notice to an authorized user regarding the download or installation of software in order to deceive the consumer.

(10) "Internet" means the global information system that is logically linked together by a globally unique address space based on the Internet Protocol or its subsequent extensions; that is able to support communications using the Transmission Control Protocol/Internet Protocol suite, its subsequent extensions, or other Internet Protocol compatible protocols; and that provides, uses, or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described in this paragraph.

(11) "Person" means any individual, partnership, corporation, limited liability company, or other organization, or any combination thereof.

(12) "Personally identifiable information" means any of the following:

(A) A first name or first initial in combination with a last name;

(B) Credit or debit card numbers or other financial account numbers;

(C) A password or personal identification number required to access an identified financial account;

(D) A social security number; or

(E) Any of the following information in a form that personally identifies an authorized user:

(i) Account balances;

(ii) Overdraft history;

(iii) Payment history;

(iv) A history of websites visited;

(v) A home address;

(vi) A work address; or

(vii) A record of a purchase or purchases. (Code 1981, § 16-9-151, enacted by Ga. L. 2005, p. 1241, § 1/SB 127; Ga. L. 2006, p. 72, § 16/SB 465; Ga. L. 2010, p. 312, § 1/SB 470.)

16-9-152. Spyware, browsers, hijacks, and other software prohibited.

(a) It shall be illegal for a person or entity that is not an authorized user, as defined in Code Section 16-9-151, of a computer in this state to knowingly, willfully, or with conscious indifference or disregard cause computer software to be copied onto such computer and use the software to do any of the following:

(1) Modify, through intentionally deceptive means, any of the following settings related to the computer's access to, or use of, the Internet:

(A) The page that appears when an authorized user launches an Internet browser or similar software program used to access and navigate the Internet;

(B) The default provider or web proxy the authorized user uses to access or search the Internet; or

(C) The authorized user's list of bookmarks used to access web pages;

(2) Collect, through intentionally deceptive means, personally identifiable information that meets any of the following criteria:

(A) It is collected through the use of a keystroke-logging function that records all keystrokes made by an authorized user who uses the computer and transfers that information from the computer to another person;

(B) It includes all or substantially all of the websites visited by an authorized user, other than websites of the provider of the software, if the computer software was installed in a manner designed to conceal from all authorized users of the computer the fact that the software is being installed; or

(C) It is a data element described in subparagraph (B), (C), or (D) of paragraph (12) of Code Section 16-9-151, or in division (12)(E)(i) or (12)(E)(ii) of Code Section 16-9-151, that is extracted from the consumer's or business entity's computer hard drive for a purpose wholly unrelated to any of the purposes of the software or service described to an authorized user;

(3) Prevent, without the authorization of an authorized user, through intentionally deceptive means, an authorized user's reasonable efforts to block the installation of, or to disable, software, by causing software that the authorized user has properly removed or disabled to automatically reinstall or reactivate on the computer without the authorization of an authorized user;

(4) Intentionally misrepresent that software will be uninstalled or disabled by an authorized user's action, with knowledge that the software will not be so uninstalled or disabled; or

(5) Through intentionally deceptive means, remove, disable, or render inoperative security, antispyware, or antivirus software installed on the computer.

(b) Nothing in this Code section shall apply to any monitoring of, or interaction with, a user's Internet or other network connection or service, or a protected computer, by a telecommunications carrier, cable operator, computer hardware or software provider, or provider of information service or interactive computer service for network or computer security purposes, diagnostics, technical support, repair, network management, network maintenance, authorized updates of software or system firmware, authorized remote system management, or detection or prevention of the unauthorized use of or fraudulent or other illegal activities in connection with a network, service, or computer software, including scanning for and removing software proscribed under this article. (Code 1981, § 16-9-152, enacted by Ga. L. 2005, p. 1241, § 1/SB 127; Ga. L. 2007, p. 47, § 16/SB 103.)

16-9-153. E-mail virus distribution, denial of service attacks, and other conduct prohibited.

(a) It shall be illegal for a person or entity that is not an authorized user, as defined in Code Section 16-9-151, of a computer in this state to knowingly, willfully, or with conscious indifference or disregard cause computer software to be copied onto such computer and use the software to do any of the following:

(1) Take control of the consumer's or business entity's computer by doing any of the following:

(A) Transmitting or relaying commercial e-mail or a computer virus from the consumer's or business entity's computer, where the transmission or relaying is initiated by a person other than the authorized user and without the authorization of an authorized user;

(B) Accessing or using the consumer's or business entity's modem or Internet service for the purpose of causing damage to the consumer's or business entity's computer or of causing an authorized user or a third party affected by such conduct to incur financial charges for a service that is not authorized by an authorized user;

(C) Using the consumer's or business entity's computer as part of an activity performed by a group of computers for the purpose of causing damage to another computer, including, but not limited to, launching a denial of service attack; or

(D) Opening multiple, sequential, stand-alone advertisements in the consumer's or business entity's Internet browser without the authorization of an authorized user and with knowledge that a reasonable computer user cannot close the advertisements without turning off the computer or closing the consumer's or business entity's Internet browser;

(2) Modify any of the following settings related to the computer's access to, or use of, the Internet:

(A) An authorized user's security or other settings that protect information about the authorized user for the purpose of stealing personal information of an authorized user; or

(B) The security settings of the computer for the purpose of causing damage to one or more computers; or

(3) Prevent, without the authorization of an authorized user, an authorized user's reasonable efforts to block the installation of, or to disable, software, by doing any of the following:

(A) Presenting the authorized user with an option to decline installation of software with knowledge that, when the option is selected by the authorized user, the installation nevertheless proceeds; or

(B) Falsely representing that software has been disabled.

(b) Nothing in this Code section shall apply to any monitoring of, or interaction with, a user's Internet or other network connection or service, or a protected computer, by a telecommunications carrier, cable operator, computer hardware or software provider, or provider of information service or interactive computer service for network or computer security purposes, diagnostics, technical support, repair, network management, network maintenance, authorized updates of software or system firmware, authorized remote system management, or detection or prevention of the unauthorized use of or fraudulent or other illegal activities in connection with a network, service, or computer software, including scanning for and removing software proscribed under this article. (Code 1981, § 16-9-153, enacted by Ga. L. 2005, p. 1241, § 1/SB 127; Ga. L. 2011, p. 752, § 16/HB 142.)

16-9-154. Inducement to install, copy, or execute software through misrepresentation prohibited.

(a) It shall be illegal for a person or entity that is not an authorized user, as defined in Code Section 16-9-151, of a computer in this state to do any of the following with regard to such computer:

(1) Induce an authorized user to install a software component onto the computer by intentionally misrepresenting that installing software is necessary for security or privacy reasons or in order to open, view, or play a particular type of content;

(2) Deceptively causing the copying and execution on the computer of a computer software component with the intent of causing an authorized user to use the component in a way that violates any other provision of this Code section;

(3) Prevent reasonable efforts to block the installation, execution, or disabling of a covered file-sharing program on the computer; or

(4) Install, offer to install, or make available for installation, reinstallation, or update a covered file-sharing program on the computer without first providing clear and conspicuous notice to the authorized user of the computer showing which files on that computer will be made available to the public, obtaining consent from the authorized user to install the covered file-sharing program, and requiring affirmative steps by the authorized user to activate any feature on the covered file-sharing program that will make files on

that computer available to the public. Such notice shall be redisplayed each time a change occurs in the list of files that will be made available to the public.

(b) Nothing in this Code section shall apply to any monitoring of, or interaction with, a user's Internet or other network connection or service, or a protected computer, by a telecommunications carrier, cable operator, computer hardware or software provider, or provider of information service or interactive computer service for network or computer security purposes, diagnostics, technical support, repair, network management, network maintenance, authorized updates of software or system firmware, authorized remote system management, or detection or prevention of the unauthorized use of or fraudulent or other illegal activities in connection with a network, service, or computer software, including scanning for and removing software proscribed under this article. (Code 1981, § 16-9-154, enacted by Ga. L. 2005, p. 1241, § 1/SB 127; Ga. L. 2010, p. 312, § 2/SB 470.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting not required. — Offenses arising from a violation of subsection (a) of O.C.G.A. § 16-9-154 does not appear to be an offense for which fingerprinting is required. 2010 Op. Att'y Gen. No. 10-6.

16-9-155. Penalties.

(a) Any person who violates the provisions of paragraph (2) of Code Section 16-9-152, subparagraph (a)(1)(A), (a)(1)(B), or (a)(1)(C) of Code Section 16-9-153, or paragraph (2) of subsection (a) of Code Section 16-9-153 shall be guilty of a felony and, upon conviction thereof, shall be sentenced to imprisonment for not less than one nor more than ten years or a fine of not more than $3 million, or both.

(b) The Attorney General may bring a civil action against any person violating this article to enforce the penalties for the violation and may recover any or all of the following:

(1) A civil penalty of up to $100.00 per violation of this article, or up to $100,000.00 for a pattern or practice of such violations;

(2) Costs and reasonable attorney's fees; and

(3) An order to enjoin the violation.

(c) In the case of a violation of subparagraph (a)(1)(B) of Code Section 16-9-153 that causes a telecommunications carrier to incur costs for the origination, transport, or termination of a call triggered using the modem of a customer of such telecommunications carrier as a result of such violation, the telecommunications carrier may bring a civil action against the violator to recover any or all of the following:

(1) The charges such carrier is obligated to pay to another carrier or to an information service provider as a result of the violation, including, but not limited to, charges for the origination, transport, or termination of the call;

(2) Costs of handling customer inquiries or complaints with respect to amounts billed for such calls;

(3) Costs and reasonable attorney's fees; and

(4) An order to enjoin the violation.

(d) An Internet service provider or software company that expends resources in good faith assisting consumers or business entities harmed by a violation of this chapter, or a trademark owner whose mark is used to deceive consumers or business entities in violation of this chapter, may enforce the violation and may recover any or all of the following:

(1) Statutory damages of not more than $100.00 per violation of this article, or up to $1 million for a pattern or practice of such violations;

(2) Costs and reasonable attorney's fees; and

(3) An order to enjoin the violation. (Code 1981, § 16-9-155, enacted by Ga. L. 2005, p. 1241, § 1/SB 127; Ga. L. 2006, p. 72, § 16/SB 465.)

16-9-156. Exceptions.

(a) For the purposes of this Code section, the term "employer" includes a business entity's officers, directors, parent corporation, subsidiaries, affiliates, and other corporate entities under common ownership or control within a business enterprise. No employer may be held criminally or civilly liable under this article as a result of any actions taken:

(1) With respect to computer equipment used by its employees, contractors, subcontractors, agents, leased employees, or other staff which the employer owns, leases, or otherwise makes available or allows to be connected to the employer's network or other computer facilities; or

(2) By employees, contractors, subcontractors, agents, leased employees, or other staff who misuse an employer's computer equipment for an illegal purpose without the employer's knowledge, consent, or approval.

(b) No person shall be held criminally or civilly liable under this article when its protected computers have been used by unauthorized

users to violate this article or other laws without such person's knowledge, consent, or approval.

(c) A manufacturer or retailer of computer equipment shall not be liable under this Code section, criminally or civilly, to the extent that the manufacturer or retailer is providing third-party branded software that is installed on the computer equipment that the manufacturer or retailer is manufacturing or selling. (Code 1981, § 16-9-156, enacted by Ga. L. 2005, p. 1241, § 1/SB 127.)

16-9-157. Legislative findings and preemption.

The General Assembly finds that this article is a matter of state-wide concern. This article supersedes and preempts all rules, regulations, codes, ordinances, and other laws adopted by any county, municipality, consolidated government, or other local governmental agency regarding spyware and notices to consumers from computer software providers regarding information collection. (Code 1981, § 16-9-157, enacted by Ga. L. 2005, p. 1241, § 1/SB 127.)

CHAPTER 10

OFFENSES AGAINST PUBLIC ADMINISTRATION

Article 1

Abuse of Governmental Office

Sec.

16-10-1. Violation of oath by public officer.
16-10-2. Bribery.
16-10-3. Using private funds for law enforcement; off-duty employment of law enforcement officers.
16-10-4. Influencing of legislative action by state and local government officers or employees.
16-10-5. Influencing of officer or employee of state or political subdivision by another officer or employee.
16-10-6. Sale of real or personal property to political subdivision by local officer or employee; exceptions; limitation of civil liability.
16-10-7. False acknowledgments, certificates, or statements of appearance or oath by officer authorized to do same.
16-10-8. False official certificates or writings by officers or employees of state and political subdivisions.
16-10-9. Acceptance of office or employment in more than one branch of government.

Article 2

Obstruction of Public Administration and Related Offenses

Sec.

16-10-20. False statements and writings, concealment of facts, and fraudulent documents in matters within jurisdiction of state or political subdivisions.
16-10-20.1. Filing false documents.
16-10-21. Conspiracy to defraud state or political subdivision.
16-10-22. Conspiracy in restraint of free and open competition in transactions with state or political subdivisions; forfeiture of right to bid on or enter into contracts.
16-10-23. Impersonating a public officer or employee.
16-10-24. Obstructing or hindering law enforcement officers; penalty.
16-10-24.1. Obstructing or hindering firefighters.
16-10-24.2. Obstructing or hindering emergency medical technicians or emergency medical professionals; criminal penalty.
16-10-24.3. Obstructing or hindering persons making emergency telephone calls.
16-10-24.4. Obstructing or hindering park ranger.
16-10-25. Giving false name, address, or birthdate to law enforcement officer.
16-10-26. False report of a crime.
16-10-27. Transmitting false report of fire.
16-10-28. Transmitting a false public alarm; restitution.
16-10-29. Request for ambulance service when not reasonably needed.
16-10-30. Refusal to obey official request at fire or other emergency.
16-10-31. Concealing death of another person.
16-10-32. Attempted murder or threatening of witnesses in official proceedings.
16-10-33. Removal or attempted removal of weapon from public official; punishment.
16-10-34. Use of laser devices against law enforcement officer.

Article 3

Escape and Other Offenses Related to Confinement

16-10-50. Hindering apprehension or punishment of criminal.

Sec.
16-10-51. Bail jumping.
16-10-52. Escape.
16-10-53. Aiding or permitting another to escape lawful custody or confinement.
16-10-54. Assailing, opposing, or resisting officer of the law in a penal institution.
16-10-55. Persuading, enticing, instigating, aiding, or abetting person in a penal institution to commit mutiny.
16-10-56. Unlawful acts of violence in a penal institution.

Article 4

Perjury and Related Offenses

16-10-70. Perjury.
16-10-71. False swearing.
16-10-72. Subornation of perjury or false swearing.
16-10-73. Impersonating another in the acknowledgment of recognizance, bail, or judgment.

Article 5

Offenses Related to Judicial and Other Proceedings

Sec.
16-10-90. Compounding a crime.
16-10-91. Embracery.
16-10-92. Acceptance of benefit, reward, or consideration by witness for changing testimony or being absent from trial, hearing, or other proceeding.
16-10-93. Influencing witnesses.
16-10-94. Tampering with evidence.
16-10-94.1. Willful destruction, alteration, or falsification of medical records.
16-10-95. Barratry; penalty [Repealed].
16-10-96. Impersonating another in the course of an action, proceeding, or prosecution.
16-10-97. Intimidation or injury of any officer in or of any court.
16-10-98. Illegal remuneration of judges and law enforcement officials.

ARTICLE 1

ABUSE OF GOVERNMENTAL OFFICE

Cross references. — Further provisions regarding criminal penalties for miscellaneous offenses concerning public officers and employees, T. 45, C. 11.

Law reviews. — For article, "Conflicts of Interests of Public Officers and Employees," see 13 Ga. St. B.J. 64 (1976).

RESEARCH REFERENCES

ALR. — De facto status of officer as affecting his criminal responsibility or liability to punishment for contempt, 64 A.L.R. 534.

Constitutionality of corrupt practices acts, 69 A.L.R. 377.

Conduct contemplated by statute which makes neglect of duty by public officer or employee a punishable offense, 134 A.L.R. 1250.

Liability of public officer for interest or other earnings received on public money in his possession, 5 A.L.R.2d 257.

Solicitation or receipt of funds by public officer or employee for political campaign expenses or similar purposes as bribery, 55 A.L.R.2d 1137.

What constitutes offense of official oppression, 83 A.L.R.2d 1007.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 A.L.R.3d 280.

16-10-1. Violation of oath by public officer.

Any public officer who willfully and intentionally violates the terms of his oath as prescribed by law shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years. (Code 1933, § 26-2302, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Official oaths generally, § 45-3-1 et seq.

Law reviews. — For article discussing statute preceding present criminal Code section restricting municipal purchasing from city officials, see 5 Ga. St. B.J. 309 (1969).

JUDICIAL DECISIONS

Not unconstitutionally vague. — O.C.G.A. § 16-10-1 was not unconstitutionally vague as applied to a police officer who pawned a confiscated handgun to finance the officer's personal water bill, since such conduct was so far outside the realm of acceptable police behavior that defendant had adequate notice of the potential for prosecution for that conduct. Poole v. State, 262 Ga. 718, 425 S.E.2d 655 (1993).

What public officers included. — Former Code 1933, § 26-2302 (see now O.C.G.A. § 16-10-1) plainly applies to any public officer, and includes public officers of a municipality. Beckman v. State, 229 Ga. 327, 190 S.E.2d 906 (1972).

Misdemeanor committed by public officer. — Police officer's act of taking a candy bar from a convenience store without paying for it was not the offense of violation of oath by a public officer. State v. Tullis, 213 Ga. App. 581, 445 S.E.2d 282 (1994).

Proving terms of oath of office. — Violation of O.C.G.A. § 16-10-1 was not established where the state failed to prove the terms of the oath of office administered to defendant were as averred in the charge. Jowers v. State, 225 Ga. App. 809, 484 S.E.2d 803 (1997).

It is not necessary that the conduct prohibited by O.C.G.A. § 16-10-1 take place while the officer is on duty. Barnes v. State, 230 Ga. App. 884, 497 S.E.2d 594 (1998).

Lesser included offense of bribery. — The offense of violation of oath by a public officer is a lesser included offense of bribery. Nave v. State, 171 Ga. App. 165, 318 S.E.2d 753 (1984).

Proof of the alleged bribery of an assistant district attorney as a factual matter would include the facts necessary to establish a violation of oath, and thus the latter is embraced within the charge of bribery and constitutes a lesser included offense of that crime. Nave v. Helms, 845 F.2d 963 (11th Cir. 1988).

Indictment of county clerk for violating the clerk's oath as a public officer for failure to collect costs, fines, and forfeitures was sufficient to withstand defendant's special demurrer where all of the elements of the offense of "violation of oath by public officer" were included in the indictment, and there was a clear exposition of the facts alleged as the basis for the charge set forth in the body of the indictment in such a plain manner as to be easily understood by the jury and the defendant. State v. Greene, 171 Ga. App. 329, 320 S.E.2d 183 (1984).

County jailer. — Motion for general demurrer by defendant, a county jailer, was properly denied on defendant's indictment on a charge of violating defendant's oath of office for receiving marijuana as payment for delivering a pack of cigarettes to an inmate because it could not be said that defendant had "well and truly" performed defendant's duties. Murkerson v. State, 264 Ga. App. 701, 592 S.E.2d 184 (2003).

Prison guard. — There was sufficient evidence to support the conviction of the defendant, a corrections officer, of violating the defendant's oath of office when the defendant was found bringing drugs into the prison where the defendant was employed. The terms of the oath the defen-

dant signed were set out in an exhibit exactly as averred in the indictment, and the oath was prescribed by law. Bradley v. State, 292 Ga. App. 737, 665 S.E.2d 428 (2008).

Evidence that a corrections officer threatened an inmate that if the inmate did not give the officer $2,000, the officer would have the inmate charged with marijuana possession was insufficient for a jury to find that the officer attempted to improperly influence official action by another officer in violation of O.C.G.A. § 16-10-5, but was sufficient to support the officer's conviction of violation of an oath by a public officer in violation of O.C.G.A. § 16-10-1. Beard v. State, 300 Ga. App. 146, 684 S.E.2d 306 (2009).

Coerced statement. — In a prosecution under both O.C.G.A. §§ 16-6-5.1 and 16-10-1, the trial court properly suppressed the oral and written statements made by the defendant, a public employee, during an internal investigation interview conducted by the Georgia Department of Corrections, and after the defendant was forbidden to seek the advice of counsel, as the defendant had an objective belief that a failure to cooperate with the investigation by taking part in the interview and signing a written document entitled "Notice of Interfering with On-Going Internal Investigation" would result in a loss of employment; thus, the defendant's right against self-incrimination was violated. State v. Aiken, 281 Ga. App. 415, 636 S.E.2d 156 (2006).

Failure to charge jury on issue of character of defendant was reversible error, where defendant's character was an issue in the trial of the case. Chastain v. State, 177 Ga. App. 236, 339 S.E.2d 298 (1985).

Notice of charges. — Defendant's special demurrer was properly denied because the indictment accusing the defendant of "threatening to arrest (the victim) if she did not meet with him at a separate location and comply with his demands for sex, by lying to officials with the Georgia Bureau of Investigation during a criminal investigation, and by committing crimes against the State while on duty," sufficiently apprised defendant of the charge. Wiggins v. State, 272 Ga. App. 414, 612 S.E.2d 598 (2005), aff'd in part and rev'd in part, 280 Ga. 268, 626 S.E.2d 118 (2006).

Evidence sufficient for conviction. — Trial court properly denied defendant's demurrer to two counts alleging violation of defendant's oath of office (as a police officer) as defendant made various admissions in judicio and there was a sufficient connection between defendant's taking possession of the weapons from an impounded car and defendant's duties as a police officer to support one charge for violating the oath of office. Further, the indictment sufficiently alleged that defendant failed to turn over the contraband taken, which indicated that defendant wilfully and intentionally violated the oath to faithfully administer and discharge the duties of defendant's office by intentionally failing to turn in the weapons to authorities. Brandeburg v. State, 292 Ga. App. 191, 663 S.E.2d 844 (2008), cert. denied, No. S08C1796, 2008 Ga. LEXIS 921 (Ga. 2008).

Evidence supported the defendant's conviction for violation of oath of office as the jury was authorized to find that the defendant, a police officer, obtained the victim's taxpayer identification number without authorization by using the police database with personal information in the database. Gaskins v. State, 318 Ga. App. 8, 733 S.E.2d 338 (2012).

Cited in In re Nave, 254 Ga. 107, 326 S.E.2d 769 (1985); Tesler v. State, 295 Ga. App. 569, 672 S.E.2d 522 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, § 369 et seq.

C.J.S. — 67 C.J.S., Officers and Public Employees, § 360 et seq.

ALR. — Criminal offense of bribery as affected by lack of legal qualification of person assuming or alleged to be an officer, 115 A.L.R. 1263.

Personal liability of policeman, sheriff, or similar peace officer or his bond, for

injury suffered as a result of failure to enforce law or arrest lawbreaker, 41 A.L.R.3d 700.

16-10-2. Bribery.

(a) A person commits the offense of bribery when:

(1) He or she gives or offers to give to any person acting for or on behalf of the state or any political subdivision thereof, or of any agency of either, any benefit, reward, or consideration to which he or she is not entitled with the purpose of influencing him or her in the performance of any act related to the functions of his or her office or employment; or

(2) A public official, elected or appointed, or an employee of this state or any agency, authority, or entity of the state, or any county or municipality or any agency, authority, or entity thereof, directly or indirectly solicits, receives, accepts, or agrees to receive a thing of value by inducing the reasonable belief that the giving of the thing will influence his or her performance or failure to perform any official action. A thing of value shall not include:

(A) Food or beverage consumed at a single meal or event;

(B) Legitimate salary, benefits, fees, commissions, or expenses associated with a recipient's nonpublic business, employment, trade, or profession;

(C) An award, plaque, certificate, memento, or similar item given in recognition of the recipient's civic, charitable, political, professional, or public service;

(D) Food, beverages, and registration at group events to which all members of an agency, as defined in paragraph (1) of subsection (a) of Code Section 21-5-30.2, are invited. An agency shall include the Georgia House of Representatives, the Georgia Senate, committees and subcommittees of such bodies, and the governing body of each political subdivision of this state;

(E) Actual and reasonable expenses for food, beverages, travel, lodging, and registration for a meeting which are provided to permit participation or speaking at the meeting;

(F) A commercially reasonable loan made in the ordinary course of business;

(G) Any gift with a value less than $100.00;

(H) Promotional items generally distributed to the general public or to public officers;

(I) A gift from a member of the public officer's immediate family; or

(J) Food, beverage, or expenses afforded public officers, members of their immediate families, or others that are associated with normal and customary business or social functions or activities;

provided, however, that receiving, accepting, or agreeing to receive anything not enumerated in subparagraphs (A) through (J) of this paragraph shall not create the presumption that the offense of bribery has been committed.

(b) A person convicted of the offense of bribery shall be punished by a fine of not more than $5,000.00 or by imprisonment for not less than one nor more than 20 years, or both. (Cobb's 1851 Digest, p. 805; Code 1863, §§ 4364, 4365; Ga. L. 1865-66, p. 233, § 1; Code 1868, §§ 4402, 4403; Code 1873, §§ 4469, 4470; Code 1882, §§ 4469, 4470; Penal Code 1895, §§ 267, 268; Penal Code 1910, §§ 270, 271; Code 1933, §§ 26-4101, 26-4102; Ga. L. 1949, p. 274, § 1; Ga. L. 1959, p. 34, § 18; Code 1933, § 26-2301, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1991, p. 1749, § 1; Ga. L. 1992, p. 1075, § 17.)

Cross references. — Prohibition against contributions by corporations for purpose of influencing vote, judgment, or action of officer of state, § 14-5-6. Lobbying, T. 28, C. 7 and T. 21, C. 5, Art. 4.

Law reviews. — For article discussing statute preceding present criminal Code section restricting municipal purchasing from city officials, see 5 Ga. St. B.J. 309 (1969). For annual survey on criminal law and procedure, see 42 Mercer L. Rev. 141 (1990).

For note on 1991 amendment of this Code section, see 8 Ga. St. U.L. Rev. 40 (1992). For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 247 (1992).

JUDICIAL DECISIONS

Analysis

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General Consideration

Ethics in Government Act, O.C.G.A. § 21-5-1 et seq., has in no manner altered the bribery statutes; the act simply defines a campaign contribution and, having defined, requires disclosure; specifically, nothing in the act permits a public officeholder to request or receive anything of value to which the officeholder is not entitled with the purpose of influencing the officeholder in the performance of any act related to the functions of the office or employment; nor is the term "entitled," as contained in the bribery statute, modified in any way by the Ethics in Government Act. State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

Change in definition did not restrict definition of bribe. — Ethics in Government Act, O.C.G.A. § 21-5-1 et seq., carried forward the substance of the definition of contribution from the Financial Disclosure Act, but removed the words that restricted the term "influence" to "in-

fluencing the introduction of enriching legislation"; the change was not an attempt to restrict the definition of a bribe, but as a manner of enlarging the definition of a contribution so as to ensure the reporting of almost all transfers to the candidate or office holder. State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

Essential elements of offense are offer or gift, purpose to corruptly influence, and official status of offeree. Ingram v. State, 97 Ga. App. 468, 103 S.E.2d 666 (1958); Slaughter v. State, 99 Ga. App. 239, 108 S.E.2d 161 (1959).

Offense of bribery is complete when offer of reward is made to influence vote or action of an official. York v. State, 42 Ga. App. 453, 156 S.E. 733 (1931).

Act need not be lawful to render officer liable, but need only be official in form and done under color of office. York v. State, 42 Ga. App. 453, 156 S.E. 733 (1931).

One cannot be bribed to do something entirely outside of one's official duties. Taylor v. State, 42 Ga. App. 443, 156 S.E. 623, later appeal, 44 Ga. App. 387, 161 S.E. 793 (1931).

Both giving and receiving of bribe are not necessary elements of offense; giving renders offerer guilty, and receiving, with criminal intent, renders receiver guilty. Slaughter v. State, 99 Ga. App. 239, 108 S.E.2d 161 (1959).

Giving or offering reward to governmental official in exchange for official act prohibited. — Other than those emoluments of public office that are expressly authorized and established by law, no holder of public office is entitled to request or receive — from any source, directly or indirectly — anything of value in exchange for the performance of any act related to the functions of that office. State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

Citizens of Georgia have every right to try to influence their public officers — through petition and protest, promises of political support and threats of political reprisal; they do not have, nor have they ever had, the "right" to buy the official act of a public officer. State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

Exclusivity of section. — Only offense expressly designated as bribery under Georgia law is this section. Ansley v. State, 124 Ga. App. 670, 185 S.E.2d 562 (1971), cert. denied, 408 U.S. 929, 92 S. Ct. 2503, 33 L. Ed. 2d 341 (1972).

Bribery is a well-known word, used widely and understood generally. King v. State, 246 Ga. 386, 271 S.E.2d 630 (1980).

Bribery defined. — Ordinary signification of "bribery" may mean an act of influencing action of another by corrupt inducement. As a legal word of art, "bribery" is somewhat broader, including offering, giving, receiving, or soliciting of anything of value to influence action as an official or in discharge of a legal or public duty. King v. State, 246 Ga. 386, 271 S.E.2d 630 (1980).

That an officer may not be "entitled" under the terms of the officer's public employment to receive money for private work does not demonstrate that soliciting and receiving such compensation is bribery. If, on the other hand, an officer is not prohibited by the terms of the officer's public employment from engaging in private work, by soliciting and receiving money for such work, the officer is likewise not seeking a "bribe." A bribe must be for the purpose of influencing an officer in the performance of any act related to the officer's public office or employment. Upton v. State, 166 Ga. App. 541, 305 S.E.2d 1 (1983).

Acceptance of a bribe is an egregious conflict of interest, and will vitiate official acts that otherwise appear to be lawful. State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

Public officers do not have the right to sell powers of office. — Public officers are not prohibited from receiving legitimate financial aid in support of nomination or election to public office; they do not have, nor have they ever had, the "right" to sell the powers of their offices. State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989),

General Consideration (Cont'd)

cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

Campaign contribution, whether made to a candidate in the heat of a campaign or to encourage or influence the official after the candidate is elected, is not something which a candidate or elected official is qualified or privileged to request or receive and thus is not something to which the candidate is "entitled" within the meaning of O.C.G.A. § 16-10-2. State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

Transfer may come within definition of "contribution." — Transfer that is a bribe as defined in O.C.G.A. § 16-10-2 also may come within the definition of "contribution" as contained in the third sentence of O.C.G.A. § 21-5-3(6); the fact that such a transfer must be reported does not change the transfer's character as a bribe. State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

Former Code 1933, § 26-2301 (see now O.C.G.A. § 16-10-2(a)(2)) must be read in pari materia with the rest of the section. King v. State, 246 Ga. 386, 271 S.E.2d 630 (1980).

Meaning of offense set forth in paragraph (a)(2) of former Code 1933, §§ 26-4101 and 26-4102 (see now O.C.G.A. § 16-10-2) was dependent upon language of paragraph (a)(1) of that section with respect to purpose for which person "solicits or receives" and was thus restricted to "influencing him in performance of any act related to functions of his office or employment" whereas former Code 1933, § 26-2304 (see now O.C.G.A. § 16-10-4(b)) included solicitation for sale of influence by perpetrating officer or employee, who might or might not be a member of the legislative body, or others, members of the legislative body, to assure passage or defeat of legislation. Ansley v. State, 124 Ga. App. 670, 185 S.E.2d 562 (1971), cert. denied, 408 U.S. 929, 92 S. Ct. 2503, 33 L. Ed. 2d 341 (1972).

Offering bribe to two officers at same time and place constitutes two offenses. — Although at same place and time under same circumstances, appellant extended offer of bribe to two officers, appellant's conduct constituted a violation of former Code 1933, § 26-2301 as to each, and the two counts of bribery did not have to be consolidated for trial. Hall v. State, 155 Ga. App. 724, 272 S.E.2d 578 (1980) (see O.C.G.A. § 16-10-2).

Distinction between this section and § 16-10-4(b). — Former Code 1933, § 26-2301 (see now O.C.G.A. § 16-10-2) was restricted to bribes to influence an official in the official's performance of any act related to functions of office or employment, whereas former Code 1933, § 26-2304 (see now O.C.G.A. § 16-10-4(b)) included the sale of an official's influence on others who were members of a legislative body. Ansley v. Stynchcombe, 480 F.2d 437 (5th Cir. 1973).

Acquittal under this section not necessarily inconsistent with conviction under § 16-10-4. — From standpoint of conviction and acquittal, acquittal on a count under former Code 1933, § 26-2301 (see now O.C.G.A. § 16-10-2) was not, as a matter of law, inconsistent and repugnant to a simultaneous conviction on a count under former Code 1933, § 26-2304 (see now O.C.G.A. § 16-10-4). Ansley v. State, 124 Ga. App. 670, 185 S.E.2d 562 (1971), cert. denied, 408 U.S. 929, 92 S. Ct. 2503, 33 L. Ed. 2d 341 (1972).

Lesser included offense of bribery. — Offense of violation of oath by a public officer is a lesser included offense of bribery. Nave v. State, 171 Ga. App. 165, 318 S.E.2d 753 (1984).

Proof of the alleged bribery of an assistant district attorney as a factual matter would include the facts necessary to establish a violation of oath, and thus the latter is embraced within the charge of bribery and constitutes a lesser included offense of that crime. Nave v. Helms, 845 F.2d 963 (11th Cir. 1988).

Receiver of bribe might be convicted, although person paying money is innocent. — Receiver of bribe might be convicted although person who paid money might have been in fact ignorant that receiver, in order to do what was

requested of the receiver, would have to act in such official capacity as to commit crime of bribery. Slaughter v. State, 99 Ga. App. 239, 108 S.E.2d 161 (1959).

Municipal officer fell within scope of former Code 1933, §§ 26-4101 and 26-4102 (see now O.C.G.A. § 16-10-2). Wellborn v. State, 78 Ga. App. 520, 51 S.E.2d 588 (1949).

Bribery statute is applicable to members of municipal council. Turner v. State, 43 Ga. App. 799, 160 S.E. 509 (1931).

Former Code 1910, §§ 270, 271 (see now O.C.G.A. § 16-10-2) was applicable to an attempt to offer money to a member of the Atlanta City Council for purposes of trying to influence the council member's official action. Taylor v. State, 44 Ga. App. 64, 160 S.E. 667 (1931), cert. dismissed, 175 Ga. 642, 165 S.E. 733 (1932), overruled on other grounds, State v. Tyson, 544 S.E.2d 444 (Ga. 2001).

Offices of police officer and deputy sheriff of county were included in the coverage provided by former Code 1933, §§ 26-4101 and 26-4102 (see now O.C.G.A. § 16-10-2). Usry v. State, 90 Ga. App. 644, 83 S.E.2d 843 (1954).

Statute of limitation. — Because the existence, execution, and timing of an agreement that allegedly violated the bribery statute were unknown to the state before February 2010, the statute of limitation for the bribery charge was tolled until it was discovered; and the trial court did not err by denying the defendant's plea in bar based on the expiration of the statute of limitation. Kenerly v. State, 325 Ga. App. 412, 750 S.E.2d 822 (2013).

Cited in Ken Stanton Music, Inc. v. Board of Educ., 227 Ga. 393, 181 S.E.2d 67 (1971); Partain v. State, 129 Ga. App. 213, 199 S.E.2d 549 (1973); Hickox v. State, 138 Ga. App. 882, 227 S.E.2d 829 (1976); Patterson v. State, 247 Ga. 736, 280 S.E.2d 836 (1981); United States v. Williams, 642 F.2d 136 (5th Cir. 1981); Patterson v. State, 161 Ga. App. 85, 289 S.E.2d 270 (1982); United States v. Ward, 808 F. Supp. 803 (S.D. Ga. 1992); Five Star Partners v. Vincent Netherlands Properties, 169 Bankr. 994 (Bankr. N.D. Ga. 1994).

Application

Receipt of bribe by assistant district attorney proved. — Under the evidence, the state met its burden of proving that an assistant district attorney received something of value to influence the attorney's action in the discharge of a legal or public duty, and the payments could be found by a jury to have influenced the attorney's decision as to whether to reopen the case and prosecute an accused. Nave v. State, 166 Ga. App. 466, 304 S.E.2d 491 (1983).

Receipt of bribe by jailer. — Motion for general demurrer by defendant, a county jailer, was properly denied on defendant's indictment on a charge of bribery for receiving marijuana as payment for delivering a pack of cigarettes to an inmate because where the indictment alleged the giving of a thing of value in exchange for a service rendered, the thing could not be considered a gift, notwithstanding the $10 value of the alleged bribe. Murkerson v. State, 264 Ga. App. 701, 592 S.E.2d 184 (2003).

Evidence that a corrections officer threatened an inmate that if the inmate did not give the officer $2,000, the officer would have the inmate charged with marijuana possession, was insufficient for a jury to find that the officer attempted to improperly influence official action by another officer in violation of O.C.G.A. § 16-10-5, although it might have supported a conviction for bribery in violation of O.C.G.A. § 16-10-2. Beard v. State, 300 Ga. App. 146, 684 S.E.2d 306 (2009).

Small "gift" to detention officer. — Within the context of O.C.G.A. § 16-10-2(a)(2), it is only "gifts" which are excepted from the purview thereof and not "bribes," no matter how small the amount involved; accordingly, where a trial court construed § 16-10-2 and held that small amounts of cash that added up to less than $100, which were accepted by defendant, a detention officer, from inmates, were specifically excepted from the offense of bribery, it did not construe the statute using the ordinary meaning of the words pursuant to O.C.G.A. § 1-3-1(b), which was error. State v. Fortner, 264 Ga. App. 783, 592 S.E.2d 454 (2003).

Application (Cont'd)

Libel action. — Verdict awarding general damages in a libel suit filed by an attorney against a former client, which showed that the client published facts intimating that the attorney bribed judges, contrary to O.C.G.A. § 16-10-2, was upheld as: (1) the jury could reasonably conclude that the attorney was a limited public figure, and was properly charged; (2) the client failed to seek any remedy regarding the verdict entered; (3) the trial court did not err in prohibiting the client from offering testimony about corrupt individuals who were exposed as a result of the publication about the attorney; and (4) based on the evidence of said publication on the client's web site, neither a directed verdict or judgment notwithstanding the verdict in the client's favor was authorized. Milum v. Banks, 283 Ga. App. 864, 642 S.E.2d 892 (2007).

Holding relating to definition of "entitled" was harmless error. — When the court of appeals found the trial court's definition of the term "entitled" misleading because the term failed to inform the jury that a public official is entitled to receive campaign contributions, the Supreme Court reversed the Court of Appeals holding because the more appropriate meaning of "entitled" was more restrictive than the definition given by the trial court, any error was helpful to the accused, and was therefore harmless error. State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

Rational trier of fact could have found the essential elements of the crime of bribery to have been established beyond a reasonable doubt in regard to defendant; there was ample evidence at trial that defendant gave payments to county commissioners for the specific purpose of influencing their votes on his application for a building height variance. State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

Evidence was sufficient to authorize the jury to conclude that defendant made payments to county commissioners in an effort to induce a vote in favor of defendant's application for a zoning variance. State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

Sufficient evidence supported a bribery conviction under O.C.G.A. § 16-10-2 when: the defendant, a jail officer, agreed to sell an inmate a handcuff key; the defendant gave the inmate the key in exchange for $100; the inmate told a shift supervisor that the inmate had the key and told investigators about how the inmate got the key; and a second inmate overheard the discussion between the defendant and the inmate. Felder v. State, 286 Ga. App. 271, 648 S.E.2d 753 (2007).

Court under no obligation to charge on bribery offense. — When the defendant was not charged with bribery and did not assert that bribery constituted a lesser included offense of any of the charges for which the defendant was on trial, the trial court was under no obligation to charge the jury on this offense. Gober v. State, 203 Ga. App. 5, 416 S.E.2d 292, cert. denied, 203 Ga. App. 906, 416 S.E.2d 292 (1992).

Intent shown by offer to participate in drug distribution. — Rational trier of fact could have found that the defendant's intent in offering to allow a police officer to participate in the defendant's drug distribution activities where the officer could make $6,000.00 a week or more was specifically to influence the officer in the performance of official duties. Lee v. State, 204 Ga. App. 283, 418 S.E.2d 809 (1992).

No evidence of payments made to informants in exchange for testimony against defendant. — Trial court did not err in denying the defendant's motion for new trial because there was no violation of the bribery statute, O.C.G.A. § 16-10-2(a)(1), when the record contained no evidence that the state made payments or promised benefits in exchange for testimony at the defendant's trial with the purpose of influencing informants in the performance of such testimony, and it was up to the jury to weigh the evidence of the state's arrangements with the informants in assessing their credibility; the informants were offered leniency, and one of the informants was

paid cash, in exchange for their assistance in drug investigations by the police, only a portion of which involved the controlled buys with the defendant, and although the parties could have contemplated that the informants would testify upon the completion of the investigation, there was no evidence that the informants were paid in exchange for their testimony. Moreland v. State, 304 Ga. App. 468, 696 S.E.2d 448 (2010).

Selective prosecution. — When in support of the defendants' pre-trial motion to dismiss for selective prosecution, defendants claimed the defendants could not be prosecuted for paying money to county commissioners for the purpose of influencing their vote on a pending land use application because the district attorney had not prosecuted others who had made similar payments, the Court of Appeals correctly held that the trial court applied an incorrect standard in denying the defendants an evidentiary hearing on their selective prosecution defense; the proffer included details of money transfers that were similar to those for which the defendants were prosecuted, sources of reliable and available evidence, i.e., permanent public records, and names of witnesses who were disinterested in the prosecution. State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

Admissibility of display of currency. — In a case where defendants allegedly bribed county commissioners, the court did not determine the propriety of the admission into evidence of currency obtained through the cashing of checks and the district attorney's display of that currency; the error, if any, was not so harmful as to require reversal. State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

Debtor's bribery claim failed. — Debtor's claim that bribery, as defined in O.C.G.A. § 16-10-2, had been committed by a bank and the bank's director and was therefore a predicate act for purposes of the debtor's civil racketeering claims was without merit; the debtor contended that the bank bribed the debtor's ex-spouse to file for divorce and to write a check from the debtor's account, but there was no evidence that the ex-spouse was a state official or representative. Tucker v. Morris State Bank, 2005 U.S. App. LEXIS 24544 (11th Cir. Nov. 14, 2005) (Unpublished).

Constitutional Issues

Former Code 1933, § 26-2301 (see now O.C.G.A. § 16-10-2) was not unconstitutionally vague. King v. State, 246 Ga. 386, 271 S.E.2d 630 (1980); Whitfield v. State, 247 Ga. 367, 276 S.E.2d 841 (1981); State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

Former Code 1933, § 26-2301 (see now O.C.G.A. § 16-10-2) was not vague, ambiguous, or violative of U.S. Const., amends. 5 and 14. Whitfield v. State, 159 Ga. App. 398, 283 S.E.2d 627 (1981).

Bribery statute is not an impermissible restraint upon free speech. — Bribery statute is not an impermissible restraint upon free speech under the U.S. Const., amend. 1; the bribery statute, which places no limitation upon amounts of contributions or expenditures, restricts the purposes for which any benefit, reward or consideration may be offered or given to, or solicited, or accepted by a public officer. State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

O.C.G.A. § 16-10-2 does not violate the First Amendment on the statute's face since the statute includes corrupt intent as an element. Therefore, the statute was not unconstitutional as applied to the defendant's offer of campaign contributions to influence the decision of county commissioners' regarding the defendant's zoning variance request. Agan v. Vaughn, 119 F.3d 1538 (11th Cir. 1997), cert. denied, 523 U.S. 1023, 118 S. Ct. 1305, 140 L. Ed. 2d 470 (1998).

Purpose. — O.C.G.A. § 16-10-2 was intended to discourage the making of affirmatively false statements. Watkins v. State, 191 Ga. App. 87, 381 S.E.2d 45, cert. denied, 191 Ga. App. 923, 381 S.E.2d 45 (1989).

Constitutional Issues (Cont'd)

False statement to state trooper. — Defendant, by stating to a state trooper that defendant's brother-in-law had been driving a truck involved in a fatal accident when, in fact, defendant had been the driver, made a false statement in a matter within the jurisdiction of a department of state government. Watkins v. State, 191 Ga. App. 87, 381 S.E.2d 45, cert. denied, 191 Ga. App. 923, 381 S.E.2d 45 (1989).

"Benefit, reward or consideration" need not be specifically defined. — Words, "benefit, reward or consideration" in this section all relate to thing of value and need not be specifically defined to meet constitutional standards. King v. State, 246 Ga. 386, 271 S.E.2d 630 (1980).

Application of confiscated bribe money to fine not tantamount to prohibited forfeiture. — When trial court, in bribery case, ordered confiscation of bribe money and ruled that money might be used toward payment of fine assessed in case, and when bribe money did not exceed maximum fine under former Code 1933, § 26-2301 (see now O.C.G.A. § 16-10-2), confiscation was not tantamount to forfeiture prohibited under former Code 1933, § 85-1109 (see now O.C.G.A. § 44-5-210) and Ga. Const. 1976, Art. I, Sec. I, Para. XVII (see now Ga. Const. 1983, Art. I, Sec. I, Para. XX). Hall v. State, 155 Ga. App. 724, 272 S.E.2d 578 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Applicability to public officials. — Elements of the crime proscribed by O.C.G.A. § 16-10-2(a)(2) are: (1) a public official or employee; (2) directly or indirectly solicits, receives, accepts, or agrees to receive; (3) a thing of value; (4) by inducing the reasonable belief that the giving of the thing will influence his or her performance or failure to perform any official action. 1991 Op. Att'y Gen. No. U91-10.

Public officials in many instances have influence over a wide array of interests of potential contributors. Nonetheless, the bribery statute should not become a factor unless the potential donor's interest is narrowed to a matter which is then pending or reasonably likely to be pending before the public official or the body in which the official serves and upon which the official may be called upon to act. 1991 Op. Att'y Gen. No. U91-10.

Bribery statute cannot be said to unequivocally exclude specific situations facing public officials such as meals, receptions, trips and so forth. In any event, the applicability of the statute to any such situation will depend on all the relevant facts. 1991 Op. Att'y Gen. No. U91-10.

Members of General Assembly may receive salary from employer during session. — Members of the General Assembly may continue to receive their legitimate regular salary and benefits from their employer during a legislative session without violating O.C.G.A. § 16-10-2(a) or being subject to the limitations and disclosure requirements of O.C.G.A. T. 21, Ch. 5, as long as the giving of the salary and benefits is not for the purpose of influencing the legislator's performance of his or her duties or the legislator's nomination or election to public office. 1992 Op. Att'y Gen. No. 92-27.

ADVISORY OPINIONS OF THE STATE BAR

Committing offense results in Rules of Professional Conduct violation. — If an attorney were to indicate to an officer that as a result of the attorney's position as a member of the city council a favorable recommendation as to one of the attorney's clients would result in benefits flowing to the officer, or that an unfavorable recommendation would result in harm, the attorney would have committed the offense of bribery, O.C.G.A. § 16-10-2(a)(1), or extortion, O.C.G.A. § 16-8-16(a)(4). The attorney would also have violated Rule 3.5(a) of the Georgia Rules of Professional Conduct. Adv. Op. No. 05-12 (July 25, 2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Bribery, § 1 et seq.

Am. Jur. Trials. — Handling the Defense in a Bribery Prosecution, 37 Am. Jur. Trials 273.

C.J.S. — 11 C.J.S., Bribery, § 2 et seq.

ALR. — Bribe giver as accomplice of bribe taker and vice versa within rule requiring corroboration of testimony of accomplice, 73 A.L.R. 389.

Statement by candidate regarding salary or fees of office as violation of Corrupt Practice Acts or bribery, 106 A.L.R. 493.

Criminal offense of bribery as affected by lack of legal qualification of person assuming or alleged to be an officer, 115 A.L.R. 1263.

Bribery as affected by nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him, 158 A.L.R. 323.

Admissibility, in prosecution for bribery or accepting bribes, of evidence tending to show the commission of other bribery or acceptance of bribe, 20 A.L.R.2d 1012.

Solicitation or receipt of funds by public officer or employee for political campaign expenses or similar purposes as bribery, 55 A.L.R.2d 1137.

Recovery of money paid, or property transferred, as a bribe, 60 A.L.R.2d 1273.

Criminal liability of corporation for bribery or conspiracy to bribe public official, 52 A.L.R.3d 1274.

Furnishing public official with meals, lodging, or travel, or receipt of such benefits, as bribery, 67 A.L.R.3d 1231.

Criminal offense of bribery as affected by lack of authority of state public officer or employee, 73 A.L.R.3d 374.

Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 A.L.R.3d 245.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 A.L.R.3d 280.

Who is a public official within meaning of federal statute punishing bribery of a public official (18 USCA § 201), 161 A.L.R. Fed. 491.

16-10-3. Using private funds for law enforcement; off-duty employment of law enforcement officers.

(a) Except as otherwise provided in this Code section, any officer or employee of the state or any agency thereof who receives from any private person, firm, or corporation funds or other things of value to be used in the enforcement of the penal laws or regulations of the state is guilty of a misdemeanor.

(b) Except as otherwise provided in this Code section, any officer or employee of a political subdivision who receives from any private person, firm, or corporation funds or other things of value to be used in the enforcement of the penal laws or regulations of the political subdivision of which he is an officer or employee is guilty of a misdemeanor.

(c) Nothing contained within this Code section shall be deemed or construed so as to prohibit any law enforcement officer of the state or any political subdivision thereof:

(1) From being employed by private persons, firms, or corporations during his off-duty hours when such employment is approved in writing by the chief or head, or his duly designated agent, of the law

enforcement agency by which such law enforcement officer is employed; or

(2) From soliciting for or accepting contributions of equipment or of funds to be used solely for the purchase of equipment to be used in the enforcement of the penal laws or regulations of this state or any political subdivision thereof when such acceptance is approved in writing by the chief or head, or his duly designated agent, of the law enforcement agency by which such law enforcement officer is employed. (Ga. L. 1958, p. 333, § 1; Ga. L. 1959, p. 34, § 3; Code 1933, § 26-2303, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1972, p. 1147, § 1; Ga. L. 1987, p. 906, § 1.)

Administrative rules and regulations. — Performance of duty, Official Compilation of the Rules and Regulations of the State of Georgia, Board of Corrections, Departmental Operations, § 125-2-1-.07.

Off duty police employment, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Public Safety, Ch. 570-9.

OPINIONS OF THE ATTORNEY GENERAL

Maintenance of records by Georgia Crime Information Center regarding violations of former Code 1933, § 26-2303 (see now O.C.G.A. § 16-10-3). See 1976 Op. Att'y Gen. No. 76-33.

Georgia Bureau of Investigation may not accept funds from private concerns such as banks to support investigations when the private concerns have a vested interest, such as credit card frauds. 1986 Op. Att'y Gen. No. 86-45.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Bribery, § 5 et seq.

C.J.S. — 67 C.J.S., Officers and Public Employees, § 360 et seq.

ALR. — Criminal offense of bribery as affected by lack of legal qualification of person assuming or alleged to be an officer, 115 A.L.R. 1263.

Furnishing public official with meals, lodging, or travel, or receipt of such benefits, as bribery, 67 A.L.R.3d 1231.

16-10-4. Influencing of legislative action by state and local government officers or employees.

(a) Any officer or employee of the state or any agency thereof who asks for or receives anything of value to which he or she is not entitled in return for an agreement to procure or attempt to procure the passage or defeat the passage of any legislation by the General Assembly, or procure or attempt to procure the approval or disapproval of the same by the Governor, shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $100,000.00 or by imprisonment for not less than one nor more than five years, or both.

(b) Any officer or employee of a political subdivision who asks for or receives anything of value to which he or she is not entitled in return for an agreement to procure or attempt to procure the passage or defeat the passage of any legislation by the legislative body of the political subdivision of which he or she is an officer or employee shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $100,000.00 or by imprisonment for not less than one nor more than five years, or both. (Ga. L. 1959, p. 34, § 1; Ga. L. 1964, p. 261, § 1; Code 1933, § 26-2304, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2010, p. 1173, § 24/SB 17.)

Cross references. — Lobbying, T. 28, C. 7 and T. 21, C. 5, Art. 4.

Editor's notes. — Ga. L. 2010, p. 1173, § 1/SB 17, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Georgia Government Transparency and Campaign Finance Act of 2010.'"

Ga. L. 2010, p. 1173, § 30/SB 17, not codified by the General Assembly, provides, in part, that the amendment to this Code section applies to all reports filed on and after January 10, 2011.

JUDICIAL DECISIONS

Offense under former Code 1933, § 26-2304(b) (see now O.C.G.A. § 16-10-4(b)) was a species of bribery, regardless of the label used by the General Assembly. Ansley v. State, 124 Ga. App. 670, 185 S.E.2d 562 (1971), cert. denied, 408 U.S. 929, 92 S. Ct. 2503, 33 L. Ed. 2d 341 (1972).

Former Code 1933, § 26-2304(b) (see now O.C.G.A. § 16-10-4(b)) was an offense within provisions of 18 U.S.C. § 2516(2). Ansley v. State, 124 Ga. App. 670, 185 S.E.2d 562 (1971), cert. denied, 408 U.S. 929, 92 S. Ct. 2503, 33 L. Ed. 2d 341 (1972).

Distinction between §§ 16-10-2 and 16-10-4. — Meaning of the offense set forth in former Code 1933, § 26-2301 (see now O.C.G.A. § 16-10-2(a)(2)) was dependent upon language of paragraph (a)(1) of that section with respect to purpose for which person "solicits or receives" and was thus restricted to "influencing him in performance of any act related to functions of his office or employment" whereas former Code 1933, § 26-2304 (see now O.C.G.A. § 16-10-4) included solicitation for sale of influence by perpetrating officer or employee, who might or might not be a member of the legislative body, on others, members of the legislative body, to assure passage or defeat of legislation. Ansley v. State, 124 Ga. App. 670, 185 S.E.2d 562 (1971), cert. denied, 408 U.S. 929, 92 S. Ct. 2503, 33 L. Ed. 2d 341 (1972).

Former Code 1933, § 26-2301 (see now O.C.G.A. § 16-10-2) was restricted to bribes to influence an official in performance of any act related to functions of the official's office or the official's employment, whereas former Code 1933, § 26-2304(b) (see now O.C.G.A. § 16-10-4(b)) included sale of official's influence on others who are members of a legislative body. Ansley v. Stynchcombe, 480 F.2d 437 (5th Cir. 1973).

Conviction under § 16-10-4 not necessarily inconsistent with acquittal under § 16-10-2. — From standpoint of conviction and acquittal, acquittal on count under former Code 1933, § 26-2301 (see now O.C.G.A. § 16-10-2) was not, as a matter of law, inconsistent and repugnant to simultaneous conviction on count under former Code 1933, § 26-2304 (see now O.C.G.A. § 16-10-4). Ansley v. State, 124 Ga. App. 670, 185 S.E.2d 562 (1971), cert. denied, 408 U.S. 929, 92 S. Ct. 2503, 33 L. Ed. 2d 341 (1972).

Cited in Koehler v. Massell, 229 Ga. 359, 191 S.E.2d 830 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Bribery, §§ 7, 8.

C.J.S. — 11 C.J.S., Bribery, § 9.

ALR. — Agreement to use one's influence to have punishment for crime mitigated as contrary to public policy, 24 A.L.R. 1453.

Furnishing public official with meals, lodging, or travel, or receipt of such benefits, as bribery, 67 A.L.R.3d 1231.

Construction and application of § 2C1.1 of United States Sentencing Guidelines (18 USCS APPX § 2C1.1) pertaining to offenses involving public officials offering, giving, soliciting, or receiving bribes, or extortion under color of official right, 144 A.L.R. Fed. 615.

Who is a public official within meaning of federal statute punishing bribery of a public official (18 USCA § 201), 161 A.L.R. Fed. 491.

16-10-5. Influencing of officer or employee of state or political subdivision by another officer or employee.

(a) Any officer or employee of the state or any agency thereof who asks for or receives anything of value to which he or she is not entitled in return for an agreement to influence or attempt to influence official action by any other officer or employee of the state or any agency thereof shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $100,000.00 or by imprisonment for not less than one nor more than five years, or both.

(b) Any officer or employee of a political subdivision who asks for or receives anything of value to which he or she is not entitled in return for an agreement to influence or attempt to influence official action by any other officer or employee of that political subdivision shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $100,000.00 or by imprisonment for not less than one nor more than five years, or both. (Ga. L. 1878-79, p. 175, § 1; Code 1882, § 4470a; Penal Code 1895, § 269; Penal Code 1910, § 272; Code 1933, § 26-4103; Code 1933, § 26-2305, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2010, p. 1173, § 25/SB 17.)

Cross references. — Lobbying, T. 21, C. 5, A. 4 and T. 28, C. 7.

Editor's notes. — Ga. L. 2010, p. 1173, § 1/SB 17, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Georgia Government Transparency and Campaign Finance Act of 2010.'"

Ga. L. 2010, p. 1173, § 30/SB 17, not codified by the General Assembly, provides, in part, that the amendment to this Code section applies to all reports filed on and after January 10, 2011.

JUDICIAL DECISIONS

Defective indictment. — Indictment alleging attempt to influence official who was not elected on date involved is fatally defective. Roberts v. State, 131 Ga. App. 316, 205 S.E.2d 494 (1974).

Evidence insufficient for convic-

tion. — Evidence that a corrections officer threatened an inmate that if the inmate did not give the officer $2,000, the officer would have the inmate charged with marijuana possession was insufficient for a jury to find that the officer attempted to improperly influence official action by another officer in violation of O.C.G.A. § 16-10-5, but was sufficient to support the officer's conviction of violation of an oath by a public officer in violation of O.C.G.A. § 16-10-1. Beard v. State, 300 Ga. App. 146, 684 S.E.2d 306 (2009).

Cited in Koehler v. Massell, 229 Ga. 359, 191 S.E.2d 830 (1972); Quillan v. State, 160 Ga. App. 167, 286 S.E.2d 503 (1981).

RESEARCH REFERENCES

ALR. — Agreement to use one's influence to have punishment for crime mitigated as contrary to public policy, 24 A.L.R. 1453.

Furnishing public official with meals, lodging, or travel, or receipt of such benefits, as bribery, 67 A.L.R.3d 1231.

Who is a public official within meaning of federal statute punishing bribery of a public official (18 USCA § 201), 161 A.L.R. Fed. 491.

16-10-6. Sale of real or personal property to political subdivision by local officer or employee; exceptions; limitation of civil liability.

(a) As used in this Code section, the term "employing local authority" means a local authority or board created by a local Act of the General Assembly or a local constitutional amendment or created by general law and requiring activation by an ordinance or resolution of a local governing authority.

(b) Any employee, appointed officer, or elected officer of a political subdivision, hereafter referred to as "employing political subdivision," or agency thereof or any employee or appointed officer of an employing local authority who for himself or herself or in behalf of any business entity sells any real or personal property to:

(1) The employing political subdivision or employing local authority;

(2) An agency of the employing political subdivision;

(3) A political subdivision for which local taxes for education are levied by the employing political subdivision; or

(4) A political subdivision which levies local taxes for education for the employing political subdivision

shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.

(c) Subsection (b) of this Code section shall not apply to:

(1) Sales of personal property of less than $800.00 per calendar quarter;

(2) Sales of personal property made pursuant to sealed competitive bids made by the employee, appointed officer, or elected officer, either for himself or herself or on behalf of any business entity; or

(3) Sales of real property in which a disclosure has been made:

(A) To the judge of the probate court of the county in which the purchasing political subdivision or local authority is wholly included or, if not wholly included in any one county, to the judge of the probate court of any county in which the purchasing political subdivision or local authority is partially included and which shall have been designated by the purchasing political subdivision or local authority to receive such disclosures, provided that if the sale is made by the judge of the probate court, a copy of such disclosure shall also be filed with any superior court judge of the superior court of the county;

(B) At least 15 days prior to the date the contract or agreement for such sale will become final and binding on the parties thereto; and

(C) Which shows that an employee, appointed officer, or elected officer of an employing political subdivision or agency thereof or of an employing local authority has a personal interest in such sale, which interest includes, without being limited to, any commission, fee, profit, or similar benefit and which gives the name of such person, his or her position in the political subdivision or agency or local authority, the purchase price, and location of the property.

(d) Any contract or transaction for a sale made in accordance with subsection (c) of this Code section shall be valid and no employee, appointed officer, or elected officer shall be subject to civil liability for any such sale. (Code 1933, § 26-2306, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1972, p. 542, § 1; Ga. L. 1975, p. 854, § 1; Ga. L. 1979, p. 536, § 1; Ga. L. 1980, p. 733, § 1; Ga. L. 1982, p. 2107, § 15; Ga. L. 1983, p. 1326, § 2; Ga. L. 1984, p. 22, § 16; Ga. L. 1986, p. 10, § 16; Ga. L. 1994, p. 607, § 9; Ga. L. 1998, p. 593, § 1; Ga. L. 2003, p. 140, § 16; Ga. L. 2010, p. 228, § 1/HB 1007; Ga. L. 2011, p. 752, § 16/HB 142.)

Cross references. — Purchase by state of supplies, materials, and other items generally, § 50-5-50 et seq.

Law reviews. — For article discussing statute preceding present criminal Code section restricting municipal purchasing from city officials, see 5 Ga. St. B.J. 309 (1969). For article discussing the effect of this Code section on general statute on votes by municipal councilmen in matters of personal interest, § 36-30-6, and on local statutory law, see 7 Ga. St. B.J. 431 (1971).

JUDICIAL DECISIONS

Broad definition of property not intended. — In enacting former Code 1933, § 26-2306 (see now O.C.G.A. § 16-10-6), the General Assembly obviously did not intend that a broad definition of property should be applied, because it limited the term property by the word "personal." DeFoor v. State, 233 Ga. 190, 210 S.E.2d 707 (1974).

Description of property in indictment. — The fact that an indictment charged a county employee with the sale of "creek sand and gravel" while the proof demonstrated that the substance sold was "chert" did not create a fatal variance between the indictment and the proof; defendant had notice of the charges against the defendant and was not surprised or prevented from preparing a defense. Young v. State, 205 Ga. App. 357, 422 S.E.2d 244 (1992).

Ordinance did not preempt statute. — Miller County, Ga., Ordinance No. 10-01, § 3 does not purport to supplant O.C.G.A. § 16-10-6 because the effect of § 3 is to strengthen O.C.G.A. § 16-10-6 by a broader prohibition with additional specific requirements for any exception; the county had authority, as an incident of the county's home rule power, to enact Miller County, Ga., Ordinance No. 10-01, § 3 so long as the ordinance did not conflict with general law. Bd. of Comm'rs v. Callan, 290 Ga. 327, 720 S.E.2d 608 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 26-5004, and Ga. L. 1959, p. 34, § 2 are included in the annotations for this Code section.

Contract placing public officer in conflict-of-interest position is absolutely void, even though it is fair and honestly executed. 1970 Op. Att'y Gen. No. U70-116.

Application. — Section applies to all elected officers of a political subdivision who sell any personal property to a political subdivision of which they are officers. 1980 Op. Att'y Gen. No. U80-22.

Prohibition of section extends to members of legislature. — Because of clear principle of law that members of legislature are deemed to be state officers, they are included within the scope of this section. 1969 Op. Att'y Gen. No. 69-444.

City council may not employ one of its councilmen to perform contract with city. 1970 Op. Att'y Gen. No. U70-116.

Sale of services was not embraced within former Code 1933, § 26-2306 (see now O.C.G.A. § 16-10-6). 1980 Op. Att'y Gen. No. U80-22.

When sale of services by member of one agency to another agency is permissible. — Member of state board such as State Advisory Council may sell services to state on competitive bid basis provided the member operates a regularly established business enterprise which meets all legal requirements for submission of bids on services involved, and provided further that the member shall not under any circumstances sell services to agency of which the person is a member. 1969 Op. Att'y Gen. No. 69-475.

Rendering of architectural service is not sale of personal property within meaning of section. 1969 Op. Att'y Gen. No. 69-476.

State agency member should not participate directly in sales by corporation it owns stock in. — Member of state agency who is officer and stockholder in corporation making sales to the member's agency should not participate directly in sale of goods to state. 1970 Op. Att'y Gen. No. U70-175.

Following instances constitute violations of this section: (1) state officer or employee who acts for personal interest and sells personal property to state; (2) state officer or employee who acts as agent for another and sells any personal property to state; and (3) state officer or employee who intends to violate section but acts through agent who sells officer's or employee's personal property to state. 1969 Op. Att'y Gen. No. 69-444.

Chair of a board of county commissioners cannot sell groceries to the chair's county where the nature of that contract would require the chair to judge own continual performance, notwithstanding the use of a competitive sealed bid in awarding the contract. 1983 Op. Att'y Gen. No. U83-8.

There is no prohibition of state officer or employee selling to political subdivision of state. 1971 Op. Att'y Gen. No. 71-124.

Legislator is not prevented from selling personal property to political subdivision of state. 1971 Op. Att'y Gen. No. 71-124.

Officers or employees of political subdivision not precluded from selling personal property to state. 1971 Op. Att'y Gen. No. 71-124.

Sale or lease of real property to private corporation by state official falls outside scope of former Code 1933, § 26-2306 (see now O.C.G.A. § 16-10-6) and the provisions concerning the code of ethics for public office and employees (see O.C.G.A. Ch. 10, T. 45). 1977 Op. Att'y Gen. No. 77-53.

Uncompensated public authority member may deal with public institution governed by authority. — Member of public authority who receives neither compensation nor per diem is not prohibited from dealing with the public institution the authority is set up to govern. 1963-65 Op. Att'y Gen. p. 345 (decided under former Code 1933, § 26-5004, and Ga. L. 1959, p. 34, § 2).

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, § 375.

C.J.S. — 67 C.J.S., Officers and Public Employees, § 362.

ALR. — Construction and application of "public authority" defense to criminal prosecution of private citizen, 24 A.L.R.6th 455.

16-10-7. False acknowledgments, certificates, or statements of appearance or oath by officer authorized to do same.

Any officer authorized to administer oaths or to take and certify acknowledgments who knowingly makes a false acknowledgment, certificate, or statement concerning the appearance before him or the taking of an oath or affirmation by any person is guilty of a misdemeanor. (Ga. L. 1959, p. 34, § 14; Code 1933, § 26-2310, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Notaries public generally, T. 45, C. 17.

OPINIONS OF THE ATTORNEY GENERAL

Maintenance of records by Georgia Crime Information Center regarding violations of former Code 1933, § 26-2310 (see now O.C.G.A. § 16-10-7). See 1976 Op. Att'y Gen. No. 76-33.

16-10-8. False official certificates or writings by officers or employees of state and political subdivisions.

An officer or employee of the state or any political subdivision thereof or other person authorized by law to make or give a certificate or other

writing who knowingly makes and delivers such a certificate or writing containing any statement which he knows to be false shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years. (Ga. L. 1959, p. 34, § 16; Code 1933, § 26-2311, enacted by Ga. L. 1968, p. 1249, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, § 369 et seq.
C.J.S. — 37 C.J.S., Forgery, § 27. 67 C.J.S., Officers and Public Employees, § 362.

16-10-9. Acceptance of office or employment in more than one branch of government.

(a) It shall be unlawful for:

(1) Members of the General Assembly to accept or hold office or employment in the executive branch of the state government or any agency thereof or in the judicial branch of the state government;

(2) Judges of courts of record or their clerks and assistants to accept or hold office or employment in the executive branch of the state government or any agency thereof or in the legislative branch of the state government; or

(3) Officers or employees of the executive branch of the state government to accept or hold office or employment in the legislative or judicial branches of the state government.

(b) A person who knowingly disburses or receives any compensation or money in violation of this Code section is guilty of a misdemeanor.

(c) Nothing in this Code section shall be construed to apply to any officer or employee of the executive branch who has taken a leave of absence without pay from his post for temporary service as an employee of the legislative branch while it is in session and during the authorized stay-over period. (Ga. L. 1959, p. 34, § 7; Ga. L. 1961, p. 42, § 1; Code 1933, § 26-2309, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Separation of legislative, judicial, and executive powers of government, Ga. Const. 1983, Art. I, Sec. II, Para. III.

JUDICIAL DECISIONS

Former Code 1933, § 26-2309 (see now O.C.G.A. § 16-10-9) was an attempt to prevent obvious conflicts of interest inherent in situations where an individual serves concurrently in two branches of state government. Galer v. Board of Regents of Univ. Sys., 239 Ga. 268, 236 S.E.2d 617 (1977).

Restrictions imposed on employees of executive branch by former Code 1933, § 26-2309 (see now O.C.G.A. § 16-10-9) were reasonable and justi-

fiable. Galer v. Board of Regents of Univ. Sys., 239 Ga. 268, 236 S.E.2d 617 (1977).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 26-5009, and Ga. L. 1959, p. 34, § 7 are included in the annotations for this Code section.

Former Code 1933, § 26-2309 (see now O.C.G.A. § 16-10-9) did not prohibit one from holding two employments in same branch of state government; the statute prohibited an employee from holding two employments in different branches of state government. 1969 Op. Att'y Gen. No. 69-467; 1971 Op. Att'y Gen. No. 71-101.

Word "services" within meaning of former Code 1933, § 26-5009 (see now O.C.G.A. § 45-10-20) referred to an independent contract or relationship, such as an attorney, architect, consultant, cleaning contractor, etc. The word services as used in that section did not refer to "employment" where a master-servant relationship was created. 1969 Op. Att'y Gen. No. 69-467.

Member of General Assembly cannot hold employment as faculty member of institution within University System of Georgia even where General Assembly member takes leave without pay from the member's regent's employment during legislative sessions; it was the potential for conflicting interests which arose from holding of two positions towards which former Code 1933, § 26-2309 (see now O.C.G.A. § 16-10-9) was directed. 1976 Op. Att'y Gen. No. 76-117.

State Senator in private veterinary practice may be retained by Department of Agriculture for meat inspections. 1974 Op. Att'y Gen. No. 74-156.

Employee of executive branch of state government may not run for justice of the peace since a justice of the peace was a state officer in the judicial branch; this would be a violation of former Code 1933, § 26-2309 (see now O.C.G.A. § 16-10-9), which made it a crime for executive officers or employees to accept employment in judicial branch. 1972 Op. Att'y Gen. No. U72-26.

Clerk of superior court cannot lawfully serve as member of General Assembly. 1965-66 Op. Att'y Gen. No. 66-105 (decided under former Code 1933, § 26-5009, Ga. L. 1959, p. 34, § 7).

Simultaneous service as official court reporter and justice of the peace did not offend former Code 1933, § 26-2309 (see now O.C.G.A. § 16-10-9). 1980 Op. Att'y Gen. No. U80-23.

Court reporter may not hold simultaneous employment with the State Board of Workers' Compensation and a superior court or state court, though the individual may provide court reporting services to those courts provided the role is that of an independent contractor. 1983 Op. Att'y Gen. No. 83-56.

Judge's uncompensated services on advisory council to Department of Human Resources. — Uncompensated services of juvenile and superior court judges on advisory council to Department of Human Resources would meet letter as well as spirit of both statutory and constitutional provisions relating to separation of powers. 1963-65 Op. Att'y Gen. p. 320 (decided under former Code 1933, § 26-5009, Ga. L. 1959, p. 34, § 7).

Board of commissioners member may hold democratic executive committee office at county or state level. Since state officials are not prevented from holding city or county offices and since positions involved are not ones for which political activity is banned by rules and regulations of merit system, a member of board of commissioners is eligible to hold office on democratic executive committee at either county or state level. 1965-66 Op. Att'y Gen. No. 66-181 (decided under former Code 1933, § 26-5009, Ga. L. 1959, p. 34, § 7).

Solicitors of the municipal court are not within the judicial branch of state government for purposes of the constitutional provision prohibiting one person from simultaneously exercising the functions of more than one of three branches of state government. 1991 Op. Att'y Gen. No. U91-4.

University institution cannot contract for another agency's employee. — Member institution of the University System of Georgia may not contract for the services of an employee of an agency in another branch of state government. 1993 Op. Att'y Gen. No. 93-24.

Staff member in the judicial branch or General Assembly is prohibited from employment as a graduate research, laboratory, or teaching assistant at any unit of the University System of Georgia. 1997 Op. Att'y Gen. No. 97-1.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, § 57 et seq.

ALR. — One acting under authority of emergency or relief board or administration as civil officer within contemplation of constitutional provision against holding two or more offices at same time, 105 A.L.R. 1237.

ARTICLE 2

OBSTRUCTION OF PUBLIC ADMINISTRATION AND RELATED OFFENSES

16-10-20. False statements and writings, concealment of facts, and fraudulent documents in matters within jurisdiction of state or political subdivisions.

A person who knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact; makes a false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry, in any matter within the jurisdiction of any department or agency of state government or of the government of any county, city, or other political subdivision of this state shall, upon conviction thereof, be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both. (Code 1933, § 26-2408, enacted by Ga. L. 1976, p. 483, § 1; Ga. L. 1979, p. 1068, § 1; Ga. L. 1982, p. 3, § 16.)

Cross references. — Violations of this section via assertions of false claims under the Georgia Cotton Producers Indemnity Fund, § 2-19-7. Violation of this section for falsification of contractor affidavit, § 13-10-91. Annual salaries of certain state officials; cost-of-living adjustments, § 45-7-4.

Law reviews. — For article surveying legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979). For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

JUDICIAL DECISIONS

Former Code 1933, §§ 26-2402 and 26-2408 (see now O.C.G.A. §§ 16-10-11 and 16-10-20) distinguished. — See Carl E. Jones Dev., Inc. v. Wilson, 149 Ga. App. 679, 255 S.E.2d 135 (1979).

Constitutionality. — O.C.G.A.

§ 16-10-20 was not unconstitutionally vague under Ga. Const. 1983, Art. I, Sec. I, Para. I, as: (1) the statute gave a defendant ample notice of the prohibited conduct; (2) the statute also provided sufficient objective standards to those who were charged with enforcing the statute; and (3) a defendant's act was made criminal when a false statement was made, without regard to the result of that act, and the fact that application of the statute's standards sometimes required an assessment of the surrounding circumstances to determine if the statute was violated did not render the statute unconstitutional. Banta v. State, 281 Ga. 615, 642 S.E.2d 51 (2007).

False statement statute, O.C.G.A. § 16-10-20, when properly construed to require that the defendant make the false statement with knowledge and intent that the statement may come within the jurisdiction of a state or local government agency, is constitutional because correctly interpreted, the statute raises no substantial constitutional concern on the statute's face; the statute requires a defendant to know and intend, that is, to contemplate or expect, that his or her false statement will come to the attention of a state or local department or agency with the authority to act on the statement, and as properly construed, O.C.G.A. § 16-10-20 may only be applied to conduct that persons of common intelligence would know was wrongful because the statement could result in harm to the government. Haley v. State, 289 Ga. 515, 712 S.E.2d 838 (2011), cert. denied, U.S. , 133 S. Ct. 60, 183 L. Ed. 2d 711 (2012).

Construction with O.C.G.A. § 16-10-24. — Appeals court rejected the defendant's claim that under the rule of lenity, the defendant's act of violating O.C.G.A. § 16-10-20 could only be considered a misdemeanor, because the acts alleged met the definition of misdemeanor obstruction of a police officer, as both O.C.G.A. §§ 16-10-20 and 16-10-24 did not define the same offense, did not address the same criminal conduct, and there was no ambiguity created by different punishments being set forth for the same crime; hence, the rule of lenity did not apply. Banta v. State, 281 Ga. 615, 642 S.E.2d 51 (2007).

Construction with O.C.G.A. § 16-10-25 — When, after viewing the transaction between defendant and the police officer as a whole, it was apparent that the same evidence could be used to prove both the offense of giving a false name and the offense of making a false statement, the appeals court reversed defendant's felony conviction and remanded the case for sentencing under the misdemeanor statute. Dawkins v. State, 278 Ga. App. 343, 629 S.E.2d 45 (2006).

Section does not create civil cause of action. — O.C.G.A. § 16-10-20 was enacted for the protection of the state itself, not private parties, and it does not create a civil cause of action. Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir.), cert. denied, 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 130 (1991).

Violation of O.C.G.A. § 16-10-20 constitutes "racketeering activity" for purposes of a Racketeer Influenced and Corrupt Organizations (RICO), O.C.G.A. § 16-14-1 et seq., claim. Maddox v. Southern Eng'g Co., 216 Ga. App. 6, 453 S.E.2d 70 (1994).

Trial court erred in failing to grant defendant's demurrer to ten predicate acts of racketeering activity involving the filing of false deeds because the deed transactions were part of 14 theft by taking transactions and therefore could not form the basis of separate predicate acts. Adams v. State, 231 Ga. App. 279, 499 S.E.2d 105 (1998).

When the evidence did not show that the defendant's misrepresentations in violation of O.C.G.A. § 16-10-20 were the proximate cause of the defendant's injuries, the plaintiff lacked standing to assert claims under the Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq. Maddox v. Southern Eng'g Co., 231 Ga. App. 802, 500 S.E.2d 591 (1998).

In a product liability action against an auto manufacturer claiming Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., violations, plaintiffs failed to establish a violation of O.C.G.A. § 16-10-20 as a predicate offense because they did not present evidence that defendant made representations to any department or agency of state

or local government. Gentry v. Volkswagen of Am., Inc., 238 Ga. App. 785, 521 S.E.2d 13 (1999).

Venue of the crime of making a false statement was in the county where defendant signed a form falsely attesting to the use being made of government property, not the location of the office to which the form was sent. Spray v. State, 223 Ga. App. 154, 476 S.E.2d 878 (1996).

Venue of a prosecution for the use of a false document is proper in the county in which it was submitted for use, even if the person charged made the document in another county. State v. Johnson, 269 Ga. 370, 499 S.E.2d 56 (1998).

Trial court committed reversible error as a result of convicting a defendant for making false statements to a state or local government agency or department in a case wherein the state failed to prove venue in the jurisdiction that the defendant was tried. The state was obligated to prove that the defendant's false statements to Federal Bureau of Investigation officers occurred in Fulton County wherein the defendant was tried, thus, the defendant's conviction required reversal. Tesler v. State, 295 Ga. App. 569, 672 S.E.2d 522 (2009), cert. denied, No. S09C0810, 2009 Ga. LEXIS 334 (Ga. 2009).

Defendant's conviction for making a false statement in violation of O.C.G.A. § 16-10-20 was reversed because the state offered no proof that the jail where the alleged statement was made was in a particular county and since the defendant was also driven, the false statement may have been made in another county. Stockard v. State, 327 Ga. App. 184, 755 S.E.2d 548 (2014).

Venue for false writing and false police report. — Evidence was insufficient to prove venue for charges of making a false writing and making a false police report because, despite the fact that the state introduced evidence to show where the defendant allegedly committed the crimes, the state did not prove that the city was entirely within the forum county. Lembcke v. State, 277 Ga. App. 110, 625 S.E.2d 505 (2005).

Sufficiency of indictment. — Trial court did not err by denying the defendant's general demurrer alleging that the defendant concealed a material fact within the jurisdiction of the police department based on the failure to allege the essential element of materiality because the allegations that the defendant knowingly and willfully concealed a romantic relationship with the man that murdered the defendant's husband from police department representatives while the police department was investigating the murder necessarily raised an inference that the defendant acted intentionally to conceal that fact from the police department representatives with knowledge that the fact was material. Sneiderman v. State, 336 Ga. App. 153, 784 S.E.2d 18 (2016), overruled on other grounds by Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391 (2016).

Lack of proper notice to police officer. — Charge of false writings and statements, in violation of O.C.G.A. § 16-10-20, which arose during the performance of official duties by the defendant, a police officer, should have been dismissed because proper notice pursuant to O.C.G.A. §§ 17-7-52 and 45-11-4 was not given to the defendant; other charges against the defendant were not subject to dismissal as those charges did not arise in the performance of official duties, and the lack of notice did not improperly influence or infect the other convictions. Wiggins v. State, 280 Ga. 268, 626 S.E.2d 118 (2006).

With regard to a defendant's conviction on three counts of false statements and writings, the trial court erred by denying the defendant's motion for a new trial as a result of erring by denying the defendant's plea in abatement and motion to dismiss the indictment as the state violated the notice provisions under O.C.G.A. §§ 17-7-52 and 45-11-4, with respect to peace officers and public officials, by failing to notify the defendant when the proposed indictment would be presented to the grand jury. The defendant, a police officer and police chief of two municipalities, was accused of falsifying time records and, as a police officer, was entitled to the notice set forth under the statutes. Smith v. State, 297 Ga. App. 300, 676 S.E.2d 750 (2009), aff'd, 286 Ga. 409, 688 S.E.2d 348 (2010).

Concealing material fact from police. — Evidence was sufficient to convict

the defendant of concealing a material fact from the police department as the defendant engaged in conduct that could result in harm to the investigation of the murder of the defendant's husband because the defendant had a duty to answer truthfully and disclose relevant information when the defendant voluntarily responded to questions about the man who killed the defendant's husband; and the defendant responded to the officers' questions by giving the officers false and misleading information about the defendant's relationship with the man deliberately designed to deceive the officers and impede the investigation by creating the false impression that the man had no motive to murder the defendant's husband. Sneiderman v. State, 336 Ga. App. 153, 784 S.E.2d 18 (2016), overruled on other grounds by Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391 (2016).

Use of false documents. — Because O.C.G.A. § 16-10-20 does not place a limitation on the prohibited conduct of "making or using" false documents, prosecution for use of a false document is not limited to those situations in which the person charged uses false documents prepared by another. State v. Johnson, 269 Ga. 370, 499 S.E.2d 56 (1998).

When the defendants were charged with making or using "any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry," the trial court did not err in refusing to instruct the jury that a false writing submitted to an agency must be "material" before it can be considered a crime. Bullard v. State, 242 Ga. App. 843, 530 S.E.2d 265 (2000).

Offenses of falsifying official documents and submitting false financial reports and embezzlement of funds representing traffic tickets and other fines from the city was supported by sufficient evidence, including that the losses stopped after the defendant resigned and that the defendant had more deposits to defendant's personal account than from defendant's salary; the jury's guilty verdict was supported over defendant's defenses that included that the city: (1) did not lose the money, but had poor accounting procedures; (2) had four other employees that had access to the safe and that could have taken the money; and (3) blamed the defendant because the city's insurance policy did not cover non-theft-related losses, and that the defendant and defendant's spouse had outside receipts or gifts to explain deposits greater than their salary income deposited to their account. Stack-Thorpe v. State, 270 Ga. App. 796, 608 S.E.2d 289 (2004).

False statement to state trooper. — Defendant, by stating to a state trooper that the defendant's brother-in-law had been driving a truck involved in a fatal accident when, in fact, the defendant had been the driver, made a false statement in a matter within the jurisdiction of a department of state government. Watkins v. State, 191 Ga. App. 87, 381 S.E.2d 45, cert. denied, 191 Ga. App. 923, 381 S.E.2d 45 (1989).

False statement to government agency. — Evidence supported the defendant's convictions of felony murder while in the commission of cruelty to children in the first degree and making a false statement to a government agency after a 23-month-old child whom the defendant had been baby-sitting died from severe aspiration pneumonia due to brain swelling and bleeding on the surface of the brain caused by multiple blows to the child's head and face; the defendant was the only adult with the child during the afternoon and early evening in question, the child had appeared uninjured and was walking when the child visited a store earlier in the day, the child had "pattern injury" contusions indicating that hair had been pulled out, a medical examiner testified that the child's brain swelling would have prevented the child from performing normal functions such as walking, talking, or waking, and the defendant told several conflicting stories about how the child had been injured. Banta v. State, 282 Ga. 392, 651 S.E.2d 21 (2007).

Because the defendant violated O.C.G.A. § 16-10-20 each time defendant intentionally made a false statement or concealed a material fact when applying for public assistance, and violated O.C.G.A. § 49-4-15(a)(2) by knowingly and intentionally accepting more public financial assistance than that to which

the defendant was entitled, the two statutes had different elements of knowledge and intent; accordingly, the offenses did not merge. Ousley v. State, 296 Ga. App. 486, 675 S.E.2d 226 (2009).

O.C.G.A. § 16-10-20 requires proof that the defendant knowingly and willfully made a false statement and that he or she knowingly and willfully did so in a matter within the jurisdiction of a state or local department or agency, but this does not require proof that the defendant made the false statement directly to the government agency, although in such cases it would normally be undisputed that the defendant knew and intended that the statement came within the jurisdiction of the agency; however, the statute does require the defendant to have made the false statement in some intended relationship to a matter within the state or local agency's jurisdiction, that is, to have contemplated that the statement would come to the attention of an agency with the authority to act on the statement. Furthermore, knowingly and willfully making a false statement in a matter within a government agency's jurisdiction is a lie that threatens to deceive and thereby harm the government, if only because the government may need to expend time and resources to determine the truth. Haley v. State, 289 Ga. 515, 712 S.E.2d 838 (2011), cert. denied, U.S. , 133 S. Ct. 60, 183 L. Ed. 2d 711 (2012).

Evidence supported the defendant's conviction for making a false statement or writing in violation of O.C.G.A. § 16-10-20 when the defendant executed a false Cancellation of Certificate of Title for Scrap Vehicles form, representing that there were no security interests in the vehicle, because the form clearly stated that the form was to be sent to the Department of Revenue — Motor Vehicles Division. Edwards v. State, 330 Ga. App. 732, 769 S.E.2d 150 (2015).

False statement to police. — Despite defendant's argument that defendant's acquittals for aggravated assault and firearm possession and defendant's conviction for giving a false statement were mutually exclusive, they involved completely different issues of, on the one hand, whether defendant shot the victim while defendant and the victim's mother struggled over the gun and, on the other hand, whether defendant told the officer that the victim's mother shot the victim before shooting defendant; thus, the evidence was sufficient to support the conviction for making a false statement to the police. Williams v. State, 261 Ga. App. 410, 582 S.E.2d 556 (2003).

Evidence that defendant fatally shot the victim during a scuffle in a robbery attempt and told the police that the defendant was shot by a robber was sufficient to support the defendant's conviction for felony murder, aggravated assault, making a false statement to law enforcement officers, and giving a false name to law enforcement officers. Sampson v. State, 279 Ga. 8, 608 S.E.2d 621 (2005).

Evidence was sufficient to support defendant's convictions for felony murder, aggravated assault, and giving a false statement when defendant and the codefendant were arrested when the codefendant sought medical treatment for a gunshot wound sustained in the incident, the codefendant gave police a false name and said that the codefendant was shot when someone tried to rob the codefendant, the codefendant told a neighbor who saw the wound that someone else was worse off than the codefendant was, defendant asked the neighbor's niece to tell police the codefendant was at the niece's house on the night of the crime and was robbed when leaving, and, while in jail, defendant told one inmate defendant shot someone in the incident and told another inmate that defendant was involved in a robbery of this victim that went bad, and that defendant and the codefendant had been looking for a safe with money and marijuana. Styles v. State, 279 Ga. 134, 610 S.E.2d 23 (2005).

Sufficient evidence supported the defendant's convictions of false statements under O.C.G.A. § 16-10-20 and conspiracy to commit theft by shoplifting under O.C.G.A. § 16-4-8, as the co-conspirator testified as to the defendant's request for specific items to be stolen, the special agent testified about the defendant's false statements, and the defendant gave a statement admitting to the conduct; the testimony of the co-conspirator and of the

special agent established the elements of the offenses, and the jury, under former O.C.G.A. § 24-9-80 (see now O.C.G.A. § 24-6-620), had the right to disbelieve the defendant's testimony to the contrary. Acey v. State, 281 Ga. App. 197, 635 S.E.2d 814 (2006).

In a case in which defendant appealed the three-year sentence imposed following the revocation of defendant's supervised release, defendant argued unsuccessfully that the district court impermissibly based the sentence on speculation and unproven conduct. The district court did not sentence defendant for any unproved role in an apartment-complex shooting, the court considered the circumstances surrounding defendant's lies to the police during a murder investigation; in light of defendant's statements to the defendant's parole officer and the evidence linking defendant to the scene of the crime, the district court did not err by concluding that defendant's misconduct was more serious than a simple false statement. United States v. Rieara, No. 09-14368, 2010 U.S. App. LEXIS 11381 (11th Cir. June 4, 2010) (Unpublished).

Trial judge's explanation to a defendant's counsel that based on counsel's questioning of an investigator regarding the defendant's statement to the investigator that the defendant lived in Florida, the judge was going to expand the indictment to include falsifying or concealing a material fact, which was one possible violation of O.C.G.A. § 16-10-20, when the defendant had only been charged with making a false statement, did not constitute an improper remark under O.C.G.A. § 17-8-57 because it was a colloquy with counsel regarding possible jury charges and did not express an opinion on what had or had not been proved. Adams v. State, 312 Ga. App. 570, 718 S.E.2d 899 (2011), cert. denied, No. S12C0500, 2012 Ga. LEXIS 263 (Ga. 2012).

Evidence was sufficient to convict the defendant of making a false statement to the police department that the defendant was with the man that murdered the defendant's husband in Denver, Colorado because, while the defendant was attending an out-of-town business conference in Longmont, a Denver suburb, the man flew from Atlanta to Denver; the defendant picked up the man at the Denver airport; they drove together to the defendant's hotel in Longmont; the defendant changed a hotel reservation from one guest to two and requested a king size bed; and, after the conference, the defendant and man flew together from Denver to Atlanta. Sneiderman v. State, 336 Ga. App. 153, 784 S.E.2d 18 (2016), overruled on other grounds by Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391 (2016).

Evidence was sufficient to convict the defendant of knowingly and wilfully making a false statement to police officers in a matter within the jurisdiction of the police department because the defendant's statement that the defendant never suspected that the man who killed the defendant's husband was involved in the murder prior to December 28, 2010, was within the jurisdiction of the police department. Sneiderman v. State, 336 Ga. App. 153, 784 S.E.2d 18 (2016), overruled on other grounds by Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391 (2016).

Evidence that the defendant drove the subject car and let friends borrow the car, the car contained multiple items that identified the defendant, the defendant's sister testified that the sister sold the car to the defendant, who had made a couple of payments for it, and the registration for the car was found in the defendant's bedroom support the defendant's conviction for making a false statement when the defendant told officers the defendant did not have a car. Esquibel v. State, 339 Ga. App. 58, 791 S.E.2d 582 (2016).

Evidence was sufficient for the jury, which viewed video surveillance footage and read and heard the testimony regarding the defendants' statements to police, to have found the defendants guilty of making a false statement. Marlow v. State, 339 Ga. App. 790, 792 S.E.2d 712 (2016).

Evidence was sufficient to convict both of the defendants of two felony counts of making a false statement because the defendants' written and signed statements to police and their subsequent oral statements to police at the scene were inconsistent with the video surveillance; and the fact that the witnesses conceded

on cross-examination that the defendants' statements could have been the product of an innocent lapse in memory was unavailing. Marlow v. State, 339 Ga. App. 790, 792 S.E.2d 712 (2016).

Defendant's statement to police, as contrasted with the video surveillance footage of the incident, was sufficient to support the defendant's conviction for making a false statement. Knowles v. State, 342 Ga. App. 344, 801 S.E.2d 582 (2017).

False statements in application for warrant. — Evidence that the defendant filed an application for an arrest warrant against an officer who had attempted to pass the defendant some forms the defendant requested and that the defendant's failure to accept the forms caused the forms to fall and possibly brush the defendant's face was sufficient to show the defendant knowingly made a false statement or writing and supported a conviction for such. Simpson v. State, 327 Ga. App. 516, 759 S.E.2d 590 (2014).

False statement by city council member. — Evidence was sufficient to convict a city council member of submitting false statements to the city to collect lost profits from the member's business while on an out-of-town trip for the city. Parris v. State, 216 Ga. App. 848, 456 S.E.2d 59 (1995).

False statements made in court clerk's office. — O.C.G.A. § 16-10-20 is not limited to false writing made only within the executive branch of the state, and, thus, it does not except from its terms false statements made in a court clerk's office. Grant v. State, 227 Ga. App. 88, 488 S.E.2d 79 (1997).

Settlement by agreement. — Trial court did not err in granting state senator's plea in bar to charges of making a false writing where there was no criminal charge pending, only the knowledge that public monies allocated for one purpose had been expended for another where the Department of Community Affairs was represented by the Attorney General in the matter. State v. Dean, 212 Ga. App. 724, 442 S.E.2d 830 (1994).

Award of restitution was proper. — Trial court properly ordered that restitution was to be made directly to the homeowners, even if the homeowners technically were not the direct victims of the crime which the defendant, a contractor, committed of false statement and writing, concealment of facts, under O.C.G.A. § 16-10-20, in applying for a building permit because the homeowners suffered damages due to the lack of oversight of the defendant's work. The evidence at trial directly linked this lack of oversight to the defendant's misrepresentations on the building permit application, and demonstrated that if the defendant had submitted an application that accurately reflected the extent of the work to be performed for the homeowners, more safeguards would have been in place, which would have prevented the extent of the damage. Wilson v. State, 317 Ga. App. 171, 730 S.E.2d 500 (2012).

Alleging defendants "caused" false deeds to be made. — Although O.C.G.A. § 16-10-20 focuses on the first-person as the actor, an indictment stating that defendants "caused" false deeds to be made alleged an offense within the section. Grant v. State, 227 Ga. App. 88, 488 S.E.2d 79 (1997).

Providing documents to others for submission to agency. — Dismissal of an indictment for the use of false certificates was not required on the basis that defendant did not submit the certificates personally but only provided them to others who submitted them to a state department. State v. Johnson, 269 Ga. 370, 499 S.E.2d 56 (1998).

Forgery and false writing not included in each other. — When the defendant was convicted of first-degree forgery under O.C.G.A. § 16-9-1 and false writing under O.C.G.A. § 16-10-20 for obtaining expungement order by presenting a Georgia Crimes Information Center certificate that had been altered to state that the defendant had no criminal record, the counts were not included in each other under O.C.G.A. §§ 16-1-6 and 16-1-7; the false writing charge did not require proof that the writing purported to be made by authority of one who in fact gave no such authority, and the forgery charge did not require proof that the writing was made or used in a matter within the jurisdiction of district attorney's office. Jones v. State, 290 Ga. App. 490, 659 S.E.2d 875 (2008).

Requirements for state to prove. — There is nothing in the language of O.C.G.A. § 16-10-20 that requires the state to prove that a defendant made the defendant's false statement directly to a department or agency of either a particular city or a county. Rather, the state need only show that the statement was made in a matter within the jurisdiction of one or more of those governments, which interpretation is based upon the federal courts' interpretation of 18 U.S.C. § 1001. Tesler v. State, 295 Ga. App. 569, 672 S.E.2d 522 (2009), cert. denied, No. S09C0810, 2009 Ga. LEXIS 334 (Ga. 2009).

State proved that the false statement alleged in the indictment was made in a matter within the jurisdiction of the Georgia Bureau of Investigation (GBI) because the GBI was actively investigating a missing person case; because two videos contained clues referencing a Georgia missing person and the location of a missing person's body parts in Augusta, and it was then determined that the computer from which the videos were being posted was in Georgia, the jury could reasonably infer that the other missing person cases referenced in the first video would have a Georgia connection, giving the GBI jurisdiction to investigate the cases. Haley v. State, 289 Ga. 515, 712 S.E.2d 838 (2011), cert. denied, U.S. , 133 S. Ct. 60, 183 L. Ed. 2d 711 (2012).

Valid, though erroneous, order of court presented to deputy sheriff cannot constitute criminal conduct. Marcus v. State, 249 Ga. 345, 290 S.E.2d 470 (1982).

Jury instructions. — Court's charge on criminal intent was sufficient to inform the jury that in order to convict it had to find that defendants intended to make the false statements. Implicit in such intent is knowledge of the falsity. Therefore, it was not reasonable to conclude that the jury could have understood that conviction was authorized even if defendants unwittingly made false or fraudulent statements. Tidwell v. State, 216 Ga. App. 8, 453 S.E.2d 64 (1994).

It was not error to refuse to charge the jury that materiality was an essential element of each prong of a false statement and writings offense as O.C.G.A. § 16-10-20 makes materiality only an element of the first prong of the offense, and the trial court's instruction mirrored the language of § 16-10-20, which contains no express materiality requirement as to the final two prongs. Dorsey v. State, 279 Ga. 534, 615 S.E.2d 512 (2005).

Charge barred by limitations period. — Since defendant's crimes of practicing dentistry without a license in violation of an earlier version of O.C.G.A. § 43-11-50 was subject to the two-year limitations period of O.C.G.A. § 17-3-1(d), and defendant's crime of false statements and writings in violation of O.C.G.A. § 16-10-20 was subject to the four-year limitations period of O.C.G.A. § 17-3-1(c), the court found that the claims were barred by the limitations period when the offenses were not charged in a timely manner, based on the evidence presented of when the crimes occurred; although the period of limitations did not include any period where defendant was unknown or the crime was unknown pursuant to O.C.G.A. § 17-3-2(2), it was shown that various individuals and state courts and other agencies were aware that defendant held oneself out as a dentist, which knowledge was imputed to the state and accordingly, the limitations time ran during that period. McMillan v. State, 266 Ga. App. 729, 598 S.E.2d 17 (2004), overruled in part by Gidwell v. State, 279 Ga. App. 114, 630 S.E.2d 621 (2006).

Application of the rule of lenity. — Defendant's conduct, as charged, subjected the defendant to prosecution and sentencing under both O.C.G.A. §§ 16-10-20 and 16-10-26 as the defendant willfully and knowingly made a false statement to law-enforcement officers by falsely reporting a crime the defendant alleged to have occurred in the officers' jurisdiction. Because the two statutes provided different grades of punishment for the same criminal conduct, the defendant was entitled to the rule of lenity. Gordon v. State, 334 Ga. App. 633, 780 S.E.2d 376 (2015).

Because the felony offenses of making a false statement and the misdemeanor offenses of making a false report of a crime provided different grades of punishment for the same criminal conduct, the defendants were entitled to the rule of lenity,

the defendants' sentences for the felony offenses of making a false statement were vacated, and the defendants' cases were remanded for resentencing for the misdemeanor offenses of making a false report of a crime. Marlow v. State, 339 Ga. App. 790, 792 S.E.2d 712 (2016).

Rule of lenity applied. — Under O.C.G.A. § 16-9-1(b), the defendant was guilty of intending to defraud the sheriff's department by knowingly making four writings in a fictitious name and under O.C.G.A. § 16-10-20, the defendant was guilty of knowingly and willfully making a false statement of the defendant's name, in four writings, with the intent to deceive the sheriff's department; therefore, because the two statutes provided for different penalties for the same conduct, the rule of lenity applied and resentencing was required. Martinez v. State, 337 Ga. App. 374, 787 S.E.2d 308 (2016).

Defendants' felony convictions for making false statements had to be vacated and the defendants resentenced for misdemeanor making a false report of a crime because the defendants conduct, as charged, subjected the defendants to prosecution and sentencing under both O.C.G.A. §§ 16-10-20 and 16-10-26, which provided different grades of punishment, entitling the defendants to the rule of lenity. Marlow v. State, 339 Ga. App. 790, 792 S.E.2d 712 (2016).

Defendant's reference to pick-up truck defendant did not own as "mine" was not false statement. — State failed to prove beyond a reasonable doubt that a defendant made a false statement — i.e., the state failed to prove that the defendant ever affirmatively stated during trial testimony that the defendant owned a pick-up truck the defendant was driving. Because the use of the words "mine" and "my" regarding the truck could be words of possession as well as ownership, the defendant's conviction for false statement under O.C.G.A. § 16-10-20 was reversed. Thornton v. State, 301 Ga. App. 784, 689 S.E.2d 361 (2009).

Award of restitution proper upon defendant's conviction for false statement. — Trial court's award of restitution to the homeowners was supported by a preponderance of the evidence because the homeowners essentially suffered the entire loss of use of their home, and the trial court determined that these damages flowed from the defendant's false statement which allowed the defendant, a contractor, to skip the requirements for structural engineering and architectural reports on the contractor's renovation of the owners' residence and to avoid county inspections, which would have avoided or detected problems as the problems arose. Wilson v. State, 317 Ga. App. 171, 730 S.E.2d 500 (2012).

Cited in Peugh v. State, 175 Ga. App. 90, 332 S.E.2d 384 (1985); Byrd v. State, 216 Ga. App. 316, 454 S.E.2d 594 (1995); Schoenbaum Ltd. Co., LLC v. Lenox Pines, LLC, 262 Ga. App. 457, 585 S.E.2d 643 (2003); Roberts v. State, 280 Ga. App. 672, 634 S.E.2d 790 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 32 Am. Jur. 2d, False Pretenses, §§ 77, 78.

C.J.S. — 35 C.J.S., False Pretenses, § 38.

ALR. — Fraud or perjury as to physical condition resulting from injury as ground for relief from or injunction against a judgment for personal injuries, 16 A.L.R. 397.

Perjury as predicated upon statements upon application for marriage license, 101 A.L.R. 1263.

Imputation of perjury or false swearing as actionable per se, 38 A.L.R.2d 161.

Sufficiency of proof, through one witness, to support conviction under 18 U.S.C. § 1001, relating to falsifying or concealing fact, or making false or fraudulent statements, etc., in matter within jurisdiction of any United States department or agency, 93 A.L.R.2d 730.

Civil liability of witness falsely attesting signature to document, 96 A.L.R.2d 1346.

Offense of perjury as affected by lack of jurisdiction by court or governmental body before which false testimony was given, 36 A.L.R.3d 1038.

Incomplete, misleading, or unresponsive but literally true statement as perjury, 69 A.L.R.3d 993.

Defenses to state obstruction of justice charge relating to interfering with criminal investigation or judicial proceeding, 87 A.L.R.5th 597.

16-10-20.1. Filing false documents.

(a) As used in this Code section, the term "document" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form and shall include, but shall not be limited to, liens, encumbrances, documents of title, instruments relating to a security interest in or title to real or personal property, or other records, statements, or representations of fact, law, right, or opinion.

(b) Notwithstanding Code Sections 16-10-20 and 16-10-71, it shall be unlawful for any person to:

(1) Knowingly file, enter, or record any document in a public record or court of this state or of the United States knowing or having reason to know that such document is false or contains a materially false, fictitious, or fraudulent statement or representation; or

(2) Knowingly alter, conceal, cover up, or create a document and file, enter, or record it in a public record or court of this state or of the United States knowing or having reason to know that such document has been altered or contains a materially false, fictitious, or fraudulent statement or representation.

(c) Any person who violates subsection (b) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one nor more than ten years, a fine not to exceed $10,000.00, or both.

(d) This Code section shall not apply to a court clerk, registrar of deeds, or any other government employee who is acting in the course of his or her official duties. (Code 1981, § 16-10-20.1, enacted by Ga. L. 2012, p. 90, § 1/HB 997; Ga. L. 2014, p. 741, § 1/HB 985.)

Cross references. — Public officers and employees, T. 45.

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraud and Deceit, § 137 et seq.

16-10-21. Conspiracy to defraud state or political subdivision.

(a) A person commits the offense of conspiracy to defraud the state when he conspires or agrees with another to commit theft of any

property which belongs to the state or to any agency thereof or which is under the control or possession of a state officer or employee in his official capacity. The crime shall be complete when the conspiracy or agreement is effected and an overt act in furtherance thereof has been committed, regardless of whether the theft is consummated. A person convicted of the offense of conspiracy to defraud the state shall be punished by imprisonment for not less than one nor more than five years.

(b) A person commits the offense of conspiracy to defraud a political subdivision when he conspires or agrees with another to commit theft of any property which belongs to a political subdivision or to any agency thereof or which is under the control or possession of an officer or employee of a political subdivision in his official capacity. The crime shall be complete when the conspiracy or agreement is effected and an overt act in furtherance thereof has been committed, regardless of whether the theft is consummated. A person convicted of the offense of conspiracy to defraud a political subdivision shall be punished by imprisonment for not less than one nor more than five years. (Ga. L. 1872, p. 25, § 1; Code 1882, § 4493; Penal Code 1895, § 287; Penal Code 1910, § 291; Code 1933, § 26-4201; Code 1933, § 26-2307, enacted by Ga. L. 1968, p. 1249, § 1.)

JUDICIAL DECISIONS

Section is distinct from general conspiracy statute. — Conspiracy to defraud the state is distinct from the general conspiracy statute, O.C.G.A. § 16-4-8. Gordon v. State, 181 Ga. App. 391, 352 S.E.2d 582 (1986), aff'd in part, rev'd in part on other grounds, 257 Ga. 335, 359 S.E.2d 634 (1987).

Conspiracy defined. — Conspiracy has been defined as a combination either to accomplish an unlawful end, or to accomplish a lawful end by unlawful means. Rollins v. State, 215 Ga. 437, 111 S.E.2d 63 (1959).

Gist of conspiracy is corrupt agreement between two or more persons to commit act prohibited by law. Rollins v. State, 215 Ga. 437, 111 S.E.2d 63 (1959).

Overt act within limitation period. — Fact that the first overt act in furtherance of a conspiracy was committed outside the limitation period did not bar prosecution since it is necessary only that "an overt act" occur within the limitation period. Young v. State, 205 Ga. App. 357, 422 S.E.2d 244 (1992).

To conspire to defraud state of money violated former Code 1933, § 26-4201 (see now O.C.G.A. § 16-10-11 and 16-10-21), as money comes within definition of "property". Cadle v. State, 101 Ga. App. 175, 113 S.E.2d 180 (1960).

Employee's services can be subject of criminal conspiracy to defraud state of property which belongs to it or is under the control or possession of a state officer or employee. Brown v. State, 177 Ga. App. 284, 339 S.E.2d 332 (1985).

Necessary allegations in indictment for violation of section. — Indictment charging conspiracy to cheat or defraud state of property must contain definite allegations as to who were parties to such conspiracy, how and in what manner they designed to cheat or defraud the state, and exactly what property they conspired to unlawfully defraud from the state. Wright v. State, 216 Ga. 228, 115 S.E.2d 331 (1960); Young v. State, 205 Ga. App. 357, 422 S.E.2d 244 (1992).

State failed to prove a tolling of the statute of limitation. — State argued

that O.C.G.A. § 17-3-1(c), the four-year statute of limitation for conspiracy to defraud the state, O.C.G.A. § 16-10-21, was tolled under O.C.G.A. § 17-3-2(2) until the state learned of the conspiracy. The defendants' pleas in bar were properly granted as the evidence was sufficient to establish that a defendant's supervisor, a state employee, was aware of the crimes over four years before the defendants were indicted, and the supervisor's knowledge was imputed to the state. State v. Robins, 296 Ga. App. 437, 674 S.E.2d 615 (2009).

Evidence sufficient to sustain conviction. — See McWilliams v. State, 177 Ga. App. 447, 339 S.E.2d 721 (1985).

Cited in Great Am. Ins. Co. v. Davis (In re Davis), No. A04-74475-REB, 2007 Bankr. LEXIS 3684 (Bankr. N.D. Ga. Sept. 20, 2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 16 Am. Jur. 2d, Conspiracy, § 1 et seq. 50 Am. Jur. 2d, Larceny, §§ 27, 31, 51 et seq., 96. 63C Am. Jur. 2d, Public Officers and Officials, § 369 et seq.

C.J.S. — 15A C.J.S., Conspiracy, § 94 et seq.

ALR. — When does statute of limitations begin to run against civil action or criminal prosecution for conspiracy, 62 A.L.R.2d 1369.

Criminal prosecution or disciplinary action against medical practitioner for fraud in connection with claims under medicaid, medicare, or similar welfare program for providing medical service, 50 A.L.R.3d 549.

Filing of false insurance claims for medical services as ground for disciplinary action against dentist, physician, or other medical practitioner, 70 A.L.R.4th 132.

State criminal prosecution against medical practitioner for fraud in connection with claims under Medicaid, Medicare, or similar welfare program for providing medical services, 79 A.L.R.6th 125.

16-10-22. Conspiracy in restraint of free and open competition in transactions with state or political subdivisions; forfeiture of right to bid on or enter into contracts.

(a) A person who enters into a contract, combination, or conspiracy in restraint of trade or in restraint of free and open competition in any transaction with the state or any agency thereof, whether the transaction is for goods, materials, or services, shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years. The crime of conspiracy in restraint of free and open competition in transactions with the state shall be complete when the contract, combination, or conspiracy is effected and an overt act in furtherance thereof has been committed.

(b) A person who enters into a contract, combination, or conspiracy in restraint of trade or in restraint of free and open competition in any transaction with a political subdivision or any agency thereof, whether the transaction is for goods, materials, or services, shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years. The crime of conspiracy in restraint of free and open competition in transactions with political subdivisions shall be complete when the contract, combination, or conspiracy is effected and an overt act in furtherance thereof has been committed.

(c) A person who is convicted of or who pleads guilty to a violation of subsection (a) or (b) of this Code section as a result of any contract, combination, or conspiracy in restraint of trade or in restraint of free and open competition in any transaction which was entered into or carried out, in whole or in part, on or after July 1, 1985, shall be ineligible to submit a bid on, enter into, or participate in any contract with any department, agency, branch, board, or authority of the state or any county, municipality, board of education, or other political subdivision thereof for a period of five years following the date of the conviction or entry of the plea. (Ga. L. 1959, p. 34, § 6; Ga. L. 1964, p. 261, § 6; Code 1933, § 26-2308, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1985, p. 1184, § 1.)

Cross references. — Prohibition against contracts and agreements to defeat or lessen competition or encourage monopoly, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Purchase by state of supplies, materials, and other items generally, § 50-5-50 et seq.

Law reviews. — For article, "Antitrust," see 44 Mercer L. Rev. 1047 (1993).

JUDICIAL DECISIONS

Phrase "restraint of trade" means restraint of competition. State v. Shepherd Constr. Co., 248 Ga. 1, 281 S.E.2d 151, cert. denied, 454 U.S. 1055, 102 S. Ct. 601, 70 L. Ed. 2d 591, appeal dismissed, 454 U.S. 1074, 102 S. Ct. 626, 70 L. Ed. 2d 609 (1981).

O.C.G.A. § 16-10-22 prohibits unreasonable restraints of competition. — Prohibition against "a conspiracy in restraint of trade or in restraint of free and open competition" means simply a prohibition against a conspiracy in unreasonable restraint of competition. State v. Shepherd Constr. Co., 248 Ga. 1, 281 S.E.2d 151, cert. denied, 454 U.S. 1055, 102 S. Ct. 601, 70 L. Ed. 2d 591, appeal dismissed, 454 U.S. 1074, 102 S. Ct. 626, 70 L. Ed. 2d 609 (1981).

O.C.G.A. § 16-10-22 bans only that speech by which individuals conspire to create unreasonable restraint against competition that is, only that speech which constitutes a clear and present danger of a substantive evil which the state may avoid. State v. Shepherd Constr. Co., 248 Ga. 1, 281 S.E.2d 151, cert. denied, 454 U.S. 1055, 102 S. Ct. 601, 70 L. Ed. 2d 591, appeal dismissed, 454 U.S. 1074, 102 S. Ct. 626, 70 L. Ed. 2d 609 (1981).

Change in eligibility for medical staff privileges at private hospital. — Decision of private hospital operating for profit to change bylaws so as to allow only doctors eligible for membership in the American Medical Association or American Dental Association (AMA or ADA) to obtain medical staff privileges, thus denying defendants continued staff privileges because they were doctors of podiatric medicine ineligible for membership in the AMA or ADA, was neither state nor federal action subject to scrutiny under the due process or equal protection clauses of the federal Constitution; nor did it constitute a restraint of trade in violation of O.C.G.A. § 16-10-22 merely because the hospital derived 55 percent of its income from federal medicaid and medicare funds, was licensed by the state, and was regulated as a certified provider under the medicare and medicaid programs. Todd v. Physicians & Surgeons Community Hosp., 165 Ga. App. 656, 302 S.E.2d 378 (1983).

Surrender of license by attorney convicted under section. — Attorney's conviction upon guilty plea under O.C.G.A. § 16-10-22(a) warranted acceptance of petition for voluntary surrender of license to practice. In re Matthews, 249 Ga. 586, 293 S.E.2d 716 (1982).

O.C.G.A. § 16-10-22 did not apply in

civil action involving private dispute between a nurse-midwife and two groups of physicians, where the plaintiff's allegations did not involve any transactions with the state. Sweeney v. Athens Regional Medical Ctr., 709 F. Supp. 1563 (M.D. Ga. 1989).

State failed to prove a tolling of the statute of limitation. — State argued that O.C.G.A. § 17-3-1(c), the four-year statute of limitation for conspiracy in restraint of free and open competition and O.C.G.A. § 16-10-22, was tolled under O.C.G.A. § 17-3-2(2) until the state learned of the conspiracy. The defendants' pleas in bar were properly granted as the evidence was sufficient to establish that a defendant's supervisor, a state employee, was aware of the crimes over four years before the defendants were indicted, and the supervisor's knowledge was imputed to the state. State v. Robins, 296 Ga. App. 437, 674 S.E.2d 615 (2009).

Cited in Ken Stanton Music, Inc. v. Board of Educ., 227 Ga. 393, 181 S.E.2d 67 (1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 54 Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 46 et seq. 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 773 et seq., 789.

C.J.S. — 15A C.J.S., Conspiracy, § 291 et seq.

ALR. — Conspiracy or combination to prevent actual competition in bids for public work as affecting contract for the work or recovery therefor, 62 A.L.R. 224.

Removal or attempted removal of one from field of competition by inducing him to enter another's employment as violation of anti-monopoly act, 74 A.L.R. 289.

Operation of negative or restrictive covenant in contract of employment for a specific period, as extended by continuance in the employment after the expiration of that period, 163 A.L.R. 405.

When does statute of limitations begin to run against civil action or criminal prosecution for conspiracy, 62 A.L.R.2d 1369.

Validity, construction, and effect of real-estate brokers' multiple-listing agreement, 45 A.L.R.3d 190.

Criminal liability of corporation for bribery or conspiracy to bribe public official, 52 A.L.R.3d 1274.

Application of state antitrust laws to activities or practices of real-estate agents or associations, 22 A.L.R.4th 103.

16-10-23. Impersonating a public officer or employee.

A person who falsely holds himself out as a peace officer or other public officer or employee with intent to mislead another into believing that he is actually such officer commits the offense of impersonating an officer and, upon conviction thereof, shall be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both. (Code 1933, § 26-2405, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1986, p. 1059, § 1.)

Cross references. — Criminal penalty for false representation as representative of peace officer organization for purposes of soliciting donations, selling advertising, and other activities, § 16-9-57. Impersonation of law enforcement officer by use of motor vehicle or motorcycle designed, equipped, or marked so as to resemble motor vehicle or motorcycle belonging to law enforcement agency, § 40-6-395.

JUDICIAL DECISIONS

Applicability to public employees. — Habeas court erred in finding that O.C.G.A. § 16-10-23 was vague and ambiguous as applied to a person charged with impersonating an employee of the Department of Family and Children Services; the statute clearly gave notice that the statute applied to public employees as well as public officers, and the statute's purpose was served by including employees. Kennedy v. Carlton, 294 Ga. 576, 757 S.E.2d 46 (2014).

O.C.G.A. § 16-10-23 does not require victim be misled. — Defendant's contention that, because the victims never believed that defendant was a police officer, the evidence was insufficient to support a conviction of impersonating a police officer was without merit because the crime does not require that the victims actually be misled. Self v. State, 245 Ga. App. 270, 537 S.E.2d 723 (2000).

Because defendant kicked in the door of a home while shouting that the defendant was a "federal agent," fired a shotgun through a door, shooting off a victim's thumb, inserted the barrel of the shotgun in the same man's mouth, and demanded money, which the victims turned over, two codefendants identified defendant as the user of the shotgun, and defendant's DNA was found on a ski mask recovered from the getaway car and defendant's fingerprints were found on the car, evidence supported convictions for armed robbery, possession of a weapon during the commission of a crime, aggravated assault, burglary, aggravated battery, and impersonating an officer. Garrison v. State, 276 Ga. App. 243, 622 S.E.2d 910 (2005).

Conduct of accomplice. — Evidence that the defendant's accomplice represented to the victims that they were police officers was sufficient to establish the defendant's guilt of the crime of impersonating a police officer. Murray v. State, 269 Ga. 871, 505 S.E.2d 746 (1998).

Evidence sufficient for conviction. — See Williams v. State, 178 Ga. App. 80, 342 S.E.2d 18 (1986); Walker v. State, 225 Ga. App. 19, 482 S.E.2d 515 (1997); Sweeney v. State, 233 Ga. App. 862, 506 S.E.2d 150 (1998); Thompson v. State, 240 Ga. App. 26, 521 S.E.2d 876 (1999); Stewart v. State, 240 Ga. App. 375, 523 S.E.2d 592 (1999).

When the defendant failed to provide an investigating officer with the required documentation to prove that the defendant was a sheriff's deputy, and a telephone call to the sheriff's department confirmed that the defendant was no longer employed, when coupled with a sheriff commander's testimony that the defendant's employment had long been terminated, such evidence was sufficient to sustain the defendant's conviction for impersonating a peace officer. Cain v. State, 259 Ga. App. 634, 577 S.E.2d 860 (2003).

Evidence that defendant and another person burst into a home after they had lured the victim brandishing an automatic gun and wearing black t-shirts that said "Sheriff," handcuffed the victim, took the victim's money, and forced the victim to write a bill of sale for the victim's motorcycle was sufficient to support convictions for robbery by intimidation, O.C.G.A. § 16-8-41(a), false imprisonment, O.C.G.A. § 16-5-41(a), aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), and impersonating a peace officer, O.C.G.A. § 16-10-23. Powers v. State, 303 Ga. App. 326, 693 S.E.2d 592 (2010).

Cited in In the Interest of B.M., 289 Ga. App. 214, 656 S.E.2d 855 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 32 Am. Jur. 2d, False Pretenses, § 16.

C.J.S. — 35 C.J.S., False Pretenses, §§ 7, 8.

ALR. — Intent as affecting false personation, as regards criminal offense, 97 A.L.R. 1510.

16-10-24. Obstructing or hindering law enforcement officers; penalty.

(a) Except as otherwise provided in subsection (b) of this Code section, a person who knowingly and willfully obstructs or hinders any law enforcement officer, prison guard, jailer, correctional officer, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, or conservation ranger in the lawful discharge of his or her official duties shall be guilty of a misdemeanor.

(b) Whoever knowingly and willfully resists, obstructs, or opposes any law enforcement officer, prison guard, jailer, correctional officer, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, or conservation ranger in the lawful discharge of his or her official duties by offering or doing violence to the person of such officer or legally authorized person shall be guilty of a felony and shall, upon a first conviction thereof, be punished by imprisonment for not less than one year nor more than five years. Upon a second conviction for a violation of this subsection, such person shall be punished by imprisonment for not less than two years nor more than ten years. Upon a third or subsequent conviction for a violation of this subsection, such person shall be punished by imprisonment for not less than three years nor more than 15 years.

(c) Whoever knowingly and willfully resists, obstructs, or opposes any law enforcement officer, prison guard, jailer, correctional officer, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, or conservation ranger in the lawful discharge of his or her official duties by knowingly and willfully throwing, projecting, or expelling human or animal blood, urine, feces, vomitus, or seminal fluid on or at such individual shall be guilty of a felony and shall, upon conviction thereof, be punished by imprisonment for not less than one year nor more than five years.

(d) A person convicted under this Code section shall be punished, in addition to any term of imprisonment imposed, by a fine as provided by law which shall be at least $300.00. With respect to $300.00 of the fine imposed, after distributing the surcharges and deductions required by Chapter 21 of Title 15, Code Sections 36-15-9 and 42-8-34, and Title 47, it shall be earmarked for the Georgia State Indemnification Fund for purposes of payment of indemnification for death or disability as provided for in Part 1 of Article 5 of Chapter 9 of Title 45. (Laws 1833, Cobb's 1851 Digest, p. 806; Code 1863, § 4370; Ga. L. 1865-66, p. 233, § 2; Code 1868, § 4408; Code 1873, § 4476; Code 1882, § 4476; Penal

Code 1895, § 306; Penal Code 1910, § 311; Code 1933, § 26-4401; Code 1933, § 26-2505, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1986, p. 484, § 1; Ga. L. 2015, p. 422, § 5-22/HB 310; Ga. L. 2017, p. 500, § 3-4/SB 160.)

The 2017 amendment, effective July 1, 2017, substituted the present provisions of subsection (a) for the former provisions, which read: "Except as otherwise provided in subsection (b) of this Code section, a person who knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor."; in subsection (b), in the first sentence, inserted "jailer," near the beginning, substituted "person shall be guilty" for "person is guilty" in the middle, inserted "a first" and inserted "year" near the end, and added the second and third sentences; and added subsections (c) and (d).

Cross references. — Interference with arrest by conservation officer, § 27-1-25. State-wide alert system established, § 35-3-191.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Ga. L. 2017, p. 500, § 1-1/SB 160, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Back the Badge Act of 2017.'"

Law reviews. — For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001). For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004). For article, "Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law," see 57 Mercer L. Rev. 511 (2006). For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015). For annual survey on criminal law, see 69 Mercer L. Rev. 73 (2017). For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 89 (2017).

For comment on Westin v. McDaniel, 760 F. Supp. 1563 (M.D. Ga. 1991), cited below, see 43 Mercer L. Rev. 1345 (1992).

JUDICIAL DECISIONS

Analysis

General Consideration
Lawful Discharge of Official Duties
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Application
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General Consideration

Former Code 1933, § 26-2505 (see now O.C.G.A. § 16-10-24) was made purposefully broad to cover actions which might not be otherwise unlawful, but which obstructed or hindered law enforcement officers in carrying out their duties. Hudson v. State, 135 Ga. App. 739, 218 S.E.2d 905 (1975).

Construction with O.C.G.A. § 16-5-23. — Crimes of felony obstruction of a law enforcement officer and simple battery on a law enforcement officer did not address the same criminal conduct, there was no ambiguity created by different punishments being set forth for the same crime, and the rule of lenity did not apply; although the defendant was convicted of both charged crimes, the trial court properly merged the misdemeanor battery conviction into the felony obstruction conviction. McMullen v. State, 325 Ga. App. 757, 754 S.E.2d 798 (2014).

Construction with O.C.G.A. § 16-10-20. — Appeals court rejected the defendant's claim that under the rule of lenity, the defendant's act of violating O.C.G.A. § 16-10-20 could only be considered a misdemeanor, because the acts alleged met the definition of misdemeanor

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obstruction of a police officer, as both O.C.G.A. § 16-10-20 and § 16-10-24 did not define the same offense, did not address the same criminal conduct, and there was no ambiguity created by different punishments being set forth for the same crime; hence, the rule of lenity did not apply. Banta v. State, 281 Ga. 615, 642 S.E.2d 51 (2007).

Application with O.C.G.A. § 16-10-56. — Defendant's act of swinging the defendant's fist at the deputy satisfied the elements of both riot in a penal institution under O.C.G.A. § 16-10-56(a), and obstruction of a law enforcement officer by offering violence under O.C.G.A. § 16-10-24(b), and because the two defined crimes did not address the same criminal conduct, there was no ambiguity created by different punishments being set forth for the same crime and the rule of lenity did not apply. Chynoweth v. State, 331 Ga. App. 123, 768 S.E.2d 536 (2015), cert. denied, 2015 Ga. LEXIS 396 (Ga. 2015).

No merger with obstructing public passage conviction. — It was not error to refuse to merge the defendant's convictions of obstructing a public passage and obstructing a law enforcement officer under O.C.G.A. §§ 16-10-24 and 16-11-43 after the defendant placed a barricade across a roadway, refused to move the barricade when ordered to do so, and then, after the officer moved the barricade, replaced the barricade after being told by the officer not to do so. The evidence required to prove the obstruction of a law enforcement officer was not "used up" in proving the obstruction of a public passage. Davis v. State, 288 Ga. App. 66, 653 S.E.2d 358 (2007).

Merger of felony and misdemeanor offenses required. — Because misdemeanor obstruction was a lesser included offense of felony obstruction, the defendant's convictions for felony and misdemeanor obstruction should have been merged; therefore, the defendant's sentence was void. Reid v. State, 339 Ga. App. 772, 792 S.E.2d 732 (2016).

Merger required with aggravated assault on peace officer. — Record clearly showed that the crime of obstruction was established by proof of the same or less than all the facts required to establish the crime of aggravated assault on a peace officer; thus, the convictions for aggravated assault on a peace officer and felony obstruction of a peace officer should have merged. Reid v. State, 339 Ga. App. 772, 792 S.E.2d 732 (2016).

Merger not appropriate. — Trial court did not err by failing to merge the convictions for aggravated assault and felony obstruction because each offense required proof of an additional element that the other did not. Gordon v. State, 337 Ga. App. 64, 785 S.E.2d 900 (2016).

Scope of section. — Former Code 1933, § 26-2505 (see now O.C.G.A. § 16-10-24) was meant to cover obstruction of law enforcement officers in general by use of violence, threat of violence, or other unlawful means. Hudson v. State, 135 Ga. App. 739, 218 S.E.2d 905 (1975).

Venue. — Juvenile's adjudications on the charges of loitering and obstruction of an officer arising out of the July 18 incident were reversed for failure to prove venue because, although the officer testified that the officer observed two individuals loitering outside the apartment complex, the officer never testified that the complex was in Spalding County or that the officer's pursuit of the juvenile occurred there; the state presented no other evidence of venue, and nothing in the record indicated that the trial court took judicial notice of the location of the apartment complex; and defense counsel's statements were not intended to be a stipulation of venue or that the juvenile authorized a stipulation as to venue. In the Interest of A. A., 334 Ga. App. 37, 778 S.E.2d 28 (2015).

Impeachment for conviction in civil tort action. — In an intentional tort action against a retailer and one of the retailer's employee's, the employee could be impeached with a conviction under O.C.G.A. § 16-10-24 which occurred after that employee gave a deposition, as the length of punishment that could be imposed thereunder satisfied the requirements of former O.C.G.A. § 24-9-84.1(a)(1) (see now O.C.G.A. § 24-6-609) for impeachment with a con-

viction, and no other evidence was presented which prohibited the conviction. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

No civil duty imposed by criminal statute. — Injured party was not able to recover under O.C.G.A. § 51-1-6 for the declarant's alleged violation of the criminal statutes O.C.G.A. § 16-10-26, prohibiting giving a false report of a crime, and O.C.G.A. § 16-10-24, prohibiting obstructing or hindering the police, as these statutes did not provide for a civil cause of action; furthermore, the legislature provided statutory civil remedies in the form of false arrest under O.C.G.A. § 51-7-1 and malicious prosecution under O.C.G.A. § 51-7-40. Jastram v. Williams, 276 Ga. App. 475, 623 S.E.2d 686 (2005).

Civil rights action. — In a 42 U.S.C. § 1983 case in which a pro se inmate appealed a district court's 28 U.S.C. § 1915A dismissal of the inmate's claims for false arrest and false imprisonment as barred by the Heck decision, the district court's dismissal was premature since the inmate had not been convicted of violating O.C.G.A. § 16-10-24 when the district court conducted the court's frivolity review. Nonetheless, the error was harmless since the inmate failed to demonstrate that the inmate's conviction under § 16-10-24 had been reversed or invalidated; the inmate's claims for false arrest and false imprisonment were now barred by the Heck decision. Taylor v. Freeman, No. 10-13573, 2011 U.S. App. LEXIS 22997 (11th Cir. Nov. 16, 2011) (Unpublished).

After an arrestee refused a deputy's order to turn around and pushed away from the deputy, the arrestee's excessive force claim failed because, inter alia, the arrestee was uncooperative, a video showed the close contact and the escalating nature of the incident, and the arrestee's refusal to comply with the deputy's instructions was, at least, misdemeanor obstruction. Anthony v. Coffee County, No. 13-15477, 2014 U.S. App. LEXIS 16897 (11th Cir. Sept. 2, 2014) (Unpublished).

Officer without probable cause to arrest. — Defendant officer was not entitled to qualified immunity on plaintiff's Fourth Amendment claim because the officer had no arguable probable cause to arrest the plaintiff for misdemeanor obstruction under O.C.G.A. § 16-10-24(a) or disorderly conduct under O.C.G.A. § 16-11-39(a)(3) as it was undisputed that the plaintiff uttered an epithet as the plaintiff was walking away, thus ending any face-to-face confrontation, and that the officer was the only one to hear the phrase. Further, there was no arguable probable cause to arrest the plaintiff. Merenda v. Tabor, No. 5:10-CV-493 (MTT), 2012 U.S. Dist. LEXIS 63782 (M.D. Ga. May 7, 2012), aff'd in part, appeal dismissed in part, No. 12-12562, 2013 U.S. App. LEXIS 2351 (11th Cir. Ga. 2013).

Not lesser included offense of interfering with government property. — Defendant failed to show that the charge against defendant for obstructing an officer by becoming verbally combative, refusing repeated orders, and resisting restraint under O.C.G.A. § 16-10-24, for which defendant was acquitted, was a lesser included offense under O.C.G.A. § 16-1-6 of the charge against defendant of interfering with government property by kicking the sink off the wall and flooding defendant's jail cell under O.C.G.A. § 16-7-24, for which defendant was convicted; a comparison of these two offenses shows that they have entirely different elements and require proof of entirely different facts. Carter v. State, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

Distinguished from offense of terroristic threats. — Defendant's convictions and sentence for terroristic threats and obstruction of an officer did not violate the constitutional prohibitions against double jeopardy and cruel and unusual punishment. The crimes are mutually independent and each is aimed at prohibiting specific conduct. Lemarr v. State, 188 Ga. App. 352, 373 S.E.2d 58 (1988).

Force or violence is not an element of misdemeanor obstruction under O.C.G.A. § 16-10-24(a); lying with the intent of misdirecting an officer as to the performance of the officer's official duties can certainly constitute a hindrance and authorize a conviction under that subsec-

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tion. Duke v. State, 205 Ga. App. 689, 423 S.E.2d 427 (1992); Carter v. State, 222 Ga. App. 397, 474 S.E.2d 228 (1996).

To consummate an offense of misdemeanor obstruction, some form of knowing and willful opposition to the officer sufficient to constitute obstruction or hindrance is required, but actual violence or threat is not. Weidmann v. State, 222 Ga. App. 796, 476 S.E.2d 18 (1996).

Woodward v. Gray, 241 Ga. App. 847, 527 S.E.2d 595 (2000); Ballew v. State, 245 Ga. App. 842, 538 S.E.2d 902) (2000); and Cooper v. State, 270 Ga. App. 346, 606 S.E.2d 869 (2004), are disapproved to the extent that these cases imply that misdemeanor obstruction still requires proof of forcible resistance or threats of violence. Stryker v. State, 297 Ga. App. 493, 677 S.E.2d 680 (2009).

Injury to the officer is not an element of felony obstruction of an officer. Fricks v. State, 210 Ga. App. 562, 436 S.E.2d 752 (1993).

Sufficiency of indictment. — Indictment charging defendant with misdemeanor obstruction was sufficient to apprise defendant of the acts of which defendant was accused because the indictment was substantially in the language of the statute. Turner v. State, 274 Ga. App. 731, 618 S.E.2d 607 (2005).

Juvenile proceedings. — As a security officer was on school property when a fellow officer told the security officer that a truant juvenile was hiding behind a house, the juvenile could be pursued on suspicion of hindering an officer in the lawful discharge of duties in violation of O.C.G.A. § 16-10-24, even if the officer left school grounds, as the officer did so in hot pursuit of a suspected offender. In the Interest of M.P., 279 Ga. App. 344, 631 S.E.2d 383 (2006).

Civil rights actions. — On plaintiff arrestee's claim that defendant deputy sheriff falsely arrested the plaintiff for obstruction under O.C.G.A. § 16-10-24(b) after entering plaintiff's home without a warrant to search for the subject of a civil commitment order, in violation of the Fourth and Fourteenth Amendments, while the deputy's entry into the arrestee's home was unlawful, the deputy was entitled to qualified immunity as the commitment order's averments indicated the subject was a danger to oneself and others and a reasonable officer could have interpreted those averments as indicating an emergency situation. Bates v. Harvey, 518 F.3d 1233 (11th Cir. 2008), cert. denied, 129 S. Ct. 419, 172 L.Ed.2d 289 (2008).

New trial motion properly denied. — Upon convictions of possessing cocaine with intent to distribute and obstructing a law enforcement officer, the trial court properly denied the defendant's motion for a new trial as: (1) a challenged juror affirmed the guilty verdict; (2) details about a government witness's plea deal would not have changed the trial outcome; and (3) lab results confirming the purity of the contraband seized was sufficient to show that the substance defendant possessed was cocaine. Tate v. State, 278 Ga. App. 324, 628 S.E.2d 730 (2006).

In the prosecution on charges of interference with government property and obstruction of a law enforcement officer, the trial court did not err in admitting evidence of the defendant's 1993 interference with government property conviction; a new trial was properly denied because the evidence was properly admitted, not as substantive evidence of the offense at issue, but only as to the issue of credibility, providing support for admission of the evidence. Tate v. State, 289 Ga. App. 479, 657 S.E.2d 531 (2008), cert. denied, No. S08C0986, 2008 Ga. LEXIS 386 (Ga. 2008).

Suppression motion improperly granted. — Trial court erroneously granted suppression of the evidence seized in a traffic stop involving two defendants in which an officer, after arresting the first defendant for obstruction, searched the car and found a substance which a field test showed to be cocaine, as the stopping officer was authorized to make the stop based on a violation of O.C.G.A. § 40-6-202 and because the officer could search the passenger compartment of the car incident to the arrest of the first defendant. State v. Stafford, 288 Ga. App. 309, 653 S.E.2d 750 (2007), aff'd, 284 Ga. 773, 671 S.E.2d 484 (2008).

Recidivist sentence upheld. — Because state's written notice sufficiently notified defendant of the state's intent to seek a recidivist sentence under O.C.G.A. § 17-10-7 upon conviction of felony obstruction of an officer, and during plea negotiations the state again referenced defendant's prior criminal history and reiterated the state would seek recidivist punishment, no error occurred in imposing the sentence based on lack of notice. Evans v. State, 290 Ga. App. 746, 660 S.E.2d 841 (2008).

Sentence in violation of plea agreement. — Following the state agreeing to dismiss the RICO and theft charges against the defendant in exchange for a guilty plea to one misdemeanor count of hindering and obstructing a law enforcement officer conditioned upon the defendant testifying truthfully at the trial against the co-defendants, the trial court erred by imposing a sentence upon the defendant which differed from the understood terms of the negotiated plea. Lewis v. State, 330 Ga. App. 412, 767 S.E.2d 771 (2014).

Written sentence controls when signed before oral sentence pronounced. — Trial court did not improperly increase the defendant's sentence because, although the trial court orally declared that the defendant would serve two concurrent 12-month sentences for the battery and obstruction convictions, and the defendant was taken into custody immediately, on the same day, before the defendant was taken into custody and began to serve the defendant's sentence, the trial court signed a written sentence stating that the defendant would serve two consecutive 12-month sentences for the two convictions. Green v. State, 339 Ga. App. 263, 793 S.E.2d 156 (2016).

Conviction as grounds for revocation of supervised release. — Federal district court did not abuse the court's discretion by imposing the highest possible sentence permitted by 18 U.S.C. § 3583(e)(3) after revoking defendant's supervised release term because the defendant was arrested for the misdemeanor of obstruction of officers under O.C.G.A. § 16-10-24(a) during an undercover drug sting, the defendant possessed crack cocaine and marijuana, the defendant violated the technical terms of the defendant's supervised release by failing to report to the defendant's probation officer, and the defendant associated with a known felon. United States v. Webb, No. 06-14755, 2007 U.S. App. LEXIS 14986 (11th Cir. June 22, 2007) (Unpublished).

Career offender implications from conviction. — Defendant was properly sentenced as an armed career criminal because the defendant's 1998 Georgia felony conviction for obstructing or hindering a law enforcement officer was a violent felony and the defendant's 1998 Georgia felony conviction for possessing marijuana with the intent to distribute fell squarely within the Armed Career Criminal Act's definition of a serious drug offense. United States v. Dixon, No. 14-11164, 2015 U.S. App. LEXIS 1698 (11th Cir. Feb. 4, 2015), cert. denied, 136 S. Ct. 991, 194 L. Ed. 2d 12 (U.S. 2016), cert. denied, 136 S. Ct. 1222, 194 L. Ed. 2d 222 (U.S. 2016) (Unpublished).

Felony obstruction is predicate offense under Armed Career Criminal Act. — After the defendant was convicted for possessing a firearm as a convicted felon, the federal district court did not err by applying sentencing enhancements under the Armed Career Criminal Act (ACCA) because the defendant had three qualifying predicate offenses; two convictions for felony obstruction and a conviction for selling cocaine. Defendant's two Georgia convictions for felony obstruction of justice counted as predicate offenses for ACCA purposes because the offenses categorically meet the "use, attempted use, or threatened use of physical force" requirement of the elements clause of ACCA; Georgia's felony obstruction statute applies only to those who obstruct a law enforcement officer by offering or doing violence to the officer's person. United States v. Brown, 805 F.3d 1325 (11th Cir. 2015).

No probable cause for arrest. — Defendant's motion to suppress suspected cocaine was properly granted as: (1) police officers lacked probable cause to arrest the defendant for obstruction of justice upon the defendant's flight; (2) an initial uncoercive encounter with the police did

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not constitute a seizure, and the defendant was free to leave at any time; and (3) the record was devoid of any evidence about the details of an anonymous tip that the defendant was seen selling drugs in the area of the encounter; moreover, given the tip's lack of detail and failure to predict future behavior, observation of the defendant's conduct might have warranted further investigation, but it did not rise to the level of reasonable suspicion needed to briefly detain or even arrest. State v. Dukes, 279 Ga. App. 247, 630 S.E.2d 847 (2006).

While the defendant police officer did not have to move the officer's car, the officer could not arrest the plaintiff arrestee for reasonably and politely asking the officer to move a foot so that the arrestee could enter the arrestee's driveway, and because the argument that the officer was impeded in the officer's duty under O.C.G.A. § 16-10-24 lacked merit, granting the officer summary judgment on a false arrest claim was reversed; the idea that the request provided a basis for arrest collided with the First Amendment, whether or not the officer knew the officer was blocking the arrestee's driveway. Skop v. City of Atlanta, 485 F.3d 1130 (11th Cir. 2007).

Issue waived on appeal regarding legitimacy of arrest. — Defendant waived the right to challenge the sufficiency of the evidence regarding whether a police officer was in the lawful discharge of official duties for purposes of the defendant's conviction for misdemeanor obstruction of a law enforcement officer, in violation of O.C.G.A. § 16-10-24(a), as defense counsel conceded at trial that the officer's arrest was "legitimate," and no action was taken to suggest otherwise. Jenkins v. State, 310 Ga. App. 811, 714 S.E.2d 410 (2011).

Cited in Shaw v. Jones, 226 Ga. 291, 174 S.E.2d 444 (1970); Shaw v. State, 121 Ga. App. 726, 175 S.E.2d 150 (1970); Ratliff v. State, 133 Ga. App. 256, 211 S.E.2d 192 (1974); Wooten v. State, 135 Ga. App. 97, 217 S.E.2d 350 (1975); Logan v. State, 136 Ga. App. 567, 222 S.E.2d 124 (1975); Allen v. State, 137 Ga. App. 21, 222 S.E.2d 856 (1975); Pate v. State, 137 Ga. App. 677, 225 S.E.2d 95 (1976); United States v. Gidley, 527 F.2d 1345 (5th Cir. 1976); Smith v. State, 144 Ga. App. 785, 242 S.E.2d 376 (1978); Edmonds v. City of Albany, 242 Ga. 648, 250 S.E.2d 458 (1978); Beard v. State, 151 Ga. App. 724, 261 S.E.2d 404 (1979); Rushing v. City of Plains, 152 Ga. App. 884, 264 S.E.2d 319 (1980); In re Long, 153 Ga. App. 883, 267 S.E.2d 481 (1980); Duffie v. State, 154 Ga. App. 61, 267 S.E.2d 501 (1980); Evans v. State, 154 Ga. App. 381, 268 S.E.2d 429 (1980); Latty v. State, 154 Ga. App. 751, 270 S.E.2d 38 (1980); Jenga v. State, 166 Ga. App. 26, 303 S.E.2d 170 (1983); Pugh v. State, 173 Ga. App. 670, 327 S.E.2d 745 (1985); Sapp v. State, 179 Ga. App. 614, 347 S.E.2d 354 (1986); In re M.E.H., 180 Ga. App. 591, 349 S.E.2d 814 (1986); Dickerson v. State, 180 Ga. App. 852, 350 S.E.2d 835 (1986); Robinson v. State, 182 Ga. App. 423, 356 S.E.2d 55 (1987); Banks v. State, 187 Ga. App. 280, 370 S.E.2d 38 (1988); Freeman v. State, 194 Ga. App. 905, 392 S.E.2d 330 (1990); Westin v. McDaniel, 760 F. Supp. 1563 (M.D. Ga. 1991); O'Neal v. State, 211 Ga. App. 741, 440 S.E.2d 513 (1994); Copeland v. State, 213 Ga. App. 39, 443 S.E.2d 869 (1994); Norman v. State, 214 Ga. App. 408, 448 S.E.2d 219 (1994); Williams v. State, 214 Ga. App. 834, 449 S.E.2d 532 (1994); Cline v. State, 221 Ga. App. 175, 471 S.E.2d 24 (1996); Williams v. State, 228 Ga. App. 289, 491 S.E.2d 500 (1997); Cook v. State, 235 Ga. App. 104, 508 S.E.2d 473 (1998); Askew v. State, 248 Ga. App. 230, 546 S.E.2d 15 (2001); Mathis v. State, 250 Ga. App. 500, 552 S.E.2d 97 (2001); Johnson v. State, 255 Ga. App. 537, 566 S.E.2d 349 (2002); Zachery v. State, 257 Ga. App. 539, 571 S.E.2d 529 (2002); Penland v. State, 258 Ga. App. 659, 574 S.E.2d 880 (2002); Grier v. State, 262 Ga. App. 777, 586 S.E.2d 448 (2003); Myers v. State, 268 Ga. App. 607, 602 S.E.2d 327 (2004); Monas v. State, 270 Ga. App. 50, 606 S.E.2d 80 (2004); Glanton v. State, 283 Ga. App. 232, 641 S.E.2d 234 (2007); State v. Ealum, 283 Ga. App. 799, 643 S.E.2d 262 (2007); Grant v. State, 289 Ga. App. 230, 656 S.E.2d 873 (2008); Sillah v. State, 291 Ga. App. 848, 663 S.E.2d 274 (2008); Diaz v. State, 296 Ga. App. 589, 676 S.E.2d 252

(2009); Mathis v. State, No. A09A0215; No. A09A0308, 2009 Ga. App. LEXIS 586 (May 20, 2009); Myers v. State, 311 Ga. App. 668, 716 S.E.2d 772 (2011); Foster v. State, 314 Ga. App. 642, 725 S.E.2d 777 (2012); Taylor v. State, 319 Ga. App. 850, 738 S.E.2d 679 (2013); Hyman v. State, 320 Ga. App. 106, 739 S.E.2d 395 (2013); Brooks v. State, 323 Ga. App. 681, 747 S.E.2d 688 (2013); Harper v. State, 337 Ga. App. 57, 785 S.E.2d 691 (2016); Johnson v. State, 341 Ga. App. 384, 801 S.E.2d 82 (2017).

Lawful Discharge of Official Duties

Essential element of offense is that officer be engaged in lawful discharge of official duties. Dixon v. State, 154 Ga. App. 828, 269 S.E.2d 909 (1980).

Off-duty deputy sheriff moonlighting as a bouncer for a private establishment was engaged in performance of official duties within meaning of O.C.G.A. § 16-10-24. Duncan v. State, 163 Ga. App. 148, 294 S.E.2d 365 (1982).

Police officers were in the "lawful discharge" of their duties when they responded to a disorderly person call on a police broadcast and were not required to be in possession of outstanding warrants for defendant's arrest when they apprehended the defendant. Singleton v. State, 194 Ga. App. 423, 390 S.E.2d 648 (1990).

Official duties lawfully discharged. — Officers who were summoned to the scene of a domestic disturbance and saw defendant forcibly march defendant's family into their dwelling, quite possibly at gunpoint, had probable cause to effectuate a warrantless arrest for a battery constituting a family violence and, thus, were engaged in the performance of official duties for purposes of O.C.G.A. § 16-10-24. Duitsman v. State, 212 Ga. App. 348, 441 S.E.2d 888 (1994).

When a police officer observed the defendant driving unsafely, the officer had an articulable suspicion sufficient to justify further questioning, and the defendant's flight and subsequent struggle with the officer obstructed the investigation. Tuggle v. State, 236 Ga. App. 847, 512 S.E.2d 650 (1999).

When the totality of the circumstances, including the location of the car and the defendant's position in the car, indicated that the defendant was in actual physical control of the vehicle and in possession of an open container of an alcoholic beverage, even though the defendant was not seen driving the car, there was sufficient evidence that the police officers' act of questioning the defendant was more than a consensual inquiry and was within the scope of the officers' official duties so that a jury could reasonably determine that the defendant's use of a false name was a violation. Wynn v. State, 236 Ga. App. 98, 511 S.E.2d 201 (1999).

Officers were lawfully discharging their official duties, despite their unlawful presence in the home with respect to the homeowner, because they had probable cause and a warrant to arrest defendant and defendant had no standing to object to the search of the house. Brown v. State, 240 Ga. App. 321, 523 S.E.2d 333 (1999).

Dispatcher who reported a crime at a specified location gave police an articulable suspicion to investigate and detain individuals at the scene, particularly because police observations on arriving at the scene corroborated the report. Overand v. State, 240 Ga. App. 682, 523 S.E.2d 610 (1999).

Evidence that the defendant repeatedly disobeyed the officer's lawful directive to remain in the car for the officer's safety, that the defendant jumped out of the car and confronted the officer, and that the defendant resisted the officer's attempts to physically place the defendant in the car was sufficient to support the defendant's conviction for obstruction of an officer as the evidence showed the defendant knowingly obstructed the officer in the officer's lawful discharge of the officer's duties. Arsenault v. State, 257 Ga. App. 456, 571 S.E.2d 456 (2002).

Officer was not required to have a reasonable suspicion of criminal activity to approach a vehicle parked in a neighborhood the officer was patrolling in the lawful discharge of the officer's official duties; therefore, when the defendant exited the vehicle and attacked the officer, the evidence was sufficient to allow the trier of fact to convict defendant of interference with a law enforcement officer. English v. State, 257 Ga. App. 741, 572 S.E.2d 86 (2002).

Lawful Discharge of Official Duties (Cont'd)

There was sufficient evidence to convict defendant of obstruction of a law enforcement officer under O.C.G.A. § 16-10-24(a), where defendant struck the officer after the officer grabbed defendant's grandson's hand; the officer was in the lawful discharge of the officer's official duties, as the officer had a particularized and objective basis for suspecting that the grandson had a marijuana cigarette in the grandson's hand. Smith v. State, 258 Ga. App. 225, 573 S.E.2d 472 (2002).

Because a high school principal told a school security officer to be on the lookout for a juvenile who was skipping class and would be involved in an after-school fight, the officer was engaged in the lawful discharge of official duties when the officer sought to find and detain the juvenile. In the Interest of M.P., 279 Ga. App. 344, 631 S.E.2d 383 (2006).

Although the evidence that the probationer made the probationer's arrest warrant unavailable to the officers was circumstantial, the evidence was sufficient to authorize the trial court's finding, by a preponderance of the evidence, that the probationer obstructed the officers. Carlson v. State, 280 Ga. App. 595, 634 S.E.2d 410 (2006), cert. denied, No. S06C2099, 2007 Ga. LEXIS 215 (Ga. 2007).

Defendant's misdemeanor obstruction of an officer conviction under O.C.G.A. § 16-10-24 was supported by sufficient evidence; although an officer was not lawfully discharging the officer's duty when the officer attempted to detain a person without an articulable suspicion of criminal activity, the defendant failed to recognize that the defendant's unprovoked flight, given other suspicious circumstances including the sudden departure of a truck into which the defendant had been leaning when the officer arrived on the scene, gave rise to a reasonable articulable suspicion of criminal activity. Copeland v. State, 281 Ga. App. 11, 635 S.E.2d 283 (2006).

Juvenile's interference with a juvenile probation officer's attempt to take the juvenile into custody, after the juvenile tested positive for illegal drug use, was sufficient to support an adjudication under O.C.G.A. § 16-10-24(b). In the Interest of M.M., 287 Ga. App. 233, 651 S.E.2d 155 (2007), cert. denied, 2008 Ga. LEXIS 95 (Ga. 2008).

Because there was sufficient evidence that a road that the defendant was obstructing was a public passage, there was no merit to the defendant's argument that an officer who ordered the defendant not to block the road was not lawfully discharging the officer's official duties. Davis v. State, 288 Ga. App. 66, 653 S.E.2d 358 (2007).

Defendant juvenile's arrest was not defective because a law enforcement officer was engaged in the discharge of a juvenile court's pick-up order, which the defendant resisted, thus providing probable cause for the defendant's arrest for obstruction in violation of O.C.G.A. § 16-10-24. In re C. R., 294 Ga. App. 164, 669 S.E.2d 193 (2008).

Trial court did not err in denying a defendant juvenile's motion for a directed verdict and in adjudicating the defendant delinquent on an obstruction charge because an officer working as a security guard at a restaurant was engaged in the lawful discharge of the officer's official duties at the time of the officer's encounter with the defendant as required by O.C.G.A. § 16-10-24. In the Interest of D.S., 295 Ga. App. 847, 673 S.E.2d 321 (2009).

Defendant was lawfully detained and searched for weapons because the defendant matched a citizen's specific description and location of a person who had been shooting a gun, and the defendant had threatened to kill the sheriff (who was physically present) on as many as six previous occasions. The jury could find that when the defendant elbowed the chief in the course of the pat-down, the defendant committed felony obstruction in violation of O.C.G.A. § 16-10-24(b). Meadows v. State, 303 Ga. App. 40, 692 S.E.2d 708 (2010).

Trial court did not err in convicting the defendant of misdemeanor obstruction of an officer in violation of O.C.G.A. § 16-10-24(a) because an investigator had ample specific and articulable facts to jus-

tify stopping the defendant, and the circumstances were sufficient to give rise to a reasonable suspicion of criminal conduct; minutes after having heard a lookout bulletin, the investigator arrived at the scene to discover a person there matching the description provided in the lookout bulletin, including having a red bag in the person's possession, the victim pointed to the person as the perpetrator, and gathered onlookers were shouting as the onlookers pointed the investigator to the defendant. Davis v. State, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

Officer not engaged in official duties. — Officers who attempted forcibly to resolve a civil dispute were not engaged in the lawful discharge of their official duties and did not have probable cause to arrest plaintiff for "obstruction" of their unauthorized actions. Thornton v. City of Macon, 132 F.3d 1395 (11th Cir. 1998).

Accusation must disclose official character of officer. Hunter v. State, 4 Ga. App. 579, 61 S.E. 1130 (1908); Paschal v. State, 16 Ga. App. 155, 84 S.E. 725 (1915).

Sworn reserve officer with arrest powers was a "law enforcement officer" within the meaning of O.C.G.A. § 16-10-24. Dennis v. State, 220 Ga. App. 420, 469 S.E.2d 494 (1996).

Corrections officer. — County jail corrections officer was acting in the discharge of the officer's lawful duties when the officer repeatedly commanded a defendant to take only one food tray at meal time, when the defendant insisted on taking two trays, and in knocking the trays from the defendant's hands when defendant refused to step out of the line and began eating from one of the trays. Williams v. State, 301 Ga. App. 731, 688 S.E.2d 650 (2009).

Use of force. — In a lawful arrest based upon probable cause, an officer has the right to use that force reasonably necessary to effect the arrest, and the defendant does not have the right to resist the use of such reasonable force. The officer's use of forearm strikes was reasonable and in compliance with departmental policies. Long v. State, 261 Ga. App. 478, 583 S.E.2d 158 (2003).

Resistance based on unlawful search argument failed. — Contrary to the defendant's argument, the trial court did not err in failing to grant the defendant's motion for a directed verdict of acquittal in defendant's trial for obstruction of a law enforcement officer, O.C.G.A. § 16-10-24(a), based on the defendant's claim that the defendant was entitled to resist an unlawful search of the defendant's premises; among other things, exigent circumstances existed to justify the officers' warrantless entry onto the defendant's property because officers observed that the defendant's dogs did not have their required rabies tags, and further investigation, including the capturing of the animals, was necessary to protect the public against a risk of rabies. Jarvis v. State, 294 Ga. App. 482, 669 S.E.2d 477 (2008).

Officer's act of clearing an area. — Using profanity, an arrestee challenged an officer's authority to clear an area (as the officer had been instructed by a judge), thus, the officer could arguably, if mistakenly, think probable cause existed for misdemeanor obstruction under O.C.G.A. § 16-10-24(a) and qualified immunity entitled the officer to summary judgment on an illegal arrest claim. Spruell v. Harper, No. 1:09-CV-356-TWT, 2011 U.S. Dist. LEXIS 31492 (N.D. Ga. Mar. 25, 2011).

Knowledge

One cannot be guilty of offense of hindering an officer unless that person knew official character of officer. Hardaway v. State, 7 Ga. App. 555, 67 S.E. 222 (1910); McLendon v. State, 12 Ga. App. 691, 78 S.E. 139 (1913).

Defendant knew individual was officer. — Although the arresting officer was not in uniform or driving a marked car, evidence that the officer wore a badge on the officer's belt and told defendant the officer was conducting an investigation was sufficient to show that defendant knew the person was a law enforcement officer. Mangum v. State, 228 Ga. App. 545, 492 S.E.2d 300 (1997).

On a charge of misdemeanor obstruction of an officer, the evidence that the defendant knew that the defendant was dealing with law enforcement officers was sufficient. An officer testified that the officers at the scene were in a patrol or police

Knowledge (Cont'd)

car, and the defendant testified that a caller summoned "the law" and that the defendant saw a police car come up. Reddick v. State, 298 Ga. App. 155, 679 S.E.2d 380 (2009).

Defendant saw uniformed officer. — Evidence that the defendant and another were carrying stolen items toward a police officer's car and that they dropped the items and ran when they realized it was a police car, despite a uniformed officer shouting at them to stop, was sufficient to convict the defendant of burglary and obstruction of justice in violation of O.C.G.A. §§ 16-7-1(a) and 16-10-24(a). Mitchell v. State, 312 Ga. App. 293, 718 S.E.2d 126 (2011).

Defendant's knowledge that officer's command was lawful. — Other acts evidence regarding two earlier instances of obstructing a law enforcement officer was relevant and admissible because, by expressly challenging whether the officer was lawfully discharging the officer's official duties, the defendant implicitly challenged the defendant's own knowledge that the officer's commands to the defendant were lawful; and it established that, on past occasions, the defendant had encountered officers under similar circumstances and been apprehended or accused of obstructing the officers when the defendant fled, such that the defendant knew that the officer's command that the defendant talk with the officer was made in the lawful discharge of the officer's official duties and that the defendant was not free to flee. Green v. State, 339 Ga. App. 263, 793 S.E.2d 156 (2016).

Application

Obstruction was a "crime of violence" for federal Armed Career Criminal Act. — In sentencing the defendant to 120 months for being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), a district court erred by failing to impose a minimum sentence of 15 years under 18 U.S.C. § 924(e), the Armed Career Criminal Act, because the defendant's prior Georgia conviction of felony obstruction, O.C.G.A. § 16-10-24(b), qualified as a violent felony. United States v. Cook, No. 16-11577, 2017 U.S. App. LEXIS 6862 (11th Cir. Apr. 20, 2017) (Unpublished).

Something more than mere disagreement or remonstrance must be shown. McCook v. State, 145 Ga. App. 3, 243 S.E.2d 289 (1978).

For an act to constitute obstructing an officer, the act must evidence some forcible resistance or objection to the officer (not mere argument) in the performance of the officer's duties. Kelley v. State, 171 Ga. App. 222, 319 S.E.2d 81 (1984); Webb v. Ethridge, 849 F.2d 546 (11th Cir. 1988).

Providing false information to booking officer. — Defendant's conduct in providing false information to a booking officer constituted obstruction of an officer. Carter v. State, 188 Ga. App. 464, 373 S.E.2d 277 (1988).

City ordinance regarding resisting arrest is null and void since offense was addressed by former Code 1933, § 26-2505 (see now O.C.G.A. § 16-10-24). Evans v. City of Tifton, 138 Ga. App. 374, 226 S.E.2d 471 (1976).

Flight, or attempted flight, after command to halt constitutes obstruction of officer. Tankersley v. State, 155 Ga. App. 917, 273 S.E.2d 862 (1980); Rodriguez v. State, 211 Ga. App. 256, 439 S.E.2d 510 (1993); Okongwu v. State, 220 Ga. App. 59, 467 S.E.2d 368 (1996).

Defendant's conviction for obstruction of an officer under O.C.G.A. § 16-10-24(a) was supported by sufficient evidence because the evidence showed that defendant fled after police officers ordered defendant to halt, and flight after a lawful command to halt constitutes obstruction of an officer. Dukes v. State, 275 Ga. App. 442, 622 S.E.2d 587 (2005).

Defendant's conviction of misdemeanor obstruction of a law enforcement officer was supported by sufficient evidence as defendant fled when an officer first attempted to place defendant under arrest. Mayfield v. State, 276 Ga. App. 544, 623 S.E.2d 725 (2005).

Denial of a defendant's motion to suppress was affirmed as the defendant's flight from an improper Terry stop gave the police officers an independent basis to arrest the defendant; the methamphetamine found in close proximity was ad-

missible. Reynolds v. State, 280 Ga. App. 712, 634 S.E.2d 842 (2006).

Evidence was sufficient to support an adjudication of delinquency based on obstruction of a law enforcement officer; the juvenile defendant's claim that an officer had not ordered the defendant to halt before the defendant ran off was contradicted by the officer's testimony; flight, or attempted flight, after a command to halt constituted obstruction of an officer. In the Interest of E.G., 286 Ga. App. 137, 648 S.E.2d 699 (2007).

When an officer asked the defendant, who was on a bicycle and had been looking into parked cars, what the defendant was doing, the defendant yelled obscenities at the officer and pedaled away; the defendant did not comply with the officer's command to come back so the officer could check the defendant's identification. This evidence was sufficient to support the defendant's conviction of misdemeanor obstruction of an officer, O.C.G.A. § 16-10-24(a). Steillman v. State, 295 Ga. App. 778, 673 S.E.2d 286 (2009).

Evidence was sufficient to support the jury's finding that the defendant was guilty of the charge of misdemeanor obstruction of a law enforcement officer beyond a reasonable doubt because the officer who first encountered the defendant had a reasonable articulable suspicion to detain the defendant based on a 9-1-1 call and dispatch, and when the officer requested that the defendant place the defendant's hands on the officer's vehicle in order to allow the officer to conduct a weapons pat-down, the defendant fled. Johnson v. State, 302 Ga. App. 318, 690 S.E.2d 683 (2010).

Defendant's probation was properly revoked for obstructing an officer in violation of O.C.G.A. § 16-10-24(a). The officers' detention of the defendant was a second-tier encounter because the officers had an articulable suspicion of criminal activity based on the defendant's matching the description and being in the area of an armed robbery; therefore, the defendant was not free to leave the encounter as the defendant did. Avery v. State, 313 Ga. App. 259, 721 S.E.2d 202 (2011).

Failure to give command to halt. — Defendant, upon seeing a police officer, ran away. As the officer never told the defendant to stop running, there was no probable cause to arrest the defendant for obstruction. State v. Fisher, 293 Ga. App. 228, 666 S.E.2d 594 (2008).

Request for college police chief to interfere with district attorney investigation. — Public college's chief of police who objected to the college administration's directive that the chief of police speak with the district attorney about having the charges against a suspected laptop thief dropped reasonably believed that the chief was objecting to illegal conduct, obstruction of justice under O.C.G.A. § 16-10-24(a), and this was protected activity under O.C.G.A. § 45-1-4(d)(3) of the whistleblower statute. Albers v. Ga. Bd. of Regents of the Univ. Sys. of Ga., 330 Ga. App. 58, 766 S.E.2d 520 (2014).

Screaming at officer insufficient. — Defendant who screamed at an officer at the time the officer was attempting to arrest the defendant's spouse did not commit obstruction of the officer under O.C.G.A. § 16-10-24(a); however, the defendant's later actions in refusing to comply with police requests to show the defendant's hands and put down the defendant's cell phone were obstruction. Lebis v. State, 302 Ga. 750, 808 S.E.2d 724 (2017).

Forms of speech constituting threats of violence. — Legislature clearly intended former Code 1933, § 26-2505 (see now O.C.G.A. § 16-10-24) to include forms of speech which may reasonably be interpreted as a threat of violence and which amount to an obstruction or hindrance. Wells v. State, 154 Ga. App. 246, 268 S.E.2d 74 (1980); Dumas v. State, 159 Ga. App. 517, 284 S.E.2d 33 (1981).

O.C.G.A. § 16-10-24 encompasses statements by a party to a law enforcement officer which may reasonably be interpreted as a threat of violence and which amount to an obstruction or hindrance. Moccia v. State, 174 Ga. App. 764, 331 S.E.2d 99 (1985).

Felony obstruction conviction was reversed since there was no evidence that defendant's verbal threats made against the arresting officer obstructed completion of the officer's duties, the threats

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were made while defendant was already in custody and cooperating with the officer, and concerned future acts of violence, and not imminent acts that if carried out would have prevented the officer from completing the arrest. Williams v. State, 261 Ga. App. 511, 583 S.E.2d 172 (2003).

Evidence sufficient for purposes of juvenile delinquency adjudication. — Juvenile court, as factfinder, had sufficient circumstantial and direct evidence to support the court's adjudication of defendant, a juvenile, as a delinquent for acts which, if committed by an adult, would have constituted two counts of armed robbery and one count of obstruction of a law enforcement officer, in violation of O.C.G.A. §§ 16-8-41(a) and 16-10-24; two women were robbed at knifepoint and had their purses taken, and the description of the perpetrator, including the clothing worn, matched that of the juvenile, who was found three blocks from where the incident occurred and who attempted to flee when ordered to stop by police. In the Interest of R.J.S., 277 Ga. App. 74, 625 S.E.2d 485 (2005).

There was sufficient evidence that the defendant, a juvenile, had done acts that would constitute misdemeanor obstruction of a law enforcement officer under O.C.G.A. § 16-10-24(a) if done by an adult; an officer witnessed the defendant behaving in a threatening manner toward a vice principal, who asked the officers to arrest the defendant, and the defendant refused to permit handcuffing by a single officer, requiring the assistance of a second officer. In the Interest of D.B., 284 Ga. App. 445, 644 S.E.2d 305 (2007).

An officer's testimony that a juvenile defendant assumed a "fighting stance," placed the defendant's fists in front of the defendant's face, and yelled obscenities at officers while refusing to obey the officers' commands was sufficient to show that the defendant "offered to do violence" to the officers under O.C.G.A. § 16-10-24(b); actual violence or injury to an officer was not necessary. In the Interest of D.D., 287 Ga. App. 512, 651 S.E.2d 817 (2007).

Evidence that as a deputy sheriff attempted to handcuff defendant juvenile while the defendant was in the back of a car and that the defendant jumped out the other side of the car swinging a handcuff at the deputy was sufficient to support the defendant's adjudication as delinquent on a charge of obstruction of a police officer. In the Interest of E.J., 292 Ga. App. 69, 663 S.E.2d 411 (2008).

Evidence sufficiently supported a juvenile defendant's adjudication of delinquency based upon obstruction of a law enforcement officer in violation of O.C.G.A. § 16-10-24(a) as the officer was in the lawful discharge of official duties when the officer asked the juvenile to stop in order to investigate the possibility of truancy pursuant to O.C.G.A. §§ 20-2-698 and 20-2-699; the juvenile's actions in running away despite the officer's command to stop gave the officer further reasonable suspicion that the juvenile was involved in illegal activity. In re E.C., 292 Ga. App. 798, 665 S.E.2d 896 (2008).

Defendant's failure to respond immediately to a police officer's orders was insufficient to sustain a conviction for obstruction of a law enforcement officer, even though defendant did not verbally or physically threaten the officer and, in fact, did not speak to, or argue with the officer. Coley v. State, 178 Ga. App. 668, 344 S.E.2d 490 (1986).

Although the evidence was sufficient to show that defendant stalked the victim and obstructed an officer by fleeing in violation of O.C.G.A. §§ 16-5-91(a) and 16-10-24(a), defendant had a constitutional right to stand silent during a police officer's questioning; as a result, the evidence was insufficient to support a conviction for obstruction of an officer based on defendant's silence. Johnson v. State, 264 Ga. App. 889, 592 S.E.2d 507 (2003).

Mere verbal exchange with an officer accompanied by no verbal or physical threats of violence does not constitute obstruction or hindering of a law enforcement officer. In re G.M.M., 179 Ga. App. 800, 348 S.E.2d 126 (1986).

Eluding and hiding from police sufficient to support criminal trespass count. — Criminal trespass count of a defendant's indictment was sufficient because the indictment alleged that the defendant was attempting to elude and hide

from a police officer when the defendant committed the trespass, which was a crime under O.C.G.A. § 16-10-24(a). Scruggs v. State, 309 Ga. App. 569, 711 S.E.2d 86 (2011).

Obstruction of officer lawfully entering defendant's house during pursuit of another. — When arrest of an individual in defendant's house was based on officer's hot pursuit of that individual, such arrest was a lawful activity and defendant's interference therein constituted obstruction of a law enforcement officer. Brown v. State, 163 Ga. App. 209, 294 S.E.2d 305 (1982).

Hiding from police who had come to arrest defendant. — Evidence was sufficient for the jury to find the defendant guilty of misdemeanor hindering of an officer, O.C.G.A. § 16-10-24, based on the defendant's conduct of fleeing into the house and hiding in the attic when the police officers arrived; thus, the defendant hampered and delayed the police in the lawful execution of police duty. Martinez v. State, 322 Ga. App. 63, 743 S.E.2d 621 (2013).

Defendant's obstruction of officer from dwelling. — After the officer arrived at the scene and tried for two to three minutes to persuade the defendant to calm down, but the defendant persisted in defendant's verbal barrage of obscenities and insults addressed to defendant's spouse and the police, it was this interference with the officer's attempt to maintain the peace that formed the basis for the officer's ultimate decision to arrest the defendant for misdemeanor obstruction, and the fact that the officer delayed the officer's decision until the defendant retreated to the apartment, and continued to disrupt the peace (eventually producing a crowd of 60 to 80 onlookers) did not detract from the propriety of that basis for arrest. Animashaun v. State, 207 Ga. App. 156, 427 S.E.2d 532 (1993).

No seizure occurred when defendant fled with vehicle. — Trial court properly denied the defendant's motion to suppress because undisputed facts showed that the initial stop of the vehicle on the highway ramp did not result in a seizure within the meaning of the Fourth Amendment since the defendant fled with the vehicle and, after the defendant fled from the initial stop, the officer pursued the defendant and observed the defendant commit traffic violations, speeding, running a red light, and improper lane usage, which provided a valid basis for the second stop. Jenkins v. State, No. A18A0123, 2018 Ga. App. LEXIS 236 (Apr. 25, 2018).

"Obstruction" during brief investigatory stop. — When defendant attempted to push past federal officers during a brief investigatory stop, making contact with one of the officers, the officers had probable cause to arrest the defendant for battery and obstruction of an officer, and defendant could be fully searched in connection with such an arrest. Alex v. State, 220 Ga. App. 754, 470 S.E.2d 305 (1996).

Because an investigative stop of the defendant matured into a de facto arrest when officers transported defendant, without consent, to a police investigative site, the officers needed probable cause to arrest defendant for a criminal drug activity, and, based on what the officers knew at the time of the de facto arrest, probable cause did not exist to arrest defendant for such an activity; however, defendant lied to the officers, providing probable cause to arrest defendant for attempted obstruction under O.C.G.A. §§ 16-4-1 and 16-10-24(a) and therefore, the seizure of defendant's person was not illegal, and the evidence gathered as a result of the seizure was not suppressed. United States v. Virden, 417 F. Supp. 2d 1360 (M.D. Ga. 2006), aff'd, 488 F.3d 1317 (11th Cir. 2007).

Interference with a DUI investigation of another vehicle. — Evidence was sufficient to enable a jury to find that the defendant obstructed or hindered a law enforcement official in violation of O.C.G.A. § 16-10-24(a) when the defendant refused to obey commands to return to the defendant's vehicle while the officer was attempting to investigate a DUI in another vehicle containing a driver and three passengers. Kendrick v. State, 324 Ga. App. 45, 749 S.E.2d 45 (2013).

Safety frisk justified. — Trial court properly denied the defendant's motion to suppress the contraband found on the defendant's person as a result of a traffic

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stop that came to fruition after an officer observed the defendant making a U-turn in front of a recently robbed bank because the defendant admitted to having a knife in the defendant's pocket but refused to remove the defendant's hand therefrom. As a result, the police were justified in frisking the defendant for safety reasons and the contraband was, therefore, legally obtained from the defendant. Johnson v. State, 289 Ga. App. 27, 656 S.E.2d 161 (2007).

Probable cause shown to arrest. — Deputy sheriff was entitled to qualified immunity with respect to plaintiff's federal civil rights claims, which were properly dismissed on summary judgment, because plaintiff did not show that the deputy violated plaintiff's constitutional rights; the deputy had probable cause to stop plaintiff for a tag-light violation under O.C.G.A. § 40-8-23(d), and that probable cause was sufficient to permit the deputy to arrest plaintiff for that violation. Plaintiff's refusal to comply with the deputy's instructions, as well as plaintiff's belligerent and confrontational behavior, provided ample probable cause to arrest plaintiff for violating O.C.G.A. § 16-10-24; finally, the use of a taser gun in effectuating plaintiff's arrest was reasonably proportionate to the difficult, tense, and uncertain situation that the deputy faced, and did not constitute excessive force. Draper v. Reynolds, 369 F.3d 1270 (11th Cir.), cert. denied, 543 U.S. 988, 125 S. Ct. 507, 160 L. Ed. 2d 373 (2004).

There was sufficient evidence to support convictions for felony obstruction of a law enforcement officer; disobeying the officer's lawful commands to wait and to back off constituted a misdemeanor violation under O.C.G.A. § 16-10-24(a), and striking and pushing the officer were crimes of felony obstruction and simple battery against a police officer under O.C.G.A. §§ 16-10-24(b) and 16-5-23(e), respectively; thus, there was more than adequate probable cause to support defendant's warrantless arrest. Harris v. State, 276 Ga. App. 234, 622 S.E.2d 905 (2005).

Police officer had both actual and arguable probable cause to arrest a suspect for making terroristic threats under O.C.G.A. § 16-11-37(a) based upon the suspect's admission to making the statement that the defendant was "going to have his people get" the officer and that the defendant was going or wanted to "clip" the officer; the officer was entitled to qualified immunity on the suspect's related false arrest claim under 42 U.S.C. § 1983. Alfred v. Powell, No. 1:03-CV-2683-RLV, 2005 U.S. Dist. LEXIS 38723 (N.D. Ga. Dec. 12, 2005).

Defendant argued that, because the traffic stop for a license tag light had ended, the deputy needed probable cause or articulable suspicion of another offense or valid consent to search, and further argued that, because the continued detention was illegal, defendant's consent to search was invalid and that therefore defendant was justified in physically struggling with the deputy. However, once the vehicle was lawfully stopped, the officer was allowed to ask for the driver's consent to search the car and no additional probable cause or articulable suspicion was required to simply ask the question and therefore defendant's conviction for obstructing an officer under O.C.G.A. § 16-10-24 was justified. Hampton v. State, 287 Ga. App. 896, 652 S.E.2d 915 (2007).

An officer had probable cause to arrest a defendant for public drunkenness and for obstruction of a police officer. Loudly playing a car radio in the early morning hours and quarreling with police officers was sufficient to constitute boisterousness for purposes of O.C.G.A. § 16-11-41, and once the defendant refused to exit the defendant's vehicle and physically and verbally threatened an officer, officers had probable cause to arrest the defendant for obstructing a police officer under O.C.G.A. § 16-10-24. Martin v. State, 291 Ga. App. 363, 662 S.E.2d 185 (2008).

When a defendant fought an officer during an attempted detention for an investigative stop, the officer had probable cause to arrest the defendant for obstruction of an officer under O.C.G.A. § 16-10-24. McClary v. State, 292 Ga. App. 184, 663 S.E.2d 809 (2008).

An officer had probable cause to arrest

the defendant for disorderly conduct, O.C.G.A. § 16-11-39, based on the defendant's yelling obscenities at the officer. Therefore, the defendant's claim that the defendant was entitled to a directed verdict on charges of misdemeanor obstruction of an officer because the defendant was resisting an unlawful arrest was without merit. Steillman v. State, 295 Ga. App. 778, 673 S.E.2d 286 (2009).

When an initial stop was lawful and the defendant failed to stop when ordered to do so, there was probable cause to believe O.C.G.A. § 16-10-24(a) was violated and the defendant's apprehension and arrest did not violate the Fourth Amendment. United States v. Foskey, No. 10-15221, 2012 U.S. App. LEXIS 374 (11th Cir. Jan. 9, 2012), cert. denied, U.S. , 133 S. Ct. 460, 184 L. Ed. 2d 283 (2012) (Unpublished).

When a deputy arrested an arrestee for being drunk at a high school football game, the deputy was entitled to qualified immunity as to the arrestee's excessive force claim because, inter alia, probable cause or arguable probable cause existed for the deputy to arrest the arrestee for obstructing a law enforcement officer under O.C.G.A. § 16-10-24(a) since the facts and circumstances would cause a prudent person to believe that the arrestee's negative responses to questions about drinking were intentional lies or, at least, constituted stubborn obstinance. Collins v. Ensley, 498 Fed. Appx. 908 (11th Cir. 2012) (Unpublished).

When officers arrested a defendant after responding to a report that a person resembling the subject of a "be on the lookout for" (BOLO) flyer had been in a bank, suppression was not warranted because when the defendant actively struggled with the officers, the officers acquired probable cause to arrest the defendant for obstruction under O.C.G.A. § 16-10-24. United States v. Akinlade, No. 11-15840, 2013 U.S. App. LEXIS 10270 (11th Cir. May 22, 2013) (Unpublished).

Fatal shooting of decedent pending arrest for assault. — County police officers were properly granted summary judgment in the surviving spouse's civil rights action, arising from the fatal shooting of decedent when the decedent broke into the decedent's own house as officers did not use excessive force by using tasers on two occasions because the decedent refused to put the knife down or heed the officers' instructions, and officers had probable cause to arrest the decedent for simple assault or obstruction of officers, and it was reasonable to believe that the decedent posed a danger. Smith v. LePage, 834 F.3d 1285 (11th Cir. 2016).

Pushing officer trying to handcuff defendant was sufficient evidence. — Pushing the officer when the officer tried to handcuff a defendant was sufficient to support O.C.G.A. § 16-10-24(a) misdemeanor obstruction of an officer. McCarty v. State, 269 Ga. App. 299, 603 S.E.2d 666 (2004).

Shoving and failing to obey orders sufficient for conviction. — Defendant's conviction of obstruction of a law enforcement officer, O.C.G.A. § 16-10-24(a), was proper because the evidence showed that the defendant shoved a deputy and failed to obey orders made by the deputy in efforts to assist an animal control officer capture the defendant's dogs, who did not have their required rabies tags; it was unnecessary for the state to prove the underlying offense that caused the officers to act. Jarvis v. State, 294 Ga. App. 482, 669 S.E.2d 477 (2008).

Evidence was sufficient when defendant physically resisted police. — There was sufficient evidence to support defendant's conviction for obstructing an officer in violation of O.C.G.A. § 16-10-24(a) because defendant cursed at police when police arrived at the restaurant where defendant had been asked to leave, defendant laid on the floor of the restaurant and did not heed the officer's request to stand up, and continued to physically resist the officers as the officers handcuffed and arrested defendant. Lord v. State, 276 Ga. App. 209, 622 S.E.2d 887 (2005).

Evidence that the defendant refused to get into a patrol car and struggled with two officers, then told the defendant's spouse, "I will kill you when I get out of jail," supported the defendant's convictions of terroristic threats and obstructing or hindering a law enforcement officer under O.C.G.A. §§ 16-10-24(a) and

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16-11-37(a). For there to be a violation of O.C.G.A. § 16-11-37(a), a defendant did not have to have the immediate ability to carry out a threat. Reeves v. State, 288 Ga. App. 544, 654 S.E.2d 449 (2007).

Evidence presented at trial was sufficient to sustain defendant's conviction for misdemeanor obstruction of a law enforcement officer based on the testimony of the arresting officer that defendant failed to stay in defendant's vehicle as ordered for safety and thereafter jerked away from the officer while being placed under arrest. Council v. State, 291 Ga. App. 516, 662 S.E.2d 291 (2008).

Because defendant swung at a police officer's face with a loose handcuff and violently struggled during an attempted arrest, the evidence was sufficient to sustain a felony obstruction conviction under O.C.G.A. § 16-10-24(b). Smith v. State, 294 Ga. App. 579, 669 S.E.2d 530 (2008).

Evidence that a defendant gave a fake name and address, sped from the scene of a traffic stop, abandoned the truck, and continued to run from, hide from, and fight with police was more than sufficient to support convictions for misdemeanor obstruction of a police officer in violation of O.C.G.A. § 16-10-24(a) and fleeing or attempting to elude in violation of O.C.G.A. § 40-6-395(a). Lightsey v. State, 302 Ga. App. 294, 690 S.E.2d 675 (2010).

Evidence was sufficient to convict a defendant of attempting to remove a firearm from a police officer in violation of O.C.G.A. § 16-10-33(a) and obstruction of an officer in violation of O.C.G.A. § 16-10-24(b) because the defendant refused to comply with the officer's demands that the defendant show the defendant's hands, which were hidden under a pillow and under a bed, and the defendant lunged at an officer, grabbing the barrel of the officer's gun, and trying to take the gun away from the officer. The defendant also kicked and flailed at the officers, preventing the officers from handcuffing the defendant. Daniel v. State, 303 Ga. App. 1, 692 S.E.2d 682 (2010).

Acquittal of charge for which defendant was arrested did not invalidate conviction for felony obstruction. — When police officers had probable cause to arrest the defendant for simple assault, the fact that the defendant was ultimately acquitted of the simple assault did not invalidate the arrest or the defendant's charge and conviction for felony obstruction of law enforcement officers in violation of O.C.G.A. § 16-10-24(b) for resisting that arrest; evidence regarding the defendant's resistance of the officers as the officers lawfully tried to place the defendant in custody supported the defendant's conviction for felony obstruction. Lammerding v. State, 255 Ga. App. 606, 565 S.E.2d 908 (2002).

Status of off-duty deputy working as security guard. — Although a deputy sheriff, while working off-duty in a private position as a security guard, acted in a private capacity when the deputy/guard first approached the patron at a concert who was obstructing an aisle, the guard's capacity changed to that of a law enforcement officer discharging official duties when the patron became disorderly and threatened to break the peace. Carr v. State, 176 Ga. App. 113, 335 S.E.2d 622 (1985).

Status of off-duty police officer as security guard. — Defendant was guilty under O.C.G.A. § 16-10-24 for shooting a police officer who was "moonlighting" as a security guard and who intervened in a disturbance occurring on premises outside of the officer's immediate employment area's domain. Davis v. State, 263 Ga. 5, 426 S.E.2d 844, cert. denied, 510 U.S. 950, 114 S. Ct. 396, 126 L. Ed. 2d 344 (1993).

Although an officer was working an off-duty job providing security for a store, the officer was in the lawful discharge of the officer's official duties when the officer detained a defendant's girlfriend for shoplifting and also for purposes of charging the defendant with misdemeanor obstruction after the defendant disobeyed the officer by removing the girlfriend's car from the store parking lot. Stryker v. State, 297 Ga. App. 493, 677 S.E.2d 680 (2009).

Legally authorized persons supervising juveniles. — Because a team leader and a program manager were authorized to supervise defendant juveniles at a school and manage a wilderness pro-

gram, they were legally authorized persons protected by O.C.G.A. § 16-10-24(b); despite conflicts in the evidence, the trier of fact was authorized to resolve the issue of self defense against the juveniles. In the Interest of M. W., 296 Ga. App. 10, 673 S.E.2d 554 (2009).

Acquittal for simple battery does not negate absence of elements of obstruction. — Acquittal on simple battery charge showed that jury was not convinced beyond a reasonable doubt that appellant intentionally made physical contact of an insulting or provoking nature with deputy or that appellant physically harmed the deputy intentionally, but did not show that the jury necessarily found that appellant did not obstruct or hinder the deputy in performing official duty. Duncan v. State, 163 Ga. App. 148, 294 S.E.2d 365 (1982).

Simple battery is not a lesser included offense of felony obstruction, because it is a separate and independent offense wherein the intent is to make physical contact or cause physical harm. Pearson v. State, 224 Ga. App. 467, 480 S.E.2d 911 (1997).

Proof of physical fighting not required. — Fact that the indictment used the word "fighting" did not require the state to prove the defendant physically fought with the officer; it was enough to show the defendant verbally threatened the officer and acted in opposition to the officer's authority by wielding a tire iron. Jackson v. State, 213 Ga. App. 520, 444 S.E.2d 875 (1994).

Verbal threats of force or violence can obstruct an officer and authorize a felony conviction under O.C.G.A. § 16-10-24. Pearson v. State, 224 Ga. App. 467, 480 S.E.2d 911 (1997).

Proof of lawfulness of arrest. — Because the acts of obstruction committed by defendant consisted of attempts to resist arrest, the state was required to prove the lawfulness of the arrest in order to prove an essential element of the offense. Green v. State, 240 Ga. App. 774, 525 S.E.2d 154 (1999).

When an officer arrested the defendant based on information from another officer that the defendant had been arguing with his ex-girlfriend and broke glass at the ex-girlfriend's house, and the officer observed a fresh, bleeding wound on the defendant's hand, caused by his beating on the ex-girlfriend's door, the officer had probable cause to arrest the defendant for disorderly conduct, following which defendant's attack on the officer allowed a conviction for obstruction of a law enforcement officer. Additionally, it was not necessary to introduce the city ordinance on disorderly conduct in order to convict. Thompson v. State, 259 Ga. App. 518, 577 S.E.2d 839 (2003).

Evidence supported defendant's obstruction of a law enforcement officer conviction because the officers were acting within the lawful discharge of their duties in arresting defendant for theft under either O.C.G.A. § 16-8-2 or O.C.G.A. § 16-8-7(a) and defendant violently resisted the arrest; the warrantless arrest was supported by probable cause as: (1) an officer observed defendant banging on and breaking into a coin-operated air compressor in the middle of the night; (2) the officer recognized the air compressor as belonging to a gas station; (3) the officer had seen defendant at the gas station less than 24 hours earlier; and (4) defendant refused to provide information that would verify the claim that defendant had lawfully obtained the compressor. Cole v. State, 273 Ga. App. 259, 614 S.E.2d 883 (2005).

Summary judgment based on qualified immunity was properly denied in a 42 U.S.C. § 1983 case where a claim of unlawful arrest and a properly subsumed excessive force claim as to Fourth Amendment violations were sufficiently alleged; there were disputed issues as to whether a deputy and others engaged in a lawful discharge of official duties when they arrested the claimant pursuant to O.C.G.A. § 16-10-24(a), and there was no error in concluding that the deputy had a duty to intervene in an unlawful arrest. Lepone-Dempsey v. Carroll County Comm'Rs, 2005 U.S. App. LEXIS 28258 (11th Cir. Dec. 16, 2005) (Unpublished).

Underlying offense need not be shown. — It is not necessary for the state to prove the underlying offense that causes the officers to act; it is only necessary to prove the elements of the obstruc-

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tion statute, i.e., that the act constituting obstruction was knowing and willful, and that the officer was lawfully discharging his official duties. Whaley v. State, 175 Ga. App. 493, 333 S.E.2d 691 (1985).

It is unnecessary for the state to prove that defendant was guilty of criminal trespass in order to prove defendant guilty of obstruction of an officer. Kight v. State, 181 Ga. App. 874, 354 S.E.2d 202 (1987).

No merger of felony and misdemeanor counts. — Counts of felony obstruction of an officer and misdemeanor obstruction of an officer did not merge; with regard to the felony, the defendant struck and kicked one officer, and with regard to the misdemeanor, the defendant refused to comply with the commands of a second officer. Ojemuyiwa v. State, 285 Ga. App. 617, 647 S.E.2d 598 (2007).

Sufficiency of accusation. — Accusation charging defendant with "knowingly and wilfully [obstructing] officer ... in the lawful discharge of his official duties as a law enforcement officer in violation of [this section]" sufficiently apprised the defendant of the acts of which defendant was accused. Reed v. State, 205 Ga. App. 209, 422 S.E.2d 15, cert. denied, No. S92C1446, 1992 Ga. LEXIS 865 (1992).

In an action in which the state charged that defendant violated O.C.G.A. § 40-6-395(a) by willfully failing or refusing to bring defendant's vehicle to a stop or otherwise fled or attempted to elude a pursuing police officer when given a visual or audible signal to bring the vehicle to a stop, and the state charged that defendant violated O.C.G.A. § 16-10-24(a) in that defendant knowingly and willfully obstructed or hindered the officer in the lawful discharge of the officer's duties by refusing to follow the officer's reasonable and lawful commands, the offenses as charged in the case were not mutually exclusive as the offenses had different elements and neither guilty verdict legally or logically excluded the other. Golden v. State, 276 Ga. App. 538, 623 S.E.2d 727 (2005).

When resisting unlawful arrest constitutes defense. — Trial court did not err in preventing defense counsel from arguing the "illegality" of defendant's arrest, where defendant testified that defendant struck a police officer in defense of defendant's spouse, not in resistance to an unlawful arrest. Williams v. State, 196 Ga. App. 154, 395 S.E.2d 399 (1990).

Violation involving separate victims. — Upon conviction of defendant of three counts of misdemeanor obstruction of a law enforcement officer, since there were three separate victims, the trial court did not err in treating the counts as discrete offenses for sentencing. Denny v. State, 222 Ga. App. 674, 475 S.E.2d 698 (1996).

Refusal to provide identification to officer. — Jury could find that refusal to provide identification to officer might hinder execution of duties. Hudson v. State, 135 Ga. App. 739, 218 S.E.2d 905 (1975); Bailey v. State, 190 Ga. App. 683, 379 S.E.2d 816 (1989).

Since there was no evidence that defendant was unruly or threatened to breach the peace or even that the officer thought defendant was drunk, and defendant's sole offense was to refuse to give the defendant's name, there was no probable cause for arrest; the arrest was not lawful and defendant's physical resistance did not hinder the officer in the lawful discharge of the officer's official duties. Wagner v. State, 206 Ga. App. 180, 424 S.E.2d 861 (1992).

After an officer stopped a vehicle on the reasonable suspicion that the vehicle was being driven without a proper tag, and possibly for investigation of drug possession, refusal of defendant to provide identification in such circumstances could be the basis for prosecution under O.C.G.A. § 16-10-24 and the argument that detaining defendant under threat of such prosecution tainted the searches was without merit. Clark v. State, 243 Ga. App. 362, 532 S.E.2d 481 (2000).

Venue. — Because all evidence showed that obstruction offense occurred at the location of the stop and arrest in a particular city, but there was no evidence that the location was within Glynn County as charged, the state failed to prove beyond a reasonable doubt that venue for the offense was properly laid in Glynn County; accordingly, defendant's conviction for

misdemeanor obstruction of a law enforcement officer required reversal. Bell v. State, 291 Ga. App. 169, 661 S.E.2d 207 (2008).

Attack on correctional officer. — Inmate's obstruction of a correctional officer conviction was upheld on appeal, based on sufficient evidence describing how the officer was attacked and the extent of the officer's injuries suffered at the hand of the inmate, and testimony from one of the officer's responding to the altercation describing the altercation; hence, the evidence sufficiently supported the jury's rejection of the inmate's self-defense claim. Pugh v. State, 280 Ga. App. 137, 633 S.E.2d 439 (2006).

Use of conviction for impeachment. — In a parent's tort action arising from an accusation by store employees that the parent's child stole from the store, the trial court properly refused to strike evidence of an employee's conviction for violating O.C.G.A. § 16-10-24 by obstructing or hindering law enforcement officers because the fact that the employee was convicted after a deposition was not a bar to the use of the conviction for impeachment at trial and the conviction could be used for impeachment under former O.C.G.A. § 24-9-84.1(a)(1) (see now O.C.G.A. § 24-6-609) because the violation was a felony punishable by imprisonment for not less than one nor more than five years. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Prior similar act admissible. — Admission of similar transaction evidence in a case charging the defendant with possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), and obstructing or hindering law enforcement officers, O.C.G.A. § 16-10-24, was proper because in both the similar transaction and the incident leading to the charges being tried, the defendant was arrested in possession of cocaine and "sale-sized" baggies after seeking to avoid police; the trial court also gave an instruction that the similar transaction evidence was limited to the purpose of showing the defendant's bent of mind in committing the charged offenses. Cotton v. State, 297 Ga. App. 664, 678 S.E.2d 128 (2009).

Evidence of defendant's statements while resisting arrest admissible. — Defense counsel was not deficient for failing to object to an officer's testimony that while violently resisting arrest, the defendant repeatedly screamed, "I'm not going back to jail," as evidence of these statements demonstrated the defendant's intent to commit the crimes of obstructing and hindering law enforcement officers, and were not rendered inadmissible merely because the statements incidentally put the defendant's character at issue. Bubrick v. State, 293 Ga. App. 502, 667 S.E.2d 666 (2008).

Sufficient evidence for conviction. — See Manus v. State, 180 Ga. App. 658, 350 S.E.2d 41 (1986); Salter v. State, 187 Ga. App. 178, 369 S.E.2d 798 (1988); Patterson v. State, 191 Ga. App. 359, 381 S.E.2d 754 (1989); Powell v. State, 192 Ga. App. 688, 385 S.E.2d 772 (1989); Gordon v. State, 199 Ga. App. 704, 406 S.E.2d 110 (1991); Holloway v. State, 201 Ga. App. 204, 410 S.E.2d 799 (1991); Hall v. State, 201 Ga. App. 328, 411 S.E.2d 274, cert. denied, 201 Ga. App. 903, 411 S.E.2d 274 (1991); Herren v. State, 201 Ga. App. 509, 411 S.E.2d 552 (1991); Hendrix v. State, 202 Ga. App. 54, 413 S.E.2d 232 (1991), overruled on other grounds, Duke v. State, 205 Ga. App. 689, 423 S.E.2d 427 (1992); Hardwick v. State, 210 Ga. App. 468, 436 S.E.2d 676 (1993); Onwuzuruoha v. State, 217 Ga. App. 645, 458 S.E.2d 675 (1995); Imperial v. State, 218 Ga. App. 440, 461 S.E.2d 596 (1995); Miller v. State, 218 Ga. App. 606, 462 S.E.2d 630 (1995); Strickland v. State, 221 Ga. App. 516, 471 S.E.2d 576 (1996); Harris v. State, 222 Ga. App. 83, 473 S.E.2d 245 (1996); Cunningham v. State, 222 Ga. App. 740, 475 S.E.2d 924 (1996); Reddin v. State, 223 Ga. App. 148, 476 S.E.2d 882 (1996); Burk v. State, 223 Ga. App. 530, 478 S.E.2d 416 (1996); Brown v. State, 224 Ga. App. 42, 479 S.E.2d 454 (1996); Nunn v. State, 224 Ga. App. 312, 480 S.E.2d 614 (1997); Pearson v. State, 224 Ga. App. 467, 480 S.E.2d 911 (1997); Miller v. State, 226 Ga. App. 133, 486 S.E.2d 368 (1997); Youhoing v. State, 226 Ga. App. 475, 487 S.E.2d 86 (1997); Veal v. State, 226 Ga. App. 897, 487 S.E.2d 696 (1997); In re

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C.W., 227 Ga. App. 763, 490 S.E.2d 442 (1997); Basu v. State, 228 Ga. App. 591, 492 S.E.2d 329 (1997); Larkin v. State, 230 Ga. App. 129, 495 S.E.2d 605 (1998); Leckie v. State, 231 Ga. App. 760, 500 S.E.2d 627 (1998); Wilson v. State, 233 Ga. App. 688, 505 S.E.2d 774 (1998); Johnson v. State, 234 Ga. App. 218, 507 S.E.2d 13 (1998); Pinchon v. State, 237 Ga. App. 675, 516 S.E.2d 537 (1999); Nichols v. State, 238 Ga. App. 412, 519 S.E.2d 20 (1999); Richardson v. State, 239 Ga. App. 345, 521 S.E.2d 239 (1999); Russell v. State, 243 Ga. App. 378, 532 S.E.2d 137 (2000); Burge v. State, 243 Ga. App. 673, 534 S.E.2d 132 (2000); Wilder v. State, 243 Ga. App. 807, 534 S.E.2d 487 (2000); Patterson v. State, 244 Ga. App. 222, 535 S.E.2d 269 (2000); McLeod v. State, 245 Ga. App. 668, 538 S.E.2d 759 (2000); Shaw v. State, 247 Ga. App. 867, 545 S.E.2d 399 (2001); Brackins v. State, 249 Ga. App. 788, 549 S.E.2d 775 (2001); Evans v. State, 250 Ga. App. 70, 550 S.E.2d 118 (2001); Adams v. State, 263 Ga. App. 694, 589 S.E.2d 269 (2003); Bounds v. State, 264 Ga. App. 584, 591 S.E.2d 472 (2003); Hayes v. State, 281 Ga. App. 749, 637 S.E.2d 128 (2006).

Defendant not justified in resisting arrest after failing to pay fine. — Because defendant was convicted of a traffic offense and given an alternative sentence of a fine or jail term, defendant was not justified in resisting an officer's attempts to jail the defendant after defendant refused to pay the fine. Scott v. State, 227 Ga. App. 625, 490 S.E.2d 104 (1997).

Kicking and biting officers sufficient. — Evidence that defendant purposefully kicked and attempted to bite officers as they were assisting in the investigation of a shooting was sufficient to support a conviction. Stepherson v. State, 225 Ga. App. 219, 483 S.E.2d 631 (1997).

Differences in defendant's and officer's testimony for jury. — Viewed in a light most favorable to the verdict, evidence that defendant violently assaulted two officers who arrived at the scene of a heated argument between defendant and defendant's spouse was sufficient to allow a jury to find defendant guilty of obstructing a law enforcement officer; although the officers' version differed from defendant's version, such differences were a matter for the jury to resolve. Taylor v. State, 231 Ga. App. 73, 498 S.E.2d 552 (1998).

Resisting arrest in drug transaction. — Construed most favorably to the verdict, the evidence that defendant sold cocaine to undercover officers was sufficient to allow a rational jury to find defendant guilty of selling a controlled substance, selling a controlled substance within 1,000 feet of a public housing project, and resisting arrest. Mikell v. State, 231 Ga. App. 85, 498 S.E.2d 531 (1998).

Evidence was sufficient to convict defendant of robbery, aggravated assault, felony obstruction of a law enforcement officer, attempting to elude a law enforcement officer and driving under the influence of drugs. Chisholm v. State, 231 Ga. App. 835, 500 S.E.2d 14 (1998).

Words as sufficient for conviction. — Evidence was sufficient to support a conviction since the defendant told a police officer that "if he saw [him] again, he was going to pop a cap in his ass," which is street slang for shooting somebody. Arnold v. State, 249 Ga. App. 156, 545 S.E.2d 312 (2001).

Kicking sufficient for conviction. — Evidence that the handcuffed defendant kicked at the arresting officer and threatened to break the officer's leg was sufficient to convict defendant of felony obstruction, as the jury could have reasonably found that the threat of violence and attempts to kick the officer tended to hinder and impede the officer's efforts to secure defendant. Gillison v. State, 254 Ga. App. 232, 561 S.E.2d 879 (2002).

Throwing a bottle at officer. — Police officer's testimony that defendant threw a bottle at the officer while the officer was trying to protect other officers who were arresting a violent suspect was sufficient evidence to support defendant's conviction of obstruction of a law enforcement officer with violence in violation of O.C.G.A. § 16-10-24(b). Gibbs v. State, 255 Ga. App. 183, 564 S.E.2d 789 (2002).

Obstruction of officer with vehicle. — Evidence was sufficient to support defendant's conviction for felony obstruction

of a police officer as it showed that the officer, who was assisting the officer's brother in apprehending defendant after defendant was suspected of shoplifting, was in the lawful discharge of police duties, that defendant knew the officer was a police officer, and that defendant knowingly or willfully tried to injure the officer by driving defendant's vehicle while the officer was hanging half-in and half-out of the vehicle. Frayall v. State, 259 Ga. App. 286, 576 S.E.2d 654 (2003).

Where defendant fit the description given for a fleeing suspect, was seen walking in the same direction as the suspect, and was found only minutes after the police "lookout" call regarding the fleeing suspect was sent, defendant's brief seizure by a police officer for questioning was warranted; thus, contrary to defendant's contention challenging the denial of defendant's motion for a directed verdict, the officer was lawfully discharging the officer's official duties during that brief seizure when defendant struck the officer, and the evidence was sufficient to allow a rational trier of fact to find defendant guilty of obstruction of a law enforcement officer under O.C.G.A. § 16-10-24. Hamm v. State, 259 Ga. App. 412, 577 S.E.2d 85 (2003).

Obstruction of jail detention officers. — Defendant's convictions of obstruction of peace officers, O.C.G.A. § 16-10-24, were supported by sufficient evidence as the evidence indicated that defendant was involved in an altercation with jail detention officers in which an officer was physically injured. Williams v. State, 260 Ga. App. 286, 581 S.E.2d 313 (2003).

Obstruction by giving false information. — Evidence that defendant gave police a fictitious name and social security number when police questioned defendant about a burglary was sufficient to sustain defendant's conviction of burglary and obstruction of a law enforcement officer. Wilson v. State, 261 Ga. App. 576, 583 S.E.2d 243 (2003).

Defendant committed obstruction knowingly and willfully. — Evidence was sufficient to support defendant's conviction for obstruction of a law enforcement officer, as the state proved defendant committed the obstruction act knowingly and willfully, and that the officer was lawfully discharging the officer's duties at the time of the obstruction; the state was not also required to prove the underlying offense. Mai v. State, 259 Ga. App. 471, 577 S.E.2d 288 (2003).

Evidence was legally sufficient to support the five convictions against defendant for obstruction of a law enforcement officer as it showed defendant twice obstructed officers by fleeing, twice obstructed officers by offering to do violence to their persons, and once obstructed an officer by doing violence to the officer, all while committing crimes during a six-week period. Brown v. State, 259 Ga. App. 819, 578 S.E.2d 516 (2003).

Defendant obstructed an officer where defendant consented to the deputy's entry into the home and defendant knowingly and willfully grabbed the deputy's arm to stop the deputy from arresting another occupant of the dwelling. Schroeder v. State, 261 Ga. App. 879, 583 S.E.2d 922 (2003).

Testimony from an eyewitness at the scene that the eyewitness heard suspicious noises in the adjacent government offices, which were closed for business for the day, then saw defendant flee from police while removing items from defendant's pocket, when coupled with the discovery of 169 quarters which were found in the immediate vicinity of the tree where defendant was apprehended, the presence of tools at the crime scene, visible pry marks on the door which defendant attempted to open, and the destroyed gum ball machines, authorized the jury to infer that although defendant did not have the tools in defendant's possession, defendant used them to break into the offices, steal the money from the destroyed machines, and attempt to flee the police and avoid apprehension; thus, defendant's convictions for burglary, possession of tools for the commission of a crime, interference with government property, and obstruction of an officer were all affirmed. Harris v. State, 263 Ga. App. 866, 589 S.E.2d 631 (2003).

Striking an officer sufficient for obstruction. — There was no evidence that the arresting officer assaulted defendant

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first, but the appellate court concluded that the evidence was sufficient for a rational trier of fact to find defendant guilty beyond a reasonable doubt of obstruction of an officer by refusing to obey the officer's lawful commands and by striking the officer in the face. Dudley v. State, 264 Ga. App. 845, 592 S.E.2d 489 (2003).

Obstruction by a juvenile. — State's evidence was sufficient to find juvenile defendant committed criminal trespass, obstructed a police officer, and interfered with government property, and the juvenile court properly adjudicated the juvenile delinquent; the juvenile threw an egg at an officer's car damaging a plastic strip on the car window, broke at least two windows in the police substation, and obstructed an officer by fleeing after the officer was identified and ordered defendant to stop. In the Interest of M.M., 265 Ga. App. 381, 593 S.E.2d 919 (2004).

After the defendant was lawfully arrested for attempted possession of cocaine, the defendant was not justified in obstructing the police and resisting arrest, and thus the evidence supported the defendant's conviction for misdemeanor obstruction of justice under O.C.G.A. § 16-10-24(a). Massey v. State, 267 Ga. App. 482, 600 S.E.2d 437 (2004).

Evidence sufficient for felony obstruction of officer. — Evidence was sufficient to support the defendant's conviction for felony obstruction of an officer in violation of O.C.G.A. § 16-10-24(b) since the issue of whether the police officers provided inconsistent testimony was for the jury to decide, the defendant admitted that the defendant knew that the individual who defendant struck was a police officer, there was no requirement of proving actual injury as an element of the offense, and the officers were in lawful discharge of their duties at the time of the alleged obstruction because the officers had probable cause to arrest the defendant on a probation violation warrant; upon the officer approaching the defendant, the defendant fled and the defendant struggled, punched, and hit the officers as the officers tried to arrest the defendant. Phillips v. State, 267 Ga. App. 733, 601 S.E.2d 147 (2004).

Evidence sufficient for misdemeanor obstruction. — Evidence was sufficient to support a conviction of misdemeanor obstruction of a law enforcement officer because, when officers came to defendant's home to execute an arrest warrant on a third party, defendant tried to shut the door, but officers pushed the door open, forcing defendant into the front room, where defendant yelled at the officers, stood face-to-face with one officer while yelling, pointed a finger in the face of another officer, and defendant also blocked a hallway, forcing officers to move defendant to the side so that they could search the rest of the home and defendant was told several times to sit down and remain in one place, but was uncooperative. Cooper v. State, 270 Ga. App. 346, 606 S.E.2d 869 (2004), overruled on other grounds, Stryker v. State, 297 Ga. App. 493, 677 S.E.2d 680 (2009).

Misdemeanor obstruction of a law enforcement officer conviction was supported by sufficient evidence because: (1) defendant refused to cooperate when officers requested a pat down; (2) the officer then told defendant that defendant was under arrest for obstruction and ordered the defendant to turn around and place defendant's hands behind defendant's back; (3) defendant turned around, but did not follow the officer's instructions, choosing instead to grab a rail on top of the van; (4) defendant continued to hold on to the rail despite the officers' several requests for the defendant to place defendant's hands behind defendant's back; (5) the officer attempted to physically place defendant's hands behind defendant's back but could not do so because defendant continued to resist by keeping defendant's hands on the rail; and (6) a second officer showed defendant a can of pepper spray and, eventually, used the pepper spray on defendant, which caused defendant to chase the officer, and punch the officer. Wilson v. State, 270 Ga. App. 555, 607 S.E.2d 197 (2004).

Sufficient evidence supported defendant's conviction for misdemeanor obstruction of a police officer as the evidence showed that following the traffic stop of defendant's vehicle, defendant, who was

handcuffed, fled the scene, requiring that officers pursue and apprehend defendant. Kates v. State, 271 Ga. App. 326, 609 S.E.2d 710 (2005).

Evidence supported defendant's rape, aggravated sodomy, aggravated assault, criminal trespass, misdemeanor obstruction of a law enforcement officer, felony obstruction of a law enforcement officer, and possession of marijuana conviction because: (1) a victim testified that defendant choked her, slammed her around a room, and raped and sodomized her, then drank a beer, took her BC powder packets, and a cell phone, and left; (2) defendant fled from the police, kicked two officers, and had marijuana, BC packets, and a cell phone on his person; (3) defendant's DNA matched the DNA on the beer can; (4) a nurse testified that the victim's bruise was consistent with strangulation; and (5) a doctor testified that the victim's injuries were consistent with rape and sodomy. Lewis v. State, 271 Ga. App. 744, 611 S.E.2d 80 (2005).

Because the defendant ignored the officers' requests to provide identification, and instead engaged in a fight and wrestling match with the officers in an attempt to get to a brother's residence, while a search warrant was being executed, the evidence was sufficient to support the defendant's conviction for misdemeanor obstruction in violation of O.C.G.A. § 16-10-24(a); it was not an inconsistent verdict that the jury acquitted the defendant of felony obstruction charges under O.C.G.A. § 16-10-24(b) as the jury could have found that the conduct did not rise to the level of "offering and/or doing violence" to the officer's person. Jones v. State, 276 Ga. App. 66, 622 S.E.2d 425 (2005).

Refusal to allow entrance into home sufficient. — Evidence supported defendant's conviction of misdemeanor obstruction of a law enforcement officer because: (1) an officer went to a residence to perform a safety check after a 9-1-1 hang-up call was received from the residence; (2) comments made to the officer by a child trying to climb out of a front window led the officer to believe that a domestic violence incident might be in progress inside the residence; (3) the officer entered the home and saw defendant, who uttered profanities, walked toward the officer and ordered the officer out of the house, and the officer then stepped outside the house; (4) after another officer arrived, the officers told defendant that they needed to enter the house to investigate the call, but defendant refused to allow the officers into the house; and (5) eventually, the officers were required to arrest defendant to enter the house. Berrian v. State, 270 Ga. App. 582, 608 S.E.2d 540 (2004).

Obstruction by failing to remain in vehicle. — Evidence that defendant repeatedly exited defendant's vehicle against the officer's orders to remain seated in the vehicle was sufficient to sustain defendant's conviction for misdemeanor obstruction. Turner v. State, 274 Ga. App. 731, 618 S.E.2d 607 (2005).

Because the defendant acknowledged hunting doves in an open field without a hunting license and "fading" into the woods when the rangers approached, the rangers had a reasonable and articulable suspicion that illegal activity had occurred; consequently, the defendant's Fourth Amendment rights against unreasonable search and seizure were not violated and the trial court properly denied the defendant's motion for a new trial on the charges of illegal hunting and obstruction. Sharp v. State, 275 Ga. App. 487, 621 S.E.2d 508 (2005).

Fighting with officer during arrest sufficient. — Defendant's conviction of felony obstruction of a law enforcement officer was supported by sufficient evidence as the defendant kicked an officer in the groin and violently struggled with the officer while the officer was placing the defendant under arrest. Mayfield v. State, 276 Ga. App. 544, 623 S.E.2d 725 (2005).

Intentional or accidental striking of officer. — Evidence supported the defendant's conviction for malice murder, burglary, and hindering a police officer because the defendant was at the back door of the mother's home without authorization, and fled when an officer tried to handcuff the defendant, the defendant's mother was found dead from massive head injuries, and the mother's rings, a lawn mower blade, and a hatchet were

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found on the defendant's person or stashed in bags outside the home. Smith v. State, 279 Ga. 172, 611 S.E.2d 1 (2005).

Evidence indicating that while officers were attempting to arrest the defendant in a domestic dispute, the defendant, after intentionally striking the victim one last time, intentionally punched one of the officers and then, intentionally or accidentally, struck the other with an elbow, was sufficient to support convictions for felony obstruction of a law enforcement officer and simple battery. Pinkston v. State, 277 Ga. App. 432, 626 S.E.2d 626 (2006).

Striking and kicking sufficient for conviction. — Evidence was sufficient to support the defendant's O.C.G.A. § 16-10-24(b) conviction for felony obstruction of a police officer after the officer tried to arrest the defendant on an outstanding warrant and after the officer was identified and ordered defendant to stop, the defendant struck and kicked the police officer as the defendant attempted to flee. Panzner v. State, 273 Ga. App. 868, 616 S.E.2d 201 (2005).

Defendant's conviction for misdemeanor obstruction was supported by sufficient evidence which established that when an officer activated the patrol vehicle's flashing blue lights, giving a visual signal for the defendant to remain stopped, the defendant fled from the scene and led the officers on a chase until defendant was apprehended and arrested. Prather v. State, 279 Ga. App. 873, 633 S.E.2d 46 (2006).

Obstruction of prison guards. — Obstruction of a prison guard conviction was upheld on appeal as sufficient evidence was provided by the prison-guard witnesses; thus, a psychologist's testimony regarding the defendant's competency did not influence the outcome of the trial. Griffin v. State, 281 Ga. App. 249, 635 S.E.2d 853 (2006).

Given the evidence provided by law enforcement that: (1) the defendant hindered and obstructed one officer in the lawful discharge of that officer's duties while the officer went to check on the welfare of the defendant's wife; (2) the defendant's act of resisting the other officer while that officer was arresting the defendant; and (3) the defendant's act of breaking off the interior door handle of the patrol vehicle and forcing the vehicle's window off the window's frame, the defendant's convictions for both felony and misdemeanor obstruction of an officer and a felony count of interfering with government property were upheld on appeal. Meeker v. State, 282 Ga. App. 77, 637 S.E.2d 806 (2006).

Given evidence from an ensuing police officer identifying the defendant as the driver of the vehicle stopped, and because the jury was the judge of the credibility of the witnesses presented at trial, and was authorized to reject the defendant's alibi defense, sufficient evidence was presented to support the defendant's convictions for reckless driving, failure to maintain a lane, driving with defective equipment, fleeing or attempting to elude a police officer, and obstruction of a police officer. Daniel v. State, 282 Ga. App. 291, 638 S.E.2d 430 (2006).

Despite the defendant's challenge to the sufficiency of the evidence, specifically, that no evidence showed the malice element of a cruelty-to-children offense, and that the evidence failed to show the defendant harmed the police officer to support an obstruction offense, convictions on those offenses were upheld on appeal as: (1) the severity of the bite marks inflicted on the child victim allowed the court to infer malice; (2) actual harm to the officer was not an essential element of an obstruction charge; and (3) the defendant's act of swinging at the officer's face during an effort to resist arrest supported an obstruction. Sampson v. State, 283 Ga. App. 92, 640 S.E.2d 673 (2006).

Spitting on officer sufficient. — Evidence supported the defendant's conviction of obstructing or hindering a law enforcement officer by spitting on the officer; although the defendant denied spitting and argued that only two witnesses had testified otherwise, a fact could be established by one witness, and credibility was a jury matter. Dixon v. State, 285 Ga. App. 211, 645 S.E.2d 692 (2007).

Evidence adduced at trial authorized any rational trier of fact to find the defendant guilty beyond a reasonable doubt of

felony obstruction of law enforcement officers in violation of O.C.G.A. § 16-10-24(b) because a police officer testified that the defendant interfered with the officer's attempts to interview the defendant's daughter and her mother after the officer was dispatched to the defendant's home in response to a domestic disturbance call, that the defendant ordered the officer to leave, and that the defendant approached the officer and took up a fighting stance; the officer was forced to wrestle the defendant to the ground in order to handcuff the defendant, and the defendant spat into the officer's face as the officer was putting the defendant in the patrol car. Andrews v. State, 307 Ga. App. 557, 705 S.E.2d 319 (2011).

Testimony of the arresting officer that defendant attempted to spit on the arresting officer was sufficient to support a charge of misdemeanor obstruction. Williams v. State, 307 Ga. App. 675, 705 S.E.2d 906 (2011).

Obstruction of prison guards. — When a deputy testified that the defendant resisted the deputy's efforts to break up a prison fight, then turned on the deputy, punched the deputy, and swung at the deputy repeatedly, injuring the deputy, there was sufficient evidence of mutiny in a penal institution and felony obstruction of an officer; the trial court was authorized under O.C.G.A. § 16-2-6 to infer from the circumstances that the defendant both knowingly and willfully obstructed the deputy by the use of violence and intended to cause the deputy serious bodily injury by striking the deputy with a fist, and under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), it could rely solely on the deputy's account of the events. Butler v. State, 284 Ga. App. 802, 644 S.E.2d 898 (2007).

Because sufficient evidence was presented that the defendant physically assaulted an off-duty sheriff's officer prior to arrest and continued to resist and obstruct the officer's official duties thereafter, the defendant was properly denied an acquittal and a new trial; moreover, given that the trial court properly charged the jury on the obstruction offense, explaining that a person committed the offense by knowingly and willfully obstructing or hindering a law enforcement officer in the lawful discharge of that officer's official duties, nothing beyond such was required. Helton v. State, 284 Ga. App. 777, 644 S.E.2d 896 (2007).

Because: (1) the trial court did not err in admitting certain identification evidence alleged to be hearsay, as testimony relative to the identification was not offered for the truth of the matter asserted; (2) the defendant's requested instruction was not tailored to the facts and was potentially confusing; and (3) the defendant's character was not placed in issue, convictions of armed robbery, hijacking a motor vehicle, and obstruction were all upheld. Jennings v. State, 285 Ga. App. 774, 648 S.E.2d 105 (2007), cert. denied, No. S07C1576, 2007 Ga. LEXIS 667 (Ga. 2007).

Given evidence that the defendant attempted to forcefully resist being handcuffed and threatened the officers as the officers were exercising the officers' lawful duties, that evidence was sufficient to find the defendant guilty of obstructing a law enforcement officer. Robinson v. State, 288 Ga. App. 219, 653 S.E.2d 810 (2007).

Given the evidence of the defendant's effort to resist law enforcement officers, which hindered the officers in carrying out the officers' duties, the defendant's misdemeanor obstruction of a law enforcement officer convictions were upheld on appeal as supported by sufficient evidence. Lipsey v. State, 287 Ga. App. 835, 652 S.E.2d 870 (2007).

Because the testimony from the deputy named in the challenged count charging the defendant with felony obstruction testified that the defendant was making a scene, hollering, cussing, carrying on, kicking, screaming, resisting arrest, pulling away, and attempting to kick someone in the crowd, which was confirmed by the testimony of a second deputy, sufficient evidence was presented to support the felony obstruction charge. Owens v. State, 288 Ga. App. 771, 655 S.E.2d 244 (2007), cert. denied, 2008 Ga. LEXIS 274 (Ga. 2008).

Providing false identification as obstruction. — Given evidence that the defendant: (1) knowingly provided the officer with a false name and date of birth;

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(2) failed to provide written identification when asked to do so; and (3) refused to respond when the police repeatedly knocked and telephoned, the defendant's obstruction conviction, and hence, the denial of a directed verdict of acquittal, were supported by the facts. Moreover, the trial court properly excluded a letter that the defendant claimed explained or justified the aforementioned actions as irrelevant. Williams v. State, 289 Ga. App. 402, 657 S.E.2d 556 (2008).

Because direct eyewitness testimony from three eyewitnesses supported a finding that defendant struck a correctional officer while that officer was attempting to handcuff defendant, this evidence was sufficient to sustain defendant's conviction of felony obstruction of an officer. Evans v. State, 290 Ga. App. 746, 660 S.E.2d 841 (2008).

Sufficient evidence supported convictions of aggravated assault, aggravated assault on a peace officer, obstruction of a law enforcement officer, interference with government property, and criminal trespass after the defendant admitted obstructing officers and damaging a patrol car and the victim's vehicle; although the defendant denied assaulting the victim and the responding officer, the jury was authorized to reject the defendant's testimony. Gartrell v. State, 291 Ga. App. 21, 660 S.E.2d 886 (2008).

Providing false identification as obstruction. — Evidence was sufficient to sustain the defendant's conviction for giving false identifying information to and obstruction of law enforcement officers engaged in the lawful discharge of their official duties, O.C.G.A. §§ 16-10-24 and 16-10-25. When defendant gave false identifying information to officers after a traffic stop, the defendant provided the officers with probable cause for arrest; it followed that the evidence was sufficient to sustain the defendant's conviction. Smith v. State, 294 Ga. App. 761, 669 S.E.2d 735 (2008).

Testimony of an arresting officer that the defendant acted as if the defendant were going to flee and generally refused to cooperate with police, and that this conduct hindered the officer in making the arrest was sufficient to convict the defendant of obstruction of an officer. Frasier v. State, 295 Ga. App. 596, 672 S.E.2d 668 (2009).

With regard to a defendant's convictions for obstruction of a police officer and other related crimes, there was sufficient evidence to support the convictions based on the single testimony of the officer involved. Because it was the function of the jury to determine the credibility of witnesses and weigh any conflict in the evidence, the testimony of a single witness is generally sufficient to establish a fact; therefore, the testimony of the police officer who was involved in the altercation with the defendant was sufficient evidence for the jury to convict the defendant. Whatley v. State, 296 Ga. App. 72, 673 S.E.2d 510 (2009).

Threats as sufficient for obstruction. — As a defendant offered to do violence to police officers when the defendant threatened to kill the officers while being searched, the evidence was sufficient to find the defendant guilty of felony obstruction of an officer. Steillman v. State, 295 Ga. App. 778, 673 S.E.2d 286 (2009).

An officer arrested the defendant, whose vehicle was stopped on a road, for refusing to comply with the officer's order to leave the area. The evidence was sufficient to convict the defendant of obstruction of a police officer in violation of O.C.G.A. § 16-10-24(a) as the state proved that the officer was engaged in the lawful discharge of the officer's duties with evidence that the officer was responding to a 9-1-1 call reporting that the defendant had followed the frightened caller's vehicle to the caller's home. West v. State, 296 Ga. App. 58, 673 S.E.2d 558 (2009).

An officer's testimony that the defendant struggled with both the officer and a second officer at a jail before the officers could restrain the defendant was sufficient to support the defendant's conviction of obstructing the non-testifying officer. Mackey v. State, 296 Ga. App. 675, 675 S.E.2d 567 (2009).

Obstruction by failing to come out of home. — Defendant was a suspect in a

shooting. Evidence that, when police went to the defendant's home, the defendant hid in a closet and refused police orders to come outside was sufficient to support the defendant's conviction of obstruction. Spencer v. State, 296 Ga. App. 828, 676 S.E.2d 274 (2009).

Failure to obey officer's orders. — Defendant's conviction for misdemeanor obstruction was supported by the evidence which showed that after learning that the defendant's girlfriend had been detained for shoplifting and being told by the off-duty police officer who had detained the girlfriend that the defendant should not move the girlfriend's car as the officer needed the car for the officer's investigation, the defendant had a whispered conversation with the girlfriend after which the defendant had a friend remove the car from the parking lot, and that it took over an hour for the defendant to have the car returned as directed by the officer; the state was not required to prove forcible resistance or a threat of violence. Stryker v. State, 297 Ga. App. 493, 677 S.E.2d 680 (2009).

With regard to a defendant's convictions for improper lane change, serious injury by vehicle while driving under the influence, and misdemeanor obstruction of an officer, there was sufficient evidence to support the convictions based on the state disproving the defendant's affirmative defense of accident that the bad weather and alleged malfunctioning brakes caused the single-car crash, an officer's testimony that the defendant attempted to leave the scene several times, and the evidence of the defendant's vehicle passenger suffering a severe injury to the left eye after the eye was forced out of the eye socket. It was unnecessary to show that the passenger's eye was permanently rendered useless. Wells v. State, 297 Ga. App. 153, 676 S.E.2d 821 (2009).

Obstruction of prison guards. — Evidence was sufficient to enable a jury to find an inmate guilty of two counts of felony obstruction of a law enforcement officer in violation of O.C.G.A. § 16-10-24 beyond a reasonable doubt because, during a prison disciplinary report hearing, the inmate became loud and agitated and two officers were instructed to remove the inmate from the hearing room and place the inmate in a nearby holding cell; the inmate resisted by pulling from side to side, and then resisted being placed in the holding cell by repeatedly kicking the officers, causing the officers to wrestle the inmate to the floor to subdue the inmate. Cobble v. State, 297 Ga. App. 423, 677 S.E.2d 439 (2009).

Evidence supported the defendant's conviction for obstruction of an officer as officers shouted to the defendant to show the officers the defendant's hands, but the defendant did not respond. The defendant resisted when officers tried to put handcuffs on the defendant and the officers were forced to wrestle the defendant to the ground before the officers could handcuff the defendant. Dulcio v. State, 297 Ga. App. 600, 677 S.E.2d 758 (2009).

Evidence that after being arrested, the defendant head-butted an officer in the face and yelled death threats at the officer was sufficient to convict the defendant of obstruction of an officer, O.C.G.A. § 16-10-24(a), and terroristic threats, O.C.G.A. § 16-11-37(a). Bradley v. State, 298 Ga. App. 384, 680 S.E.2d 489 (2009).

Officer who responded to a 9-1-1 call regarding a victim being harassed by the defendant testified that the officer repeatedly instructed the defendant to calm down, to stop being loud and irate, and to step back from where the officer was interviewing the victim; the defendant was arrested for not complying. As the jury was entitled to find that the defendant's refusal to obey the officer's commands hindered or obstructed the officer, the evidence was sufficient to support the defendant's conviction of obstruction of a law enforcement officer. Mayhew v. State, 299 Ga. App. 313, 682 S.E.2d 594 (2009), cert. denied, No. S09C2059, 2009 Ga. LEXIS 786 (Ga. 2009).

Use of rake to obstruct officer. — Evidence supported the defendant's felony conviction for obstruction of an officer under O.C.G.A. § 16-10-24(b). The defendant offered to do violence to the person of an officer by swinging a rake at the officer in a threatening manner when the officer sought to approach the defendant to have the defendant move from blocking the officer's vehicle. Wilcox v. State, 300 Ga. App. 35, 684 S.E.2d 108 (2009).

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Evidence was sufficient to support a defendant's conviction for felony obstruction of a law enforcement officer in violation of O.C.G.A. § 16-10-24(b): the defendant, incarcerated in a county jail, repeatedly refused to obey a corrections officer's commands to take only one food tray at meal time, struck the officer, wrestled the officer to the floor, and choked the officer until the defendant was tasered. Williams v. State, 301 Ga. App. 731, 688 S.E.2d 650 (2009).

Evidence that the defendant, age 35, met a girl online whom the defendant believed was 15, that the defendant made numerous comments about how the defendant could get in trouble or go to jail, that the defendant engaged in sexually explicit conversations and directed the child to pornography sites showing black men having sex with white women, that the defendant drove to an arranged meeting place, and, that, when officers appeared, the defendant fled, was sufficient to convict defendant of violating O.C.G.A. §§ 16-4-1 (attempt), 16-6-4 (child molestation), 16-6-5 (enticement of a child), and 16-10-24 (obstruction). Smith v. State, 306 Ga. App. 301, 702 S.E.2d 211 (2010).

Evidence was sufficient to show beyond a reasonable doubt that defendant obstructed an officer in the lawful discharge of the officer's official duties in violation of O.C.G.A. § 16-10-24(a) when the arresting officer observed defendant waiving a weapon around inside a bar, near a waitress and eventually near the officer personally, defendant disobeyed the officer's commands to drop the weapon and only complied when the officer engaged the defendant with a threat of force, and when the officer attempted to arrest defendant for disorderly conduct, defendant resisted. Moreover, defendant's behavior was threatening enough to compel the officer to draw a weapon and to order defendant to lie on the floor, facts from which the court could have inferred the officer was in reasonable fear of injury and thus had probable cause to arrest defendant for disorderly conduct, despite the lack of testimony from the bar owner or the waitress. Zeger v. State, 306 Ga. App. 474, 702 S.E.2d 474 (2010).

Elbowing an officer as obstruction. — Officer's second-tier Terry frisk of defendant did not constitute an illegal detention considering all of the circumstances including the defendant's repeated refusal to keep the defendant's hands away from the pockets of the defendant's baggy clothes at the officer's request, defendant's nervous demeanor, the presence of two companions, and the officer's knowledge of violent crime in the area. Therefore, the defendant was not justified in elbowing the officer and resisting arrest. Santos v. State, 306 Ga. App. 772, 703 S.E.2d 140 (2010).

Trial court did not err in convicting the defendant of obstruction of an officer in violation of O.C.G.A. § 16-10-24 because the evidence authorized the jury to find that the defendant had obstructed or hindered two officers; there was evidence that although the defendant had been informed of the purpose of the encounter, the defendant persisted in refusing to provide a driver's license, assumed a physically aggressive stance, and refused to comply with commands to stop fighting or resisting, and there also was evidence that after being informed that the defendant was under arrest for obstruction, the defendant physically resisted the arrest. Edwards v. State, 308 Ga. App. 569, 707 S.E.2d 917 (2011).

Evidence was sufficient to permit a rational trier of fact to find the defendant guilty of felony obstruction of a law enforcement officer in violation of O.C.G.A. § 16-10-24(b) because the defendant bit two officers and kicked one several times in the abdomen as the officers were attempting to arrest the defendant; so, the evidence clearly established that the defendant was "offering or doing violence" to the officers at the time of the obstruction. White v. State, 310 Ga. App. 386, 714 S.E.2d 31 (2011).

Defendant's conviction for misdemeanor obstruction of a law enforcement officer, in violation of O.C.G.A. § 16-10-24(a), was supported by sufficient evidence as the defendant was advised by an officer that the defendant was under arrest, whereupon the defendant resisted the officer's handcuffing attempts, ran from the officer, and failed to comply with the directive to

stop. Jenkins v. State, 310 Ga. App. 811, 714 S.E.2d 410 (2011).

Evidence that police responded to a home to investigate a crime after speaking to an injured man, that the officer saw the defendant standing with the defendant's hands concealed in a baggy jacket and instructed the defendant, whom the officer thought might be armed, to display the defendant's hands, and that the defendant failed to comply and attacked the officer supported the defendant's conviction for felony obstruction of an officer. Alvarez v. State, 312 Ga. App. 552, 718 S.E.2d 884 (2011).

Evidence was sufficient for the jury to find defendant guilty of obstructing a police officer, in violation of O.C.G.A. § 16-10-24(a), because defendant impeded the officer in the discharge of the officer's duties, and the defendant hindered the officer not just by the defendant's arguments and obstinacy, but also by placing both defendant's and the officer's safety at risk by refusing to return to defendant's vehicle during a traffic stop. Timberlake v. State, 315 Ga. App. 693, 727 S.E.2d 516 (2012).

Evidence was sufficient to support the defendant's conviction for felony obstruction of an officer because the record showed that the defendant pushed the officer and that the officer suffered scratches on a hand and knee as a result. Arnold v. State, 315 Ga. App. 798, 728 S.E.2d 317 (2012).

Evidence was sufficient to support the defendant's conviction for obstruction of an officer as the officer testified that the officer was unable to complete the search of the defendant prior to the defendant's arrest because the defendant had been swinging at the officer's head and the officer needed to gain control of the situation; there was no indication that the officer was acting unlawfully. Brown v. State, 320 Ga. App. 12, 739 S.E.2d 32 (2013).

Defendant's conviction for obstruction was supported by evidence the defendant fled and thereby knowingly and wilfully hindered police officers in the lawful discharge of the officers' official duties. Hughes v. State, 323 Ga. App. 4, 746 S.E.2d 648 (2013).

Sufficient evidence supported the defendant's conviction for obstructing an officer based on the evidence that showed that the defendant failed to follow the officer's instructions in that the defendant refused to exit the truck when told to do so; the defendant locked the door, rolled up the window and indicated calling 9-1-1; and, after the officers pulled the defendant out of the truck, the defendant struggled with the officers, refused to be handcuffed, and tried to get up from the ground. Taylor v. State, 326 Ga. App. 27, 755 S.E.2d 839 (2014).

Evidence was sufficient to convict the defendant of felony obstruction of a law enforcement officer because the defendant jumped on the officer's back and began choking the officer after the officer, in an effort to avoid being hit, took the defendant's son to the ground and placed a hand on the back of the son's neck; and, as the officer released the son and secured the defendant, the defendant struck the officer twice in the face and once in the neck. McMullen v. State, 325 Ga. App. 757, 754 S.E.2d 798 (2014).

Based on evidence that the defendant's conduct in hollering and cursing outside the house prevented an officer from continuing to photograph the scene and going inside to collect evidence and caused another officer to stop the officer's activities inside the house and come outside to assist, a rational trier of fact could have concluded that the defendant knowingly and willingly hindered the officer in the lawful charge of duties for purposes of a conviction for obstruction of an officer. Johnson v. State, 330 Ga. App. 75, 766 S.E.2d 533 (2014).

Evidence was sufficient to convict the defendant of felony obstruction, possession of a knife during the commission of a felony, and disorderly conduct because the defendant slammed the refrigerator door twice, breaking items stored in the door; the victim called 9-1-1 seeking assistance for a domestic dispute in progress; when one of the responding officers told the defendant that the defendant would have to leave the house as the victim did not want the defendant living there, the defendant told the officer that the officer could not make the defendant leave; and,

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when the officer unsnapped a taser from the taser's holster and approached the defendant, the defendant grabbed a knife with an eight-inch blade and threatened the officers with the knife. Owens v. State, 329 Ga. App. 455, 765 S.E.2d 653 (2014).

Officer's testimony that the defendant's heel grazed from the officer's knee cap down the officer's leg to the ankle, leaving a red mark and causing the officer's leg to sting, supported the defendant's conviction for obstruction of a law enforcement officer. Glispie v. State, 335 Ga. App. 177, 779 S.E.2d 767 (2015), aff'd in part and rev'd in part, 300 Ga. 128 793 S.E.2d 381 (Ga. 2016).

Evidence was sufficient to convict the defendant of three counts of felony obstruction because a jury could reasonably conclude that, when the defendant cried out immediately after the single shot was fired by the defendant's grandfather, the defendant was encouraging the grandfather to discharge the revolver for a second time at or near the officers before they had succeeded in returning to safety, and was thus offering violence to those officers; and, when the defendant shouted out immediately after the single shot was fired, the arresting deputies were forced to extinguish their flashlights so as to prevent being seen and shot by the grandfather, thus hindering their efforts to secure the defendant's arrest. Hoglen v. State, 336 Ga. App. 471, 784 S.E.2d 832 (2016).

Evidence was sufficient to convict the defendant of misdemeanor obstruction of a law enforcement officer because, by resisting the officers as the officers performed the officers' duty of investigating the domestic disturbance call, the defendant obstructed or hindered the officers. Haygood v. State, 338 Ga. App. 189, 789 S.E.2d 404 (2016).

Evidence insufficient to support conviction. — Since the defendant made neither a verbal nor physical threat of violence to the officer but was merely obnoxious and contemptuous, the evidence was insufficient to support a conviction for obstructing a law enforcement officer. Moccia v. State, 174 Ga. App. 764, 331 S.E.2d 99 (1985).

Since there was no evidence showing that defendant's arrest was lawful, defendant had the right to resist with all force necessary for that purpose, and defendant's conviction for violating O.C.G.A. § 16-10-24 was not authorized. Woodward v. State, 219 Ga. App. 329, 465 S.E.2d 511 (1995).

Although the defendant fled at the sight of the police, there was no evidence that the officers called out to the defendant to halt or that defendant failed to submit to a show of lawful authority; therefore, conviction under O.C.G.A. § 16-10-24 was not warranted. Porter v. State, 224 Ga. App. 276, 480 S.E.2d 291 (1997).

When the evidence established that the officer never had the opportunity to turn on the officer's emergency lights or siren when following defendant's vehicle, to issue a verbal command within earshot of defendant, or otherwise to communicate a command for defendant to halt, there was insufficient evidence to support a conviction for obstruction of an officer. Phillips v. State, 269 Ga. App. 619, 604 S.E.2d 520 (2004).

Evidence was insufficient to convict the defendant of obstructing a law enforcement officer; the officer, though following the defendant in a marked patrol car, had never activated the car's emergency lights or siren or attempted to stop the defendant, and once the defendant stopped the car the defendant was driving and ran, the officer did not order the defendant to stop. Williams v. State, 285 Ga. App. 190, 645 S.E.2d 676 (2007).

Evidence did not support the defendant's conviction of obstruction of a law enforcement officer since the only evidence of obstruction was that the defendant did not open the door to police officers fast enough when the officers they came to the defendant's house to look for a missing juvenile; there was no evidence that the defendant knew of an ongoing investigation or that the defendant was attempting "knowingly and willfully" to impede such an investigation. Beckom v. State, 286 Ga. App. 38, 648 S.E.2d 656 (2007).

On a summary judgment motion, under 42 U.S.C. § 1983 excessive force plaintiff arrestee's version of the facts, taking the

facts in the light most favorable to the arrestee as a non-movant, no reasonable officer could have believed that probable cause existed to arrest plaintiff for a violation of O.C.G.A. § 16-10-24(a) because: (1) ten minutes elapsed since the alleged aggressor in the domestic violence dispute had been handcuffed and placed in the patrol car; (2) the arrestee patiently waited after approaching an officer standing outside for a few minutes before making a request that law enforcement vehicles be moved and then requested to speak with the officer in charge; (3) throughout the exchange the arrestee maintained a calm voice and demeanor; and (4) the arrestee did not impede or hinder the officer in the performance of the officer's police duties; though the arrestee may have refused to obey an order to leave the scene by attempting to approach another officer, an arrest for obstruction could not be predicated upon such a refusal to obey a command to clear the general area entirely beyond the zone of police operation, which, in the circumstances described, was clearly an overly broad and unreasonable demand that exceeded reasonable law enforcement procedure and needs. Reese v. Herbert, 527 F.3d 1253 (11th Cir. 2008).

An officer testified that if the officer determined, after completing the officer's consent frisk, that the defendant had no weapons, the defendant was free to leave. As the defendant had no weapons, and the drugs the officer removed from the defendant's pockets were illegally seized, the defendant's act of fleeing from the officer did not constitute obstructing an officer in violation of O.C.G.A. § 16-10-24(a). Brown v. State, 293 Ga. App. 564, 667 S.E.2d 410 (2008).

Conviction of obstruction of a law enforcement officer, O.C.G.A. § 16-10-24(a), was not supported by sufficient evidence under circumstances in which a deputy investigating an armed robbery stopped the defendant's car, but then chased the defendant's passenger who had exited the car and fled, and the defendant then drove away from the scene; although the defendant drove away after being stopped, the encounter with the deputy apparently had ended and the defendant had not been instructed to remain on the scene. Further, the defendant had not been made aware that the defendant was going to be arrested for the robbery being investigated by the deputy. Connelly v. State, 298 Ga. App. 223, 679 S.E.2d 790 (2009).

Evidence was insufficient to support the defendant's misdemeanor conviction for obstruction of an officer because the defendant was charged with knowingly and wilfully obstructing and hindering a law enforcement officer in the lawful discharge of official duties by running from the officer as the officer attempted to take the defendant into custody; although the evidence established that the officer saw the defendant running and followed the defendant in a marked patrol car, the officer's own testimony established that the defendant stopped immediately upon seeing the police vehicle and that the defendant immediately complied with the officer's order to stop. Lackey v. State, 286 Ga. 163, 686 S.E.2d 112 (2009).

Evidence was not sufficient as to the obstruction count as there was no evidence that the officer commanded, rather than requested, that the defendant stop. The evidence established only that the officer asked the defendant to come over here to talk to the officer, which was not a command. Thomas v. State, 322 Ga. App. 734, 746 S.E.2d 216 (2013).

Probable cause not shown to arrest. — After an arrestee followed an officer to the police car after a traffic stop, leaned over the hood with a pen in hand ready to write the officer's name down, and was arrested, the wrongful arrest claim survived summary judgment because the officer lacked arguable probable cause to arrest the arrestee for misdemeanor obstruction under O.C.G.A. § 16-10-24(a) since a reasonable officer could not have interpreted the conduct as a knowing and willful act of hindrance or obstruction or as a threat to officer safety. Turner v. Jones, No. 10-14547, 2011 U.S. App. LEXIS 3760 (11th Cir. Feb. 23, 2011) (Unpublished).

When the defendant refused to answer an officer's questions and instead exercised the right to walk away, the officer lacked probable cause to justify an arrest for obstruction, even after the defendant

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began running because the defendant had the right to avoid the first-tier police-citizen encounter. Ewumi v. State, 315 Ga. App. 656, 727 S.E.2d 257 (2012).

When an arrestee allegedly called an officer "a fucking asshole" and was arrested, the officer was properly denied summary judgment based on qualified immunity as to the arrestee's claims under the Fourth Amendment because the officer did not have arguable probable cause to arrest the arrestee for obstructing an officer since the arrestee was within the arrestee's rights to hold the arrestee's arms stiffly because the officer did not have probable cause to arrest the arrestee for disorderly conduct. Merenda v. Tabor, No. 12-12562, 2013 U.S. App. LEXIS 2351 (11th Cir. Feb. 1, 2013) (Unpublished).

Rule of lenity not applicable. — Because the defendant could commit felony obstruction only if the defendant offered violence against an officer while the officer was in the lawful discharge of the officer's official duties and felony obstruction could occur regardless of whether it involved the use of an offensive weapon likely to result in serious bodily injury, unlike aggravated assault under O.C.G.A. § 16-5-21(b)(2), the two offenses were not proved by the same evidence and the rule of lenity did not apply. Gordon v. State, 337 Ga. App. 64, 785 S.E.2d 900 (2016).

Sentence not unconstitutional. — Defendant's sentence for obstruction of a law enforcement officer of 12 months confinement to be served on probation following 60 days of confinement, $1,500 in fines, 100 hours of community service, and a mental health evaluation was within the statutory limits set by O.C.G.A. §§ 16-10-24(b), 40-2-20(c), and 40-6-10(b), and did not shock the conscience. Smith v. State, 311 Ga. App. 184, 715 S.E.2d 434 (2011).

Potential to facilitate obstruction of officer justified enhanced sentence. — U.S. Sentencing Guidelines Manual § 2K2.1(b)(6)(B) enhancement was proper as the defendant concealed a gun in the defendant's pants during the police encounter, and attempted to reach for the gun when the gun fell; the offense was "in connection with" another felony offense as the possession had a potential to facilitate obstruction of an officer with violence under O.C.G.A. § 16-10-24(b) when the defendant struggled with the officers over the vehicle. United States v. Linker, No. 12-12864, 2013 U.S. App. LEXIS 4014 (11th Cir. Feb. 27, 2013) (Unpublished).

Jury Instructions

Jury instruction on "lawful discharge of official duties". — Trial court did not err in not defining further for the jury the phrase "lawful discharge of official duties" as that term was set forth in O.C.G.A. § 16-10-24 as defendant did not make a specific request that the phrase be defined, and the trial court fully and accurately charged the jury on the statutory definition of the crime charged. Poe v. State, 254 Ga. App. 767, 563 S.E.2d 904 (2002).

When the evidence showed completion of the greater offense of felony obstruction of an officer, the defendant was not entitled to a charge on the lesser included offense of misdemeanor obstruction of an officer. Fricks v. State, 210 Ga. App. 562, 436 S.E.2d 752 (1993).

Instruction on offering to do or doing violence. — Because a count of the indictment stated that defendant committed obstruction "by offering or doing violence" to an officer "by hitting him on his face," the count charged both means of committing obstruction under O.C.G.A. § 16-10-24 and the court did not err in charging both means to the jury. Hambrick v. State, 242 Ga. App. 550, 529 S.E.2d 381 (2000).

In defendant's trial for felony obstruction of an officer, in violation of O.C.G.A. § 16-10-24, the state did not introduce evidence that the defendant did violence to the officer on the date in question other than by striking the officer with a motor vehicle and, as such, no due process violation occurred in the giving of the jury instructions because there was no reasonable probability that the jury convicted the defendant for obstructing the police officer in a manner not specified in the indictment. Fairwell v. State, 311 Ga. App. 834, 717 S.E.2d 332 (2011).

Jury charge on term "obstruction". — Trial court did not abuse the court's discretion in limiting the recharge of the jury to the statutory definition of "obstruction" rather than giving a more comprehensive instruction as there was no indication that the jury was confused or left with an erroneous impression of the law. Arsenault v. State, 257 Ga. App. 456, 571 S.E.2d 456 (2002).

Failure to charge jury on the felony offense of obstruction. — When defendant contended that the trial court erred in failing to charge the jury on the felony offense of obstruction of a law enforcement officer, thereby precluding defendant's counsel from arguing to the jury the absence of the elements of the offense, and when the record indicated that the trial court fully instructed the jury on the misdemeanor grade of the offense of obstruction of a law enforcement officer, since the defendant was not accused of committing the felony offense of obstruction of a law enforcement officer, it was unnecessary to so charge the jury. Williams v. State, 192 Ga. App. 350, 385 S.E.2d 28 (1989).

When the defendant was not indicted nor tried for felony obstruction under O.C.G.A. § 16-10-24, and there was no evidence to support such a charge in law or in fact, the trial court did not err in refusing to deny defendant's request to give a charge thereon. Martinez v. State, 222 Ga. App. 497, 474 S.E.2d 708 (1996); Stewart v. State, 243 Ga. App. 860, 534 S.E.2d 544 (2000).

Reckless conduct charge not warranted as lesser-included offense in felony obstruction prosecution. — Given that the state adduced sufficient evidence establishing all the elements of the offense of felony obstruction in violation of O.C.G.A. § 16-10-24, the trial court did not err in refusing the defendant's request to charge on the lesser-included offense of reckless conduct. Helton v. State, 284 Ga. App. 777, 644 S.E.2d 896 (2007).

Charge on misdemeanor obstruction was proper. — Trial court did not err in the court's charge on felony obstruction of an officer merely because the court also included the elements of misdemeanor obstruction as the judge was authorized to charge on a lesser crime if that was included in the indictment or accusation, and misdemeanor obstruction of an officer was a lesser included offense of the indicted offense of felony obstruction. Pugh v. State, 280 Ga. App. 137, 633 S.E.2d 439 (2006).

Charge on the right to resist an unlawful arrest was not required since the jury was instructed, among other things, that the state must prove beyond a reasonable doubt that the officer was acting in the lawful discharge of official duties. Green v. State, 240 Ga. App. 774, 525 S.E.2d 154 (1999).

On appeal from convictions entered against the defendant for misdemeanor battery on a police officer, and misdemeanor obstruction of that officer entered against the defendant's parent, a charge that one could resist an unlawful arrest with reasonably necessary force was not required in either case as such was covered by the charge on the elements of the offense; moreover, as to the battery charge, because the defendant testified to never touching the officer, there was no requirement to charge on this affirmative defense. Curtis v. State, 285 Ga. App. 298, 645 S.E.2d 705 (2007).

Charge on forcible resistance not required. — Trial court properly refused to give a jury instruction that was an incorrect statement of the law. Forcible resistance was not required in a misdemeanor obstruction of an officer case. Wilcox v. State, 300 Ga. App. 35, 684 S.E.2d 108 (2009).

Instruction not authorized by evidence. — In a prosecution for obstructing a law enforcement officer, it was reversible error for the trial court to give the jury a definition of "offering violence" containing a reference to threats of violence since there was no evidence that defendant used verbal threats. Strobhert v. State, 241 Ga. App. 354, 526 S.E.2d 863 (1999).

Trial court did not err in denying the defendant's request to charge the jury on misdemeanor obstruction as a lesser included offense of felony obstruction of a law enforcement officer, O.C.G.A. § 16-10-24(b), because such a charge was not warranted by the evidence; the evidence plainly showed the completion of

Jury Instructions (Cont'd)

the greater offense, obstruction that involved "offering or doing violence" to an officer. White v. State, 310 Ga. App. 386, 714 S.E.2d 31 (2011).

Trial court did not err by rejecting the defendant's written request for a jury charge on misdemeanor obstruction of a law enforcement officer as a lesser included offense of felony obstruction because the evidence established that the defendant committed felony obstruction or no crime at all, thus, there was no evidentiary basis for the charge on the lesser included offense. Watson v. State, 328 Ga. App. 832, 763 S.E.2d 122 (2014).

Requested jury instruction not warranted. — Because the defendant was neither indicted nor tried for felony obstruction of justice, the court did not err in refusing to give the requested charge that an accomplice was the one who was present at the commission of a crime, aiding and abetting the perpetrator, or an accessory before the fact; moreover, the court's own charge, which included pattern charges on parties to a crime, knowledge, mere presence at the scene of a crime, and mere association with others committing a crime, substantially covered the same legal principles as the requested charge. Buruca v. State, 278 Ga. App. 650, 629 S.E.2d 438 (2006).

In an armed robbery prosecution, defense counsel was not deficient in not requesting jury charges on the law of abandonment and accessory after-the-fact as there was no evidence that the defendant abandoned the crime before an overt act occurred or that the defendant was an accessory after the fact rather than a party to the robbery. Bihlear v. State, 295 Ga. App. 486, 672 S.E.2d 459 (2009).

Trial court did not err in refusing to charge the jury that "Something more than mere disagreement or remonstrance must be shown." The charge as a whole adequately covered the principle of law and allowed the defendant to argue that the defendant should have been acquitted because the state proved only disagreement or remonstrance. Kendrick v. State, 324 Ga. App. 45, 749 S.E.2d 45 (2013).

Requested jury instruction on an unlawful arrest claim incorrectly stated the law; a statement that a detainee was not required to respond to an officer's questions was contrary to Georgia law as failure to identify oneself could constitute obstruction. Williams v. Hudson, No. 14-12254, 2015 U.S. App. LEXIS 3785 (11th Cir. Mar. 11, 2015) (Unpublished).

Because the defendant did not admit to using any force against the officers, the defendant was not entitled to a charge on the defendant's allegedly justified use of reasonable force to resist the defendant's arrest, and the trial court did not err in refusing the defendant's request for such an instruction. Haygood v. State, 338 Ga. App. 189, 789 S.E.2d 404 (2016).

Failure to instruct on lesser-included offense did not amount to ineffective assistance. — Because trial counsel made a reasonable decision to pursue an all-or-nothing defense strategy based on counsel's review of the evidence, the appellate court found no merit in the defendant's claim that trial counsel provided ineffective assistance due to failure to request a charge on misdemeanor obstruction as a lesser included offense of felony obstruction of an officer. Ingram v. State, 317 Ga. App. 606, 732 S.E.2d 456 (2012).

Charge on misdemeanor obstruction was not warranted. — Because the defendant decided to pursue an "all or nothing" defense, the trial court did not err in making the decision to not charge the jury on misdemeanor obstruction, sua sponte, as such would have undermined that defense. Owens v. State, 288 Ga. App. 771, 655 S.E.2d 244 (2007), cert. denied, 2008 Ga. LEXIS 274 (Ga. 2008).

Since the evidence showed completion of the greater offense of felony obstruction, the trial court did not err in failing to charge on misdemeanor obstruction as a lesser included offense. Carlson v. State, 329 Ga. App. 309, 764 S.E.2d 890 (2014).

Charge on entire section not error. — Defendant's trial counsel was not ineffective in failing to object to a jury charge on the entire obstruction code section, O.C.G.A. § 16-10-24, although there was no evidence that the defendant offered or threatened violence. The trial court instructed the jury to consider the evidence

in light of the charges in the indictment. Williams v. State, 309 Ga. App. 688, 710 S.E.2d 884 (2011).

Curative instruction regarding use of other acts evidence. — Trial court did not err in failing to grant a mistrial based on the prosecutor's allegedly impermissible argument because the trial court immediately reminded the jury of the limited purpose for which the jury could consider the other acts evidence regarding two earlier instances in which the defendant obstructed a law enforcement officer and that reminder supplemented the other points in the trial when the trial court instructed the jury as to the limited purpose of the other acts evidence. Green v. State, 339 Ga. App. 263, 793 S.E.2d 156 (2016).

Jury question. — Whether actions hinder or impede officers in carrying out assigned duties is for jury determination. Hudson v. State, 135 Ga. App. 739, 218 S.E.2d 905 (1975).

Given the sheriff's uncontradicted statement that the sheriff ordered the streets cleared in the face of large scale rioting, and the evidence that the arrestees — later plaintiffs in a civil rights action — were among those who refused to obey the order and were arrested for obstructing the efforts of police officers to restore order, a jury issue was presented on whether their conduct hindered or impeded the sheriff in the lawful discharge of the sheriff's official duties. Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985).

Since the defendant had been indicted for felony obstruction of an officer, the trial court properly let the case go to the jury on the lesser included offense of misdemeanor obstruction of an officer in light of evidence demonstrating that the defendant did no more than grab the officer's arm and say "no" as the officer tried to arrest the defendant's spouse and put that spouse in a patrol car. Williams v. State, 196 Ga. App. 154, 395 S.E.2d 399 (1990).

Whether or not the evidence established that actions taken by the defendant hindered or obstructed the officer in making the arrest is for the jury to decide. Cason v. State, 197 Ga. App. 308, 398 S.E.2d 292 (1990), overruled on other grounds, Duke v. State, 205 Ga. App. 689, 423 S.E.2d 427 (1992).

In a case involving charges of obstruction of an officer and attempting to elude, a motion for directed verdict was properly denied where the officer was investigating the defendant for driving under the influence and the defendant did not respond to the officer's orders and forced the officer to get a warrant to effectuate an arrest. Reed v. State, 205 Ga. App. 209, 422 S.E.2d 15, cert. denied, No. S92C1446, 1992 Ga. LEXIS 865 (1992).

Although the defendant's testimony deviated significantly from the officers', such differences were matters for the jury to resolve. Jones v. State, 242 Ga. App. 357, 529 S.E.2d 644 (2000).

OPINIONS OF THE ATTORNEY GENERAL

Maintenance of records by Georgia Crime Information Center regarding violations of O.C.G.A. § 16-10-24. See 1976 Op. Att'y Gen. No. 76-33.

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Obstructing Justice, § 52 et seq.

Am. Jur. Proof of Facts. — Excessive Force by Police Officer, 21 POF3d 685.

C.J.S. — 67 C.J.S., Obstructing Justice or Governmental Administration, §§ 4, 18.

ALR. — Dispute over custody as affecting charge of obstructing or resisting arrest, 3 A.L.R. 1290.

Scienter as element of offense of assaulting, resisting, or impeding federal officer [18 USC § 111], 10 A.L.R.3d 833.

Criminal liability for obstructing process as affected by invalidity or irregularity of the process, 10 A.L.R.3d 1146.

What constitutes obstructing or resisting an officer, in the absence of actual force, 44 A.L.R.3d 1018.

Right to resist excessive force used in

accomplishing lawful arrest, 77 A.L.R.3d 281.

Use of citizens' band (CB) radios as violation of state law, 87 A.L.R.3d 83.

Performance of public duty by off-duty police officer acting as private security guard, 65 A.L.R.5th 623.

What constitutes obstructing or resisting officer, in absence of actual force, 66 A.L.R.5th 397.

Defenses to state obstruction of justice charge relating to interfering with criminal investigation or judicial proceeding, 87 A.L.R.5th 597.

Criminal and civil liability of civilians and police officers concerning recording of police actions, 84 A.L.R.6th 89.

16-10-24.1. Obstructing or hindering firefighters.

(a) As used in this Code section, the term "firefighter" means:

(1) Any person who is employed as a professional firefighter on a full-time basis for at least 40 hours per week by any county, municipal, or state fire department when such person has responsibility for preventing and suppressing fires, protecting life and property, enforcing municipal, county, or state fire prevention codes, or enforcing any law or ordinance pertaining to the prevention or control of fires;

(2) Any volunteer firefighter as the term "volunteer firefighter" is defined by paragraph (7) of Code Section 47-7-1 as said paragraph (7) exists on January 1, 1988; or

(3) Any person employed as a professional firefighter on a full-time basis for at least 40 hours per week by a person or corporation which has a contract with a municipality or county to provide fire prevention and fire-fighting services for such municipality or county when such person has responsibility for preventing and suppressing fires, protecting life and property, enforcing municipal or county fire prevention codes, or enforcing any municipal or county ordinances pertaining to the prevention and control of fires.

(b) Except as otherwise provided in subsection (c) of this Code section, a person who knowingly and willfully obstructs or hinders any firefighter in the lawful discharge of the firefighter's official duties is guilty of a misdemeanor.

(c) Whoever knowingly and willfully resists, obstructs, or opposes any firefighter in the lawful discharge of the firefighter's official duties by offering or doing violence to the person of such firefighter is guilty of a felony and shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years. (Code 1981, § 16-10-24.1, enacted by Ga. L. 1988, p. 301, § 1; Ga. L. 1991, p. 755, § 1; Ga. L. 2002, p. 660, § 4; Ga. L. 2002, p. 1259, § 11.)

16-10-24.2. Obstructing or hindering emergency medical technicians or emergency medical professionals; criminal penalty.

(a) As used in this Code section, the term:

(1) "Emergency medical professional" means any person performing emergency medical services who is licensed or certified to provide health care in accordance with the provisions of Chapter 11, Chapter 26, or Chapter 34 of Title 43.

(2) "Emergency medical technician" means any person who has been certified as an emergency medical technician, cardiac technician, paramedic, or first responder pursuant to Chapter 11 of Title 31.

(b) Except as otherwise provided in subsection (c) of this Code section, a person who knowingly and willfully obstructs or hinders any emergency medical technician, any emergency medical professional, or any properly identified person working under the direction of an emergency medical professional in the lawful discharge of the official duties of such emergency medical technician, emergency medical professional, or properly identified person working under the direction of an emergency medical professional is guilty of a misdemeanor.

(c) Whoever knowingly and willfully resists or obstructs any emergency medical technician, any emergency medical professional, or any properly identified person working under the direction of an emergency medical professional in the lawful discharge of the official duties of the emergency medical technician, emergency medical professional, or properly identified person working under the direction of an emergency medical professional by threatening or doing violence to the person of such emergency medical technician, emergency medical professional, or properly identified person working under the direction of an emergency medical professional is guilty of a felony and shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years. (Code 1981, § 16-10-24.2, enacted by Ga. L. 1994, p. 331, § 1; Ga. L. 1996, p. 835, § 1; Ga. L. 1999, p. 81, § 16.)

JUDICIAL DECISIONS

Evidence sufficient to support conviction. — Defendant violated O.C.G.A. § 16-10-24.2 by threatening EMT's, ordering them to leave a public street, and otherwise preventing them from providing medical treatment to a reportedly poisoned child even though it was later determined that the child did not need medical attention. Strickland v. State, 221 Ga. App. 516, 471 S.E.2d 576 (1996).

16-10-24.3. Obstructing or hindering persons making emergency telephone calls.

Any person who verbally or physically obstructs, prevents, or hinders another person with intent to cause or allow physical harm or injury to another person from making or completing a 9-1-1 telephone call or a call to any law enforcement agency to request police protection or to report the commission of a crime is guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not to exceed $1,000.00 or imprisonment not to exceed 12 months, or both. (Code 1981, § 16-10-24.3, enacted by Ga. L. 1998, p. 608, § 1; Ga. L. 2005, p. 660, § 1/HB 470.)

JUDICIAL DECISIONS

Intent. — Requisite intent "to cause or allow physical harm or injury to another person" cannot necessarily be inferred from the circumstances surrounding the placement of a 9-1-1 emergency call. A 9-1-1 emergency call may involve a request for protection of property or the report of a property crime, and if no personal physical harm or injury is involved, a defendant's act of obstructing or hindering a 9-1-1 call is not a crime under the statute. State v. Harris, 292 Ga. App. 211, 663 S.E.2d 830 (2008).

State not required to show that defendant intended harm to person making call. — O.C.G.A. § 16-10-24.3 did not require that defendant intend to cause or allow harm to the person hindered from making a 9-1-1 call, in this case the victim's friend; it was sufficient that defendant intended harm to the victim. Brown v. State, 288 Ga. 364, 703 S.E.2d 609 (2010), cert. denied, 131 S. Ct. 2454, 179 L. Ed. 2d 1221, 2011 U.S. LEXIS 3708 (U.S. 2011).

Sufficiency of accusation. — Trial court properly granted a defendant's motion in arrest of judgment after the defendant was convicted of obstructing/hindering an emergency telephone call. The accusation did not allege the requisite intent, which could not necessarily be inferred from the circumstances surrounding the placement of a 9-1-1 call or from the other counts of the accusation. State v. Harris, 292 Ga. App. 211, 663 S.E.2d 830 (2008).

Evidence sufficient for conviction. — Evidence was sufficient to support defendant's conviction of obstruction of an emergency telephone call in violation of O.C.G.A. § 16-10-24.3, including the required specific intent to cause or allow physical harm or injury to the victim since: (1) defendant entered the victim's residence screaming and began tearing up the house and destroying the victim's things; (2) the victim testified that the victim was afraid; (3) when the victim attempted to call 9-1-1, defendant grabbed the phone, pushed the victim, and snatched the phone from the wall; (4) defendant smashed the telephone to pieces; and (5) the victim was able to complete a 9-1-1 call on the victim's cellular telephone only because defendant's mother was holding defendant back, keeping defendant away from the victim. Izzo v. State, 265 Ga. App. 143, 592 S.E.2d 915 (2004).

Evidence was sufficient to support a conviction of interference with a 9-1-1 call because the tape of the 9-1-1 calls revealed that there were at least eight calls made in rapid succession between the 9-1-1 dispatch center and the victim's residence, in the calls in which the victim actually spoke to the dispatcher, the victim was trying to report defendant and request police protection when the phone call was abruptly interrupted. Pitts v. State, 272 Ga. App. 182, 612 S.E.2d 1 (2005), aff'd, 280 Ga. 288, 627 S.E.2d 17 (2006).

Sufficient evidence supported convictions of aggravated assault, criminal trespass, and obstruction of a 9-1-1 call as the defendant became irate after a demand for a refund was denied by a store, a store manager told the defendant to leave, but the defendant refused, when the manager picked up the phone to call 9-1-1, the defendant grabbed the phone and slammed the phone on the counter, the defendant pushed the bag of brass plates the defendant was trying to return in the manager's face, cutting the manager, and punched the manager in the face. Hooker v. State, 278 Ga. App. 382, 629 S.E.2d 74 (2006).

Defendant's convictions for robbery, battery, false imprisonment, and obstruction of an emergency telephone call were all upheld on appeal as no error flowed from: (1) the trial court's admission of an audio recording of the attack on the victim and order granting the state two hearings regarding the admissibility of that recording; (2) the trial court's failure to give a curative instruction after the prosecutor injected a personal experience with domestic violence into the closing argument; (3) the trial court's failure to strike the testimony of similar transaction witnesses and issue a curative instruction; and (4) the trial court's order restricting the counsel's closing argument. Ellis v. State, 279 Ga. App. 902, 633 S.E.2d 64 (2006).

Aggravated battery and obstruction or hindering an emergency telephone call convictions were upheld on appeal, despite a change in the victim's story, as the injuries sustained were consistent with the victim's original statements, foundational requirements supported the admission of hearsay statements, the victim's actual written inconsistent statement was properly withheld from the jury, and a mistrial was unwarranted. Buchanan v. State, 282 Ga. App. 298, 638 S.E.2d 436 (2006).

Evidence that showed that during an argument with the victim, the defendant dragged the victim off a couch by the victim's hair and threw a table at the victim, that the victim fled on foot and attempted to make a 9-1-1 call, that the defendant pursued the victim in the defendant's truck, reached the victim, and held a knife to the victim, retreating only after another vehicle drove up, was sufficient to convict the defendant of obstruction of a 9-1-1 call. Stone v. State, 296 Ga. App. 305, 674 S.E.2d 31 (2009).

Evidence insufficient for conviction. — Evidence was insufficient to support defendant's conviction for hindering an emergency telephone call when the victim testified that when grabbing the cell phone which defendant broke in half, the victim was not thinking of calling or attempting to call 9-1-1, but was looking for something to throw. The victim's prior inconsistent statement about the phone was inadmissible hearsay due to lack of foundation and thus was not substantive evidence. Feagin v. State, 317 Ga. App. 543, 731 S.E.2d 778 (2012).

Conviction reversed due to Sixth Amendment violation. — Admission of a victim's statements to a deputy violated defendant's Sixth Amendment rights as defendant was not able to cross-examine the victim; as the victim's statements were the only real evidence supporting the terroristic threats and obstructing a person making an emergency call convictions, those convictions were reversed. Miller v. State, 273 Ga. App. 761, 615 S.E.2d 843 (2005).

Cutting or otherwise disabling a telephone line is a "physical" act under O.C.G.A. § 16-10-24.3. — Evidence was sufficient to convict defendant of obstructing an emergency call, a violation of O.C.G.A. § 16-10-24.3, because the victim's outside telephone line was intentionally cut, and defendant told the victim that the victim could not call 9-1-1 because defendant had cut the line. Williams v. State, 268 Ga. App. 384, 601 S.E.2d 833 (2004).

16-10-24.4. Obstructing or hindering park ranger.

(a) As used in this Code section, the term "park ranger" means any person, other than a law enforcement officer and other individuals

covered under Code Section 16-10-24, however designated, who is employed by the state, any political subdivision of the state, or the United States for the enforcement of park rules and regulations.

(b) Except as otherwise provided in subsection (c) of this Code section, a person who knowingly and willfully obstructs or hinders any park ranger in the lawful discharge of his or her official duties shall be guilty of a misdemeanor.

(c) Whoever knowingly and willfully resists, obstructs, or opposes any park ranger in the lawful discharge of his or her official duties by offering or doing violence to the person of such park ranger shall be guilty of a felony and, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years. (Code 1981, § 16-10-24.4, enacted by Ga. L. 2013, p. 642, § 1/HB 126.)

16-10-25. Giving false name, address, or birthdate to law enforcement officer.

A person who gives a false name, address, or date of birth to a law enforcement officer in the lawful discharge of his official duties with the intent of misleading the officer as to his identity or birthdate is guilty of a misdemeanor. (Code 1933, § 26-2506, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1989, p. 224, § 1.)

Law reviews. — For article, "Constitutional Criminal Litigation," see 32 Mercer L. Rev. 993 (1981). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

JUDICIAL DECISIONS

Analysis

General Consideration
Application

General Consideration

Applicability. — O.C.G.A. § 16-10-25 is not written in terms of misleading only law enforcement or peace officers of Georgia, but also applies to any law enforcement or peace officer. Rucker v. State, 191 Ga. App. 108, 381 S.E.2d 91 (1989).

Construction with O.C.G.A. § 16-10-20. — When, after viewing the transaction between the defendant and the police officer as a whole, it was apparent that the same evidence could be used to prove both the offense of giving a false name and the offense of making a false statement, the appeals court reversed the defendant's felony conviction and remanded the case for sentencing under the misdemeanor statute. Dawkins v. State, 278 Ga. App. 343, 629 S.E.2d 45 (2006).

Application

Lesser included offenses. — Trial court properly entered judgments of conviction after defendant was found guilty of five counts of forgery in the first degree as the evidence was sufficient to support those convictions; the five forgeries pertained to the false name on defendant's driver's license and the false name defendant signed on four documents filled out when defendant was arrested; the offense of giving a law enforcement officer a false

name, a misdemeanor, was not a lesser included offense of forgery of the first degree. Quaweay v. State, 274 Ga. App. 657, 618 S.E.2d 707 (2005).

Giving name other than that on official documents. — Since the defendant testified to using both names "in a legal content" but admitted the name the defendant gave police officers was not the name found on the defendant's birth certificate, social security card, or former driver's license, evidence was sufficient to sustain the jury's finding that the defendant violated former Code 1933, § 26-2506 (see now O.C.G.A. § 16-10-25). Johnson v. State, 149 Ga. App. 273, 253 S.E.2d 889 (1979).

When defendant was stopped in an airport by a Drug Enforcement Administration's (DEA) agent, who was identified as a law enforcement officer, and the defendant showed the agent an airline ticket and told the agent that the name on the ticket was defendant's, but within one minute or less produced a driver's license with defendant's correct name, the evidence was sufficient to support defendant's conviction for the offense of giving a false name to a law enforcement officer. Hunter v. State, 190 Ga. App. 24, 378 S.E.2d 352 (1989).

Evidence supported defendant's conviction, after defendant gave police defendant's father's first name as defendant's last name, regardless of whether Indian custom recognized such name usage, where there was ample evidence from which the court could have concluded that defendant meant to deceive the police by giving that name. Rajappa v. State, 200 Ga. App. 372, 408 S.E.2d 163 (1991).

Evidence was sufficient to support conviction under O.C.G.A. § 16-10-25, where defendant responded to police officer's legitimate inquiry with one name, but produced a temporary identification card containing another. Hopkins v. State, 209 Ga. App. 337, 433 S.E.2d 423 (1993).

Evidence that defendant gave the arresting officer a false name, that defendant presented no evidence that the name defendant provided to the officer appeared on defendant's official birth certificate, social security card, or driver's license, and that defendant's true name was used in another case in a different county was sufficient to support defendant's conviction for giving a false name. Richardson v. State, 256 Ga. App. 30, 567 S.E.2d 693 (2002).

Failure to produce proof of adoption. — Trial court properly denied a defendant's motion for a new trial, and there was sufficient evidence to support defendant's conviction for giving a false name to the police officers who arrested defendant as defendant's assertion that defendant accidentally gave defendant's birth name, as opposed to defendant's adopted name, was not proven as defendant provided no evidence of a birth certificate showing the name actually given to the officers; defendant presented no evidence that the name given was ever used by defendant at any other time; and defendant failed to produce any evidence that defendant was adopted. Griffin v. State, 291 Ga. App. 618, 662 S.E.2d 171 (2008).

Giving two different names. — Police had probable cause to arrest defendant for the offense of giving a false name with the intent to mislead the officers where defendant gave two different names upon being asked for identification. Stanley v. State, 213 Ga. App. 95, 443 S.E.2d 633 (1994).

Giving false name in course of unlawful arrest does not violate section. — When an officer was attempting to arrest suspects on a battery charge without a warrant, for a battery not committed in the officer's presence, the conviction arising out of false names given to the officer in the course of such attempted arrest must be reversed. Scott v. State, 123 Ga. App. 675, 182 S.E.2d 183 (1971).

Giving two different addresses in one month insufficient probable cause for arrest. — Magistrate lacked probable cause to issue a warrant for a defendant's arrest for providing false information to a law enforcement officer in violation of O.C.G.A. § 16-10-25; the fact that the defendant gave law enforcement officers two different addresses over a one-month period was not evidence that one of the addresses was false when the defendant gave the address. Anderson v. State, 305 Ga. App. 463, 699 S.E.2d 793 (2010).

Application (Cont'd)

Officer not lawfully discharging official duties. — When a police officer's roadside inquiry into defendant's name and date of birth was not based upon articulable facts indicating that defendant was engaged in criminal activity, the officer was not lawfully discharging the officer's official duties as required for conviction of a violation of O.C.G.A. § 16-10-25. Holt v. State, 227 Ga. App. 46, 487 S.E.2d 629 (1997).

Evidence of prior acts. — Defendant's conviction for giving a false name was not supported by evidence that on three different occasions defendant gave different names to a law enforcement officer since such evidence did not support even an inference that defendant gave a false name to an officer on the occasion of defendant's arrest for shoplifting. Agony v. State, 226 Ga. App. 330, 486 S.E.2d 625 (1997).

Offense involves dishonesty or false statement admissible in child molestation trial. — Defendant's prior convictions for felony forgery, O.C.G.A. § 16-9-1(a), misdemeanor theft by deception, O.C.G.A. § 16-8-3(a), and misdemeanor giving a false name to a law enforcement officer, O.C.G.A. § 16-10-25, were all less than 10 years old and involved dishonesty or false statements. Therefore, those convictions were admissible in the defendant's child molestation trial under former O.C.G.A. § 24-9-84.1(b) (see now O.C.G.A. § 24-6-609). Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82 (2011).

Sufficiency of accusation. — Trial court erred in granting the defendant's motion in arrest of judgment since the accusation in effect incorporated the terms of O.C.G.A. § 16-10-25. State v. Howell, 194 Ga. App. 594, 391 S.E.2d 415 (1990).

Severance of charges. — Severance of charges of theft by shoplifting and giving a false name was not required when the false name charge arose from the circumstances of defendant's arrest for shoplifting. Agony v. State, 226 Ga. App. 330, 486 S.E.2d 625 (1997).

Refusal to furnish identification not probable cause as to offense. — Police officer does not have probable cause to believe a suspect has violated Georgia law by falsely identifying himself when the suspect refuses to furnish identification. The refusal to furnish identification may create suspicion that the suspect has used a false name, but falls far short of probable cause. United States v. Brown, 731 F.2d 1491 (11th Cir.), modified on other grounds, 743 F.2d 1505 (1984).

Giving false name and date of birth provided probable cause for arrest. — Defendant's act of giving the officer a false name and date of birth provided the officer with probable cause to arrest the defendant, conduct a search of the defendant for weapons and contraband incident to that arrest, and to search the passenger compartment of the defendant's vehicle and, thus, the trial court properly denied the defendant's motion to suppress evidence found during that search. Loveless v. State, 337 Ga. App. 894, 789 S.E.2d 244 (2016).

Evidence sufficient for conviction. — See Walker v. State, 225 Ga. App. 19, 482 S.E.2d 515 (1997); Gibson v. State, 243 Ga. App. 610, 533 S.E.2d 783 (2000); Madge v. State, 245 Ga. App. 848, 538 S.E.2d 907 (2000).

Evidence was sufficient for conviction of giving a false name to a law enforcement officer, despite defendant's claim that defendant lacked the requisite intent because the police knew defendant's name. Flanders v. State, 230 Ga. App. 316, 496 S.E.2d 344 (1998).

When the trial judge referred to the defendant by defendant's real name without repudiation by the defendant, and when there was concordance between defendant's name and that of the person charged on the indictment upon which defendant pled guilty and signed defendant's real name, the identity of name presumptively imported identity of person, in the absence of any evidence to the contrary, and that evidence was therefore sufficient to support the defendant's conviction for giving a false name to a law enforcement officer. Brown v. State, 236 Ga. App. 478, 512 S.E.2d 369 (1999).

When the totality of the circumstances, including the location of the car and the defendant's position in the car, indicated

that defendant was in actual physical control of the vehicle and in possession of an open container of an alcoholic beverage, even though the defendant was not seen driving the car, there was sufficient evidence that the police officers' act of questioning the defendant was more than a consensual inquiry and was within the scope of the officers' official duties so that a jury could reasonably determine that defendant's use of a false name was a violation. Wynn v. State, 236 Ga. App. 98, 511 S.E.2d 201 (1999).

Evidence was sufficient to show defendant's real name was different than the name defendant gave to a police investigator as defendant did not repudiate statements made by the trial court and defendant's own counsel that showed defendant's real name was different than the name defendant gave to the police investigator; thus, the evidence supported defendant's conviction for giving a false name. Singleton v. State, 259 Ga. App. 184, 577 S.E.2d 6 (2003).

Defendant's convictions of possession of cocaine, O.C.G.A. § 16-13-30(a), and giving a false name and date of birth, O.C.G.A. § 16-10-25, were supported by sufficient evidence that, during a level-one encounter with an officer, the defendant gave the officer a false name and birth date, that, during a subsequent search of the defendant's person validly consented to by the defendant, the officer found documents that revealed the defendant's true identity and five pieces of a substance that the officer suspected was crack cocaine, that the officer's field test of the substance indicated positive for cocaine, that the substance was later tested at a state crime lab which confirmed that it was cocaine, and that there was a sufficient chain of custody for that substance. Postell v. State, 279 Ga. App. 275, 630 S.E.2d 867 (2006).

Because an officer was investigating a domestic disturbance at the time the defendant was asked for identification, and in doing so was authorized to identify the parties to the dispute and ensure that the situation was resolved before leaving the scene, the appeals court found sufficient evidence to uphold the defendant's conviction for giving a false name and date of birth to a law enforcement officer and reject the contrary claim that the officer was not discharging any official duties at the time the false information was given. Harper v. State, 285 Ga. App. 261, 645 S.E.2d 741 (2007).

Adjudication of delinquency for giving a false name to a law enforcement officer, carrying a concealed weapon, and possession of a pistol by a person under the age of 18 was proper when the juvenile defendant who was driving a relative's vehicle had free run of the relative's property while the relative was deployed overseas; also, the defendant was in the vehicle the morning of and night before a traffic stop, defendant directed the other juvenile where to drive, neither gun was registered to the relative, defendant seemed to know about the guns' existence, and defendant gave a deputy false information about the defendant's identity. In the Interest of C.M., 290 Ga. App. 788, 661 S.E.2d 598 (2008).

There was sufficient evidence to support a defendant's conviction for giving a false name to a law enforcement officer after the defendant was discovered at a construction site having no authority to be at the location and was in the process of removing an air conditioning unit. Further, the fact that the defendant eventually gave the defendant's true name to the police did not establish that the defendant somehow withdrew from the crime. Sanders v. State, 293 Ga. App. 534, 667 S.E.2d 396 (2008).

Trial court, the defendant 's own attorney, and the charging document—without objection or repudiation from the defendant—all identified the defendant by a name other than the name the defendant gave an officer. Thus, the evidence was sufficient to convict the defendant for giving a false name to an officer in violation of O.C.G.A. § 16-10-25. Brown v. State, 293 Ga. App. 564, 667 S.E.2d 410 (2008).

Evidence was sufficient to sustain the defendant's conviction for giving false identifying information to law enforcement officers, O.C.G.A. § 16-10-25. When defendant gave false identifying information to officers after a traffic stop, responding with two different birth dates, the defendant provided the officers with prob-

Application (Cont'd)

able cause for arrest; it followed that the evidence was sufficient to sustain the defendant's conviction for giving false identifying information to and obstruction of law enforcement officers engaged in the lawful discharge of their official duties. Smith v. State, 294 Ga. App. 761, 669 S.E.2d 735 (2008).

Evidence that the defendant borrowed a sibling's car, struck the rear of a slower moving car leading to the deaths of the driver and passenger, the defendant identified herself as the sibling, and the defendant signed the sibling's name on the Miranda form and on the defendant's written statement supported the defendant's convictions for first degree homicide by vehicle, forgery, reckless driving, and giving a false name. Smith v. State, 319 Ga. App. 164, 735 S.E.2d 153 (2012).

Evidence not sufficient for conviction. — Evidence was not sufficient to support the defendant's conviction for giving a false name to law enforcement despite the fact that the defendant's fingerprints were associated with one name, similar transaction evidence showed that the defendant was previously arrested under a second name, and the defendant gave neither name to the responding officer as the state did not show which was the defendant's true name and which name was false. Smith v. State, 322 Ga. App. 433, 745 S.E.2d 683 (2013).

Removal of alien for violations. — When an alien appealed denial of cancellation of removal, the alien's violation of O.C.G.A. § 16-10-25 was categorically a crime involving moral turpitude as it involved both dishonesty and the making of a false statement. Aderonke Aladesanmi v. United States AG, No. 13-11256, 2013 U.S. App. LEXIS 21358 (11th Cir. Oct. 22, 2013) (Unpublished).

Defendant not entitled to jury charge on misdemeanor offense. — Defense counsel was not ineffective for failing to request a jury charge on the misdemeanor offense of giving a false name to a law enforcement officer under O.C.G.A. § 16-10-25 because the conduct for which a defendant was indicted, falsely telling a GBI special agent that the defendant did not make a 9-1-1 call regarding a fire at another agent's residence when in fact the defendant did make the call, would not constitute a violation of § 16-10-25; the defendant failed to show under O.C.G.A. § 16-1-7(a)(1) that the same conduct would result in the violation of the misdemeanor statute. Mahoney v. State, 296 Ga. App. 570, 675 S.E.2d 285 (2009).

Sentencing. — It was not an abuse of discretion to deny the defendant's motion for a new trial, requested to facilitate the defendant's efforts to become a naturalized citizen, because the trial court considered that the defendant's sentence for giving a false name to an officer had long since been served, that six years had passed since sentencing, and that the sentence was within the statutory guidelines for misdemeanors; claims the defendant's guilty plea was not voluntary were of no avail as the defendant failed to move to withdraw the plea or to appeal, and the time for doing so had expired. Elias v. State, 272 Ga. App. 506, 613 S.E.2d 157 (2005).

Cited in Mitchell v. State, 136 Ga. App. 658, 222 S.E.2d 160 (1975); United States v. Pulvano, 629 F.2d 1151 (5th Cir. 1980); United States v. Berry, 636 F.2d 1075 (5th Cir. 1981); Mallory v. State, 164 Ga. App. 569, 298 S.E.2d 290 (1982); Bothwell v. State, 250 Ga. 573, 300 S.E.2d 126 (1983); State v. Roberson, 165 Ga. App. 727, 302 S.E.2d 591 (1983); Taylor v. State, 181 Ga. App. 703, 353 S.E.2d 619 (1987); Preston v. State, 257 Ga. 42, 354 S.E.2d 135 (1987); Wade v. State, 184 Ga. App. 289, 361 S.E.2d 266 (1987); United States v. McKennon, 814 F.2d 1539 (11th Cir. 1987); Carroll v. State, 186 Ga. App. 145, 367 S.E.2d 81 (1988); Dixson v. State, 191 Ga. App. 410, 382 S.E.2d 357 (1989); Jivens v. State, 215 Ga. App. 306, 450 S.E.2d 328 (1994); Brown v. State, 224 Ga. App. 42, 479 S.E.2d 454 (1996); Grisson v. State, 225 Ga. App. 816, 484 S.E.2d 802 (1997); Cole v. State, 262 Ga. App. 856, 586 S.E.2d 745 (2003); Tiller v. State, 286 Ga. App. 230, 648 S.E.2d 738 (2007); Finnan v. State, 291 Ga. App. 486, 662 S.E.2d 269 (2008); McBee v. State, 296 Ga. App. 42, 673 S.E.2d 569 (2009); Connelly v. State, 298 Ga. App. 223, 679 S.E.2d 790

(2009); Henley v. State, 317 Ga. App. 776, 732 S.E.2d 836 (2012); Manhertz v. State, 317 Ga. App. 856, 734 S.E.2d 406 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Maintenance of records by Georgia Crime Information Center regarding violations of former Code 1933, § 26-2506 (see now O.C.G.A. § 16-10-25). See 1976 Op. Att'y Gen. No. 76-33.

Effect of 1989 amendment on fingerprinting requirements. — When O.C.G.A. § 16-10-25, as amended, provides that a person who gives a law enforcement officer a false date of birth, as well as a false name or address, has committed a misdemeanor, and when the previous version of this offense had previously been designated as an offense for which those charged with a violation were to be fingerprinted the statutory amendment presents no reason for that designation to be withdrawn. The designation of this offense as an offense for which those charged with a violation are to be fingerprinted shall continue. 1989 Op. Att'y Gen. 89-52.

RESEARCH REFERENCES

C.J.S. — 67 C.J.S., Obstruction of Justice or Governmental Administration, §§ 4, 18, 34.

ALR. — Criminal liability for false personation during stop for traffic infraction, 26 A.L.R.5th 378.

Defenses to state obstruction of justice charge relating to interfering with criminal investigation or judicial proceeding, 87 A.L.R.5th 597.

16-10-26. False report of a crime.

A person who willfully and knowingly gives or causes a false report of a crime to be given to any law enforcement officer or agency of this state is guilty of a misdemeanor. (Code 1933, § 26-2509, enacted by Ga. L. 1968, p. 983, §§ 1, 2; Ga. L. 1969, p. 857, § 11.)

Cross references. — Criminal penalty for knowingly making false report of theft or conversion of motor vehicle, § 40-3-92.

JUDICIAL DECISIONS

No civil duty imposed by criminal statute. — Injured party was not able to recover under O.C.G.A. § 51-1-6 for the declarant's alleged violation of the criminal statutes O.C.G.A. § 16-10-26, prohibiting giving a false report of a crime, and O.C.G.A. § 16-10-24, prohibiting obstructing or hindering the police, as these statutes did not provide for a civil cause of action; furthermore, the legislature provided statutory civil remedies in the form of false arrest under O.C.G.A. § 51-7-1 and malicious prosecution under O.C.G.A. § 51-7-40. Jastram v. Williams, 276 Ga. App. 475, 623 S.E.2d 686 (2005).

Venue. — Evidence was insufficient to prove venue for charges of making a false writing and making a false police report because, despite the fact that the state introduced evidence to show where the defendant allegedly committed the crimes, the state did not prove that the city was entirely within the forum county. Lembcke v. State, 277 Ga. App. 110, 625 S.E.2d 505 (2005).

Conviction authorized by evidence. See Dunn v. State, 169 Ga. App. 368, 312

S.E.2d 851 (1983); Gibson v. State, 243 Ga. App. 610, 533 S.E.2d 783 (2000).

Application of the rule of lenity. — Defendant's conduct, as charged, subjected the defendant to prosecution and sentencing under both O.C.G.A. §§ 16-10-20 and 16-10-26 as the defendant willfully and knowingly made a false statement to law-enforcement officers by falsely reporting a crime the defendant alleged to have occurred in the officers' jurisdiction. Because the two statutes provided different grades of punishment for the same criminal conduct, the defendant was entitled to the rule of lenity. Gordon v. State, 334 Ga. App. 633, 780 S.E.2d 376 (2015).

Defendants' felony convictions for making false statements had to be vacated and the defendants resentenced for misdemeanor making a false report of a crime because the defendants' conduct, as charged, subjected the defendants to prosecution and sentencing under both O.C.G.A. §§ 16-10-20 and 16-10-26, which provided different grades of punishment, entitling the defendants to the rule of lenity. Marlow v. State, 339 Ga. App. 790, 792 S.E.2d 712 (2016).

Evidence sufficient for conviction. — Despite the defendant's claim that the defendant did not use the specific words "reckless conduct" or "aggravated assault" or name the crime the defendant alleged a school superintendent committed, the defendant's statements were sufficient to support a conviction for making a false report of a crime as O.C.G.A. § 16-10-26 does not require specific language as an element of the crime. Knowles v. State, 342 Ga. App. 344, 801 S.E.2d 582 (2017).

Cited in Del Rio v. State, 171 Ga. App. 381, 320 S.E.2d 236 (1984); Williams v. State, 171 Ga. App. 807, 321 S.E.2d 386 (1984); Veal v. State, 211 Ga. App. 879, 440 S.E.2d 762 (1994); Draper v. Reynolds, 278 Ga. App. 401, 629 S.E.2d 476 (2006); Evans v. State, 287 Ga. App. 74, 651 S.E.2d 363 (2007); Ferman v. Bailey, 292 Ga. App. 288, 664 S.E.2d 285 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Maintenance of records by Georgia Crime Information Center regarding violations of former Code 1933, § 26-2509 (see now O.C.G.A. § 16-10-26). See 1976 Op. Att'y Gen. No. 76-33.

RESEARCH REFERENCES

C.J.S. — 67 C.J.S., Obstructing Justice or Governmental Administration, § 34.

16-10-27. Transmitting false report of fire.

A person who transmits in any manner to a fire department, public or private, or to any other group which is organized for the purpose of preventing or controlling fires a false report of a fire, knowing at the time that there is no reasonable ground for believing that such fire exists, is guilty of a misdemeanor. (Ga. L. 1937, p. 373, §§ 1, 2; Code 1933, § 26-2608, enacted by Ga. L. 1968, p. 1249, § 1.)

RESEARCH REFERENCES

ALR. — Validity and construction of statutes or ordinances imposing civil or criminal penalties on alarm system users, installers, or servicers for false alarms, 17 A.L.R.5th 825.

16-10-28. Transmitting a false public alarm; restitution.

(a) As used in this Code section, the term:

(1) "Critical infrastructure" means any building, place of assembly, or facility that is located in this state and necessary for national or public security, education, or public safety.

(2) "Destructive device" means a destructive device as such term is defined by Code Section 16-7-80.

(3) "Hazardous substance" means a hazardous substance as such term is defined by Code Section 12-8-92.

(b) A person commits the offense of transmitting a false public alarm when he or she knowingly and intentionally transmits in any manner a report or warning knowing at the time of the transmission that there is no reasonable ground for believing such report or warning and when the report or warning relates to:

(1) A destructive device or hazardous substance is located in such a place that its explosion, detonation, or release would endanger human life or cause injury or damage to property; or

(2) An individual who has caused or threatened to cause physical harm to himself or herself or another individual by using a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to result in serious bodily injury.

(c)(1) Except as provided in paragraph (2) of this subsection, a person convicted of a violation of subsection (b) of this Code section shall be punished as for a misdemeanor of a high and aggravated nature and upon conviction for a second or subsequent violation of subsection (b) of this Code section shall be guilty of a felony and punished by imprisonment for not less than one nor more than ten years, by a fine of not less than $5,000.00, or both.

(2) If the location of the violation of paragraph (1) of subsection (b) of this Code section is critical infrastructure, such person shall be guilty of a felony and upon conviction shall be punished by imprisonment for not less than five nor more than ten years, a fine of not more than $100,000.00, or both.

(d) In addition to any other penalty imposed by law for a violation of this Code section, the court may require the defendant to make restitution to any affected public or private entity for the reasonable costs or damages associated with the offense including, without limitation, the actual value of any goods, services, or income lost as a result

of such violation. Restitution made pursuant to this subsection shall not preclude any party from obtaining any other civil or criminal remedy available under any other provision of law. The restitution authorized by this subsection is supplemental and not exclusive. (Code 1933, § 26-2609, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1996, p. 416, § 5; Ga. L. 2002, p. 1094, § 3; Ga. L. 2016, p. 608, § 2/SB 270.)

The 2016 amendment, effective May 3, 2016, in subsection (a), added paragraph (a)(1), redesignated former paragraphs (a)(1) and (a)(2) as present paragraphs (a)(2) and (a)(3), respectively; substituted the present provisions of subsection (b) for the former provisions, which read: "A person who transmits in any manner a false alarm to the effect that a destructive device or hazardous substance of any nature is concealed in such place that its explosion, detonation, or release would endanger human life or cause injury or damage to property, knowing at the time that there is no reasonable ground for believing that such a destructive device or hazardous substance is concealed in such place, commits the offense of transmitting a false public alarm and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or by a fine of not less than $1,000.00, or both."; added subsection (c); and redesignated former subsection (c) as present subsection (d).

Editor's notes. — Ga. L. 2002, p. 1094, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Transportation Security Act of 2002'."

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising under O.C.G.A. § 16-10-28 are designated as offenses for which those charged are to be fingerprinted. 2017 Op. Att'y Gen. No. 17-1.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Explosions and Explosives, § 192.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 270, 272. 86 C.J.S., Threats and Unlawful Communications, §§ 2, 3.

ALR. — Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949.

16-10-29. Request for ambulance service when not reasonably needed.

(a) It shall be unlawful for any person to transmit in any manner a request for ambulance service to any person, firm, or corporation furnishing ambulance service, public or private, knowing at the time of making the request for ambulance service that there exists no reasonable need for such ambulance service.

(b) Any person who violates subsection (a) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1977, p. 797, §§ 1, 2.)

Cross references. — Provision of emergency medical services generally, T. 31, C. 11.

16-10-30. Refusal to obey official request at fire or other emergency.

A person in a gathering who refuses to obey the reasonable official request or order of a peace officer or firefighter to move, for the purpose of promoting the public safety by dispersing those gathered in dangerous proximity to a fire or other emergency, is guilty of a misdemeanor. (Code 1933, § 26-2606, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2002, p. 660, § 4; Ga. L. 2002, p. 1259, § 11.)

Cross references. — Freedom of assembly, Ga. Const. 1983, Art. I, Sec. I, Para. IX. Further provisions regarding willful failure or refusal to comply with order by policeman or firefighter directing, controlling, or regulating traffic, § 40-6-2.

JUDICIAL DECISIONS

O.C.G.A. § 16-10-30 is not unconstitutionally vague or overbroad. Sabel v. State, 250 Ga. 640, 300 S.E.2d 663 (1983).

Words sufficiently definite to inform. — "Reasonable official request," "dangerous proximity," and "emergency," when given their ordinary meaning, are words of common understanding that are sufficiently definite to inform a person of common intelligence as to when that person is violating the law. Sabel v. State, 250 Ga. 640, 300 S.E.2d 663 (1983).

Application of O.C.G.A. § 16-10-30 to members of the Revolutionary Communist Party involved in an angry public confrontation with residents of an apartment complex, in the absence of any violent acts, or of efforts of the police to respond directly to any illegal conduct without focusing enforcement efforts on those engaged in speech, was unconstitutional. Sabel v. Stynchcombe, 746 F.2d 728 (11th Cir. 1984).

Cited in State v. Burroughs, 244 Ga. 288, 260 S.E.2d 5 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 53A Am. Jur. 2d, Mobs and Riots, §§ 16, 27.

C.J.S. — 67 C.J.S., Obstructing Justice or Governmental Administration, §§ 4, 18.

ALR. — Failure or refusal to obey police officer's order to move on, on street, as disorderly conduct, 65 A.L.R.2d 1152.

Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 A.L.R.3d 340.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 A.L.R.3d 280.

Criminal and civil liability of civilians and police officers concerning recording of police actions, 84 A.L.R.6th 89.

16-10-31. Concealing death of another person.

A person who, by concealing the death of any other person, hinders a discovery of whether or not such person was unlawfully killed is guilty

of a felony and upon conviction shall be punished by imprisonment for not less than one nor more than ten years, a fine of not less than $1,000.00 nor more than $5,000.00, or both. (Code 1933, § 26-1104, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1997, p. 923, § 1.)

Cross references. — Disposition of dead bodies, T. 31, C. 21.

JUDICIAL DECISIONS

Victim killed out of state but concealing occurred in Georgia. — Evidence was sufficient to convict the defendant of concealing the death of another because, notwithstanding that the victim was killed and placed in the trunk of a car in South Carolina, the undisputed evidence showed that the car was set on fire in Georgia, with the intent to conceal the victim's death. Clary v. State, 344 Ga. App. 710, No. A17A1593, 2018 Ga. App. LEXIS 129 (2018).

Evidence sufficient to support conviction. — See Wilcox v. Ford, 813 F.2d 1140 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987); Carter v. State, 238 Ga. App. 632, 519 S.E.2d 717 (1999).

Evidence was sufficient to permit a rational trier of fact to find that a female defendant's infant son was born alive, had a separate and independent existence from the defendant, was murdered by the defendant, and the body subsequently concealed by the defendant, all beyond a reasonable doubt. Life v. State, 261 Ga. 709, 410 S.E.2d 421 (1991).

Evidence was sufficient to support defendant's conviction of concealing the death of another where there was evidence that: (1) defendant shot and killed defendant's friend after finding defendant's spouse and that friend embracing; (2) defendant forced the spouse to leave with defendant; (3) the spouse's body was found two days later near the spouse's car which had gone over a cliff; (4) the spouse had been repeatedly struck on the head with a blunt object; (5) the spouse's injuries were not consistent with being alive when the car went over the cliff; (6) defendant was found staying at the home of a friend with whom defendant had planned to leave the state; and (7) defendant, who eventually testified that the spouse had purposely driven the spouse's car over the cliff, never tried to call the police or an ambulance regarding either the spouse's or the friend whom defendant had killed. Wright v. State, 276 Ga. 454, 579 S.E.2d 214 (2003), cert. denied, 540 U.S. 1106, 124 S. Ct. 1059, 157 L. Ed. 2d 892 (2004).

Witness's testimony established that defendant sold cocaine to the victim, later struggled with the victim and the victim was shot, and defendant threatened the witness not to tell the police; the evidence was sufficient to find defendant guilty of violating the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., and of concealing a death, a violation of O.C.G.A. § 16-10-31. Jackson v. State, 271 Ga. App. 278, 609 S.E.2d 207 (2005).

Evidence was sufficient to support defendant's convictions for concealment of a death and theft by taking as the evidence showed that defendant directed the customer of a salon defendant operated, who had a fight with a man with whom defendant had been living, to dispose of the man's body after the customer shot the man to death following an argument at defendant's home and that defendant told people that the man had left after an argument; too, the evidence showed that defendant had taken the man's sports memorabilia collection and a camera, and, thus, was guilty of theft by taking. James v. State, 274 Ga. App. 498, 618 S.E.2d 133 (2005).

Evidence was sufficient to support defendant's convictions of malice murder and concealing the death of another because: (1) defendant's nephew testified that defendant asked for help with "a body"; (2) the nephew noticed blood stains, evidence of a struggle, and a smell of bleach at defendant's home; (3) the vic-

tim's body was on a bed in defendant's home; (4) the nephew helped defendant roll the body in a rug and take the body to a nearby dumpster where they deposited the body; (5) authorities later determined that the victim sustained blunt force trauma to the head and died of ligature strangulation; and (6) a search of defendant's home revealed the victim's blood stains and evidence of a struggle. Ware v. State, 279 Ga. 17, 608 S.E.2d 643 (2005).

Evidence supported defendant's conviction of malice murder, possession of a firearm during the commission of a crime, and concealing the death of another; the victim was shot in the back of the head with defendant's gun in the woods behind defendant's family's property, the victim's body was found in a landfill two days later, defendant's friend confided to a friend that defendant shot the victim and then called the friend to help dispose of the body, the friend confessed to a role in the concealment and secretly videotaped a conversation with defendant about the shooting and, on the tape, defendant bragged about killing the victim and demonstrated how defendant did the killing. Bragg v. State, 279 Ga. 156, 611 S.E.2d 17 (2005).

Defendant's testimony and that of others that defendant removed the victim's body from the scene of the murder established defendant's guilt to the offense of concealing the death of another. Weldon v. State, 279 Ga. 185, 611 S.E.2d 36 (2005).

Defendant's convictions for malice murder, burglary, robbery, aggravated assault, and concealing the death of another were supported by sufficient evidence because: (1) defendant broke into the office where the victim was living; (2) defendant hit the victim several times on the head and body with a pair of pliers; (3) defendant choked the victim with defendant's hands and arms, and with the pliers, until the victim was dead; (4) defendant took the victim's credit card and driver's license; and (5) defendant disposed of the victim's body. Young v. State, 280 Ga. 65, 623 S.E.2d 491 (2005).

Trial court properly denied defendant's motion for a directed verdict of acquittal on all of the charges relating to solicitation to commit two murders and solicitation to conceal the death of one of the purported murder victims as the testimony of a witness established that defendant sought that witness's aide in murdering two game wardens who had charged defendant with various hunting violations, that the witness was equipped with a tape device to record defendant's plans and those tapes were presented at trial, which detailed defendant going over the gun to be used and the manner in which the death of one victim was to be concealed. English v. State, 290 Ga. App. 378, 659 S.E.2d 783 (2008).

Trial court properly convicted defendant for concealing a death as the evidence established that defendant directed that the victim's body be left on the side of a road in a location away from the murder and verbally threatened a witness with death if the witness told the police about the crime. Duncan v. State, 283 Ga. 584, 662 S.E.2d 122 (2008).

Evidence supported convictions of malice murder, concealing a death, and possession of a firearm during the commission of a crime. A codefendant testified that the defendant, who was jealous of one victim, shot the victims in the defendant's home, then put the bodies in the second victim's car, drove the car away, poured gasoline on the car, and set the car on fire; an officer who had known the defendant for years testified that the defendant called the officer twice about surrendering to authorities; police found blood, human tissue, shotgun pellets, part of a shotgun, and ammunition in the defendant's home, a trail of blood leading away from the house, and a shotgun shell casing and a gas can in the defendant's truck; and a cellmate testified that the defendant told the cellmate that the defendant shot two people, that the defendant inquired whether fingerprints could be retrieved from a burned vehicle, and that the defendant said that the defendant had soaked up blood on the defendant's carpet with cat litter. Hendrix v. State, 284 Ga. 420, 667 S.E.2d 597 (2008).

Evidence was sufficient to support the defendant's conviction for concealing the death of another person beyond a reasonable doubt because the defendant admitted that the defendant stabbed the victim

to death in an apparent domestic dispute; a fingerprint expert identified the victim as the dead body found behind the dumpster in the defendant's apartment complex wrapped in bags, and the defendant's confession was duly corroborated. Rowe v. State, 302 Ga. App. 239, 690 S.E.2d 884 (2010).

Evidence was sufficient to support a defendant's conviction for concealing the death of another after the defendant told the victim's children and police that the victim was missing when the defendant knew where the victim was and that the victim was dead, and since the defendant removed the victim's body from the crime scene, thereby hindering the discovery that the victim had been unlawfully killed. White v. State, 287 Ga. 713, 699 S.E.2d 291 (2010).

Defendant's admission that the defendant helped the defendant's son hold down the victim as the son penetrated the victim, that the defendant rubbed the defendant's own penis against the victim and ejaculated on the victim, that the defendant put the defendant's hands over the son's as the son choked the victim, that the defendant helped dump the victim's body, and the testimony of the defendant's wife that the defendant helped undress the victim, the defendant put the defendant's mouth on the victim's penis, and the defendant attempted to put the defendant's penis in the victim's anus was sufficient to support defendant's convictions for murder, false imprisonment, two counts of aggravated child molestation, child molestation, cruelty to children in the first degree, concealing the death of another, and tampering with evidence. Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738 (2013).

Gestational age supported evidence for conviction. — Because the state proved that, due to the defendant's child's gestational age, the defendant gave birth to a viable child and then concealed the child's death, the evidence was sufficient to support the defendant's conviction of concealing the death of another person, O.C.G.A. § 16-10-31. Hill v. State, 292 Ga. App. 366, 664 S.E.2d 781 (2008), cert. denied, 2008 Ga. LEXIS 913 (Ga. 2008).

Evidence insufficient for conviction. — Evidence was not sufficient to support the defendant's conviction for concealment as there was no proof that moving the adult victim to the sofa or turning off a night light in another room in any way concealed the adult victim's death or that killing the baby and preventing the baby from crying prevented the adult victim from being found sooner. Walker v. State, 296 Ga. 161, 766 S.E.2d 28 (2014).

Not lesser included offense of felony murder. — Concealing a death, O.C.G.A. § 16-10-31, and felony murder, O.C.G.A. § 16-5-1, have entirely different elements and require proof of totally different facts, and thus, the crime of concealing a death is not included, as a matter of fact or law, in felony murder during the commission of aggravated assault; a trial court's refusal to give a requested charge on concealing the death of another as a lesser included offense of felony murder was proper. Chapman v. State, 280 Ga. 560, 629 S.E.2d 220 (2006).

Merger of counts as only one violation occurred. — Appellant's merger claims cannot simply be deemed waived on appeal following the entry of a guilty plea, even if the appellant fails to raise the issue, and four of the appellant's five convictions for concealing the death of the appellant's girlfriend merged since only one violation occurred. Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

Because all of the defendant's acts were intended to hinder a single discovery of the single unlawful killing of the defendant's girlfriend by concealing the girlfriend's death, two of the three convictions and sentences for concealing the death of another had to be vacated. Moore v. State, 325 Ga. App. 749, 754 S.E.2d 792 (2014).

Cited in Gaines v. Wolcott, 119 Ga. App. 313, 167 S.E.2d 366 (1969); Nunnally v. State, 235 Ga. 693, 221 S.E.2d 547 (1975); Davis v. State, 236 Ga. 804, 225 S.E.2d 241 (1976); Durham v. State, 243 Ga. 408, 254 S.E.2d 359 (1979).

RESEARCH REFERENCES

ALR. — Attempt to conceal or dispose of body as evidence connecting accused with homicide, 2 A.L.R. 1227.

Liability in damages for withholding corpse from relatives, 48 A.L.R.3d 240.

16-10-32. Attempted murder or threatening of witnesses in official proceedings.

(a) Any person who attempts to kill another person with intent to:

(1) Prevent the attendance or testimony of any person in an official proceeding;

(2) Prevent the production of a record, document, or other object, in an official proceeding; or

(3) Prevent the communication by any person to a law enforcement officer, prosecuting attorney, or judge of this state of information relating to the commission or possible commission of a criminal offense or a violation of conditions of probation, parole, or release pending judicial proceedings

shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than ten nor more than 20 years.

(b) Any person who threatens or causes physical or economic harm to another person or a member of such person's family or household, threatens to damage or damages the property of another person or a member of such person's family or household, or attempts to cause physical or economic harm to another person or a member of such person's family or household with the intent to hinder, delay, prevent, or dissuade any person from:

(1) Attending or testifying in an official proceeding;

(2) Reporting in good faith to a law enforcement officer, prosecuting attorney, or judge of a court of this state, or its political subdivisions or authorities, the commission or possible commission of an offense under the laws of this state or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) Arresting or seeking the arrest of another person in connection with a criminal offense; or

(4) Causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding

shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than two years nor more than

ten years or by a fine of not less than $10,000.00 nor more than $25,000.00, or both.

(c)(1) For the purposes of this Code section, the term "official proceeding" means any hearing or trial conducted by a court of this state or its political subdivisions, a grand jury, or an agency of the executive, legislative, or judicial branches of government of this state or its political subdivisions or authorities.

(2) An official proceeding need not be pending or about to be instituted at the time of any offense defined in this Code section.

(3) The testimony, record, document, or other object which is prevented or impeded or attempted to be prevented or impeded in an official proceeding in violation of this Code section need not be admissible in evidence or free of a claim of privilege.

(4) In a prosecution for an offense under this Code section, no state of mind need be proved with respect to the circumstance:

(A) That the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of this state, a magistrate, a grand jury, or an agency of state or local government; or

(B) That the judge is a judge of this state or its political subdivisions or that the law enforcement officer is an officer or employee of the State of Georgia or a political subdivision or authority of the state or a person authorized to act for or on behalf of the State of Georgia or a political subdivision or authority of the state.

(5) A prosecution under this Code section may be brought in the county in which the official proceeding, whether or not pending or about to be instituted, was intended to be affected or in the county in which the conduct constituting the alleged offense occurred.

(d) Any crime committed in violation of subsection (a) or (b) of this Code section shall be considered a separate offense. (Code 1981, § 16-10-32, enacted by Ga. L. 1998, p. 270, § 4.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1998, a comma was deleted following "kill another person" in the introductory paragraph of subsection (a).

Law reviews. — For review of 1998 legislation relating to crimes and offenses, see 15 Ga. St. U.L. Rev. 80 (1998).

JUDICIAL DECISIONS

Probate judge erred by requesting removal of probation officers who testified against the judge. — Probate judge who, among other conduct, requested that two probation officers who had testified against the probate judge at

the Judicial Qualifications Commission be removed from the judge's court violated O.C.G.A. § 16-10-32 and was removed from office and barred from seeking judicial office again. Inquiry Concerning Fowler, 287 Ga. 467, 696 S.E.2d 644 (2010).

Threat of lawsuit insufficient. — Georgia Court of Appeals concludes that actually exercising one's right to file a lawsuit, conspiring with others to file a lawsuit, in and of itself, does not constitute a threat as required to support the crimes under O.C.G.A. §§ 16-10-93(a), 16-10-93(b)(1)(A), 16-10-32(b)(1), or 16-10-32(b)(4). Brown v. State, 322 Ga. App. 446, 745 S.E.2d 699 (2013).

Evidence insufficient to support conviction. — During an intake interview at a mental health evaluation facility, a defendant's threats regarding the defendant's sentencing judge were made for the purpose of diagnosis and treatment of mental health issues, not with the purpose of terrorizing the judge or intimidating the judge from attending legal proceedings as required for finding terroristic threats in violation of O.C.G.A. §§ 16-10-32(b) and 16-11-37(a). Koldewey v. State, 310 Ga. App. 788, 714 S.E.2d 371 (2011), cert. denied, 2012 Ga. LEXIS 239 (Ga. 2012).

Evidence sufficient to support conviction. — There was sufficient evidence to support defendant's conviction of threatening a witness in an official proceeding with regard to defendant unlawfully causing economic harm to the witness's family member by damaging the witness's spouse's car by setting the car on fire, and defendant's argument that the evidence did not show that the spouse suffered any economic harm since money was still owed on the car, the car had been broken down for about a year, and the spouse received an insurance check, did not contradict the jury's finding of economic harm. Further, the spouse's testimony authorized the jury to find that, as a result of the fire, the spouse suffered an uninsured loss of valuable personal property that was in the car, which was sufficient to show that the fire to the car had caused economic harm. Shelnutt v. State, 289 Ga. App. 528, 657 S.E.2d 611 (2008), cert. denied, No. S08C0977, 2008 Ga. LEXIS 518 (Ga. 2008).

16-10-33. Removal or attempted removal of weapon from public official; punishment.

(a) For the purposes of this Code section, the term "firearm" shall include stun guns and tasers. A stun gun or taser is any device that is powered by electrical charging units such as batteries and emits an electrical charge in excess of 20,000 volts or is otherwise capable of incapacitating a person by an electrical charge.

(b) It shall be unlawful for any person knowingly to remove or attempt to remove a firearm, chemical spray, or baton from the possession of another person if:

(1) The other person is lawfully acting within the course and scope of employment; and

(2) The person has knowledge or reason to know that the other person is employed as:

(A) A peace officer as defined in paragraph (8) of Code Section 35-8-2;

(B) An employee with the power of arrest by the Department of Corrections;

(C) An employee with the power of arrest by the State Board of Pardons and Paroles;

(D) A community supervision officer or other employee with the power of arrest by the Department of Community Supervision;

(E) A jail officer or guard by a county or municipality and has the responsibility of supervising inmates who are confined in a county or municipal jail or other detention facility; or

(F) A juvenile correctional officer by the Department of Juvenile Justice and has the primary responsibility for the supervision and control of youth confined in such department's programs and facilities.

(c) Any person who violates subsection (b) of this Code section shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years or a fine of not more than $10,000.00, or both.

(d) A violation of this Code section shall constitute a separate offense. A sentence imposed under this Code section may be imposed separately from and consecutive to or concurrent with a sentence for any other offense related to the act or acts establishing the offense under this Code section. (Code 1981, § 16-10-33, enacted by Ga. L. 2000, p. 1267, § 1; Ga. L. 2001, p. 4, § 16; Ga. L. 2011, p. 503, § 1/HB 123; Ga. L. 2015, p. 422, § 5-23/HB 310.)

Editor's notes. — Ga. L. 2011, p. 503, § 2/HB 123, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to offenses committed on or after July 1, 2011.

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

JUDICIAL DECISIONS

Evidence sufficient to support conviction. — Evidence was sufficient to convict a defendant of attempting to remove a firearm from a police officer in violation of O.C.G.A. § 16-10-33(a) (now subsection (b)) and obstruction of an officer in violation of O.C.G.A. § 16-10-24(b) because the defendant refused to comply with the officer's demands that the defendant show the defendant's hands, which were hidden under a pillow and under a bed, and the defendant lunged at an officer, grabbing the barrel of the officer's gun, and trying to take the gun away from the officer. The defendant also kicked and flailed at the officers, preventing the officers from handcuffing the defendant. Daniel v. State, 303 Ga. App. 1, 692 S.E.2d 682 (2010).

16-10-34. Use of laser devices against law enforcement officer.

(a) For purposes of this Code section, the term "laser device" means a device designed to amplify electromagnetic radiation by stimulated emission that emits a beam designed to be used by the operator as a pointer or highlighter to indicate, mark, or identify a specific position, place, item, or object. Such term also means a device that projects a beam or point of light by means of light amplification by stimulated emission of radiation or other means or that emits light which simulates the appearance of a beam of light.

(b) It shall be unlawful for any person to knowingly and intentionally project upon a law enforcement officer any laser device without such officer's permission if:

(1) The law enforcement officer is lawfully acting within the course and scope of employment; and

(2) The person has knowledge or reason to know that the law enforcement officer is employed as:

(A) A peace officer as defined in paragraph (8) of Code Section 35-8-2;

(B) An employee with the power of arrest by the Department of Corrections;

(C) An employee with the power of arrest by the State Board of Pardons and Paroles;

(D) A community supervision officer or other employee with the power of arrest by the Department of Community Supervision;

(E) A jail officer or guard by a county or municipality and has the responsibility of supervising inmates who are confined in a county or municipal jail or other detention facility; or

(F) A juvenile correctional officer or juvenile probation officer by the Department of Juvenile Justice and has the primary responsibility for the supervision and control of youth confined in such department's programs and facilities.

(c) Any person who violates subsection (b) of this Code section shall be guilty of a high and aggravated misdemeanor.

(d) It shall not be a defense to a prosecution for a violation of this Code section that the laser device was pointed at such officer through a glass, window, or other transparent or translucent object.

(e) Each violation of this Code section shall constitute a separate offense. A sentence imposed under this Code section may be imposed separately from and consecutive to or concurrent with a sentence for

any other offense related to the act or acts establishing the offense under this Code section. (Code 1981, § 16-10-34, enacted by Ga. L. 2012, p. 1142, § 1/SB 441; Ga. L. 2015, p. 422, § 5-24/HB 310.)

Editor's notes. — Ga. L. 2012, p. 1142, § 3/SB 441, not codified by the General Assembly, provides that this Code section applies to offenses committed on or after July 1, 2012.

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A. § 16-10-34 are offenses for which those charged are to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

ARTICLE 3

ESCAPE AND OTHER OFFENSES RELATED TO CONFINEMENT

RESEARCH REFERENCES

ALR. — What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

Charge of harboring or concealing or assisting one charged with crime to avoid arrest, predicated upon financial assistance, 130 A.L.R. 150.

When statute of limitation begins to run on charge of obstructing justice or of conspiracy to do so, 77 A.L.R.3d 725.

16-10-50. Hindering apprehension or punishment of criminal.

(a) A person commits the offense of hindering the apprehension or punishment of a criminal when, with intention to hinder the apprehension or punishment of a person whom he knows or has reasonable grounds to believe has committed a felony or to be an escaped inmate or prisoner, he:

(1) Harbors or conceals such person; or

(2) Conceals or destroys evidence of the crime.

(b) A person convicted of the offense of hindering apprehension or punishment of a criminal shall be punished by imprisonment for not less than one nor more than five years. (Laws 1833, Cobb's 1851 Digest, p. 808; Code 1863, § 4384; Code 1868, § 4422; Code 1873, § 4490; Ga. L. 1876, p. 114, § 1; Code 1882, §§ 4490, 4490a; Penal Code 1895, §§ 321, 322; Penal Code 1910, §§ 326, 327; Code 1933, §§ 26-4601, 26-4602; Code 1933, § 26-2503, enacted by Ga. L. 1968, p. 1249, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 26-604, as it read prior to revision of this title by Ga. L. 1968, p. 1249, are included in the annotations for this Code section.

Obstruction of justice defined. — To obstruct justice is to interpose obstacles or impediments, or to hinder, impede or in any manner interrupt or prevent administration of justice. Baker v. State, 122 Ga. App. 587, 178 S.E.2d 278 (1970), cert. denied, 401 U.S. 1012, 91 S. Ct. 1265, 28 L. Ed. 2d 549 (1971).

Essential elements of crime prohibited by former Code 1933, § 26-4601 (see now O.C.G.A. § 16-10-50) were: (1) receiving, harboring, or concealing any person guilty of a felony, and (2) knowledge of such person's guilt. Moore v. State, 94 Ga. App. 210, 94 S.E.2d 80 (1956); Stynchcombe v. Walden, 226 Ga. 63, 172 S.E.2d 402 (1970).

Mere concealment of crime constitutes no offense in this state. Moore v. State, 94 Ga. App. 210, 94 S.E.2d 80 (1956).

Sufficiency of indictment. — Trial court did not err by denying the defendant's general demurrer alleging that the defendant hindered the apprehension of a criminal based on the failure to allege the essential mens rea or intent element because that count expressly referenced the criminal statute on which the charge was based; that count alleged that the defendant knowingly and willfully concealed facts and destroyed evidence of the guilt of the man who murdered the defendant's husband; and those allegations necessarily raised an inference that the defendant acted with intent. Sneiderman v. State, 336 Ga. App. 153, 784 S.E.2d 18 (2016), overruled on other grounds by Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391 (2016).

Concealing body of murdered person. — When A, knowing that B is guilty of murder, assists B in concealing a crime and body of a murdered person, A is not thereby guilty of "receiving, harboring, or concealing" the murderer, within the meaning of former Penal Code 1910, § 326 (see now O.C.G.A. § 16-10-50). Heath v. State, 34 Ga. App. 218, 128 S.E. 914 (1925).

Concealing gun used in shooting. — Defendant could be found guilty of hindering the apprehension of a criminal where, knowing that a codefendant had used the gun to shoot someone, the defendant concealed it with the intent of protecting defendant's self and defendant's friend from punishment; defendant's later telling the police where defendant had hidden the gun was not abandonment of a crime because the crimes had already been committed. Hubbard v. State, 210 Ga. App. 141, 435 S.E.2d 709 (1993).

Conviction of principal as distinguished from the principal's guilt is not an element of crime of accessory. Stynchcombe v. Walden, 226 Ga. 63, 172 S.E.2d 402 (1970) (decided under former Code 1933, § 26-604).

An accessory after the fact cannot be an accomplice to the major crime. Schmid v. State, 77 Ga. App. 623, 49 S.E.2d 134 (1948) (decided under former Code 1933, § 26-604).

Defendant's conviction for hindering the apprehension of a criminal in violation of O.C.G.A. § 16-10-50 had to be set aside because defendant could not be convicted for both malice murder and hindering the apprehension of a criminal, which was the equivalent of the common law crime of being an accessory after the fact; a party cannot be convicted both of being a principal to the crime and an accessory after the fact. Hampton v. State, 289 Ga. 621, 713 S.E.2d 851 (2011).

An accessory after the fact was not considered an accomplice within the meaning of former Code 1933, § 38-121. Moore v. State, 240 Ga. 210, 240 S.E.2d 68 (1977) (see now O.C.G.A. § 24-14-8).

Driving principal away from scene of crime renders driver accessory after the fact. — When the defendant knew the principal had killed the victim without justification, by allowing the principal to ride in the defendant's automobile away from the scene of the crime, albeit for only a short distance, the defendant aided the principal in escaping arrest and was,

therefore, guilty as an accessory after the fact. Moore v. State, 94 Ga. App. 210, 94 S.E.2d 80 (1956).

An accessory after the fact is guilty of a separate, substantive offense in nature of obstruction of justice. Moore v. State, 240 Ga. 210, 240 S.E.2d 68 (1977).

Accessory after the fact was not a party to the underlying crime under former Code 1933, § 26-801. Moore v. State, 240 Ga. 210, 240 S.E.2d 68 (1977) (see O.C.G.A. § 16-2-20).

Since the statutory definition of hindering the apprehension of a criminal eliminates the possibility that one guilty of hindering participated as a party to the major crime, and defendant was convicted of murder as party to a crime, defendant's conviction for hindering the apprehension of a criminal was set aside. Jordan v. State, 272 Ga. 395, 530 S.E.2d 192 (2000).

Indictment must allege conviction of principal offender or that the principal cannot be taken so as to be prosecuted and punished. Roberts v. State, 18 Ga. App. 529, 89 S.E. 1055 (1916).

Theft, destruction or substitution of evidence needed in criminal prosecution. — Purloining, destruction or substitution of evidence needed or useful in prosecution of criminal offense in such manner that true and genuine evidence is not available for use in prosecution is one of the ways by which justice may be obstructed. Baker v. State, 122 Ga. App. 587, 178 S.E.2d 278 (1970), cert. denied, 401 U.S. 1012, 91 S. Ct. 1265, 28 L. Ed. 2d 549 (1971).

Evidence sufficient for conviction of hindering apprehension of criminal. — See Owen v. State, 202 Ga. App. 833, 415 S.E.2d 537 (1992).

Evidence insufficient to support conviction. — When a defendant attempted to conceal a bag of unknown (to defendant) contents upon direction of a friend who was in the custody of a police officer, the fact that the friend was on probation meant that the bag's contents could have been the product of less than felony activity in order to have caused serious trouble for the friend, and evidence thus did not prove beyond a reasonable doubt that defendant had reasonable grounds to believe that the friend had committed a felony. Pugh v. State, 173 Ga. App. 670, 327 S.E.2d 745 (1985).

Neither the wrongful signing of disclosure letter by county school superintendent, nor the evidence of collusion with assistants to cover up theft by taking after it was committed, constituted evidence that superintendent was a party or aider or abettor of the diversion of funds. Purvis v. State, 208 Ga. App. 653, 433 S.E.2d 58 (1993).

Revealing to jury that defendant's attorney was source of information. — While the state is likely correct that the defendant's attorney had a positive obligation to reveal the location of the victim's body to law enforcement officers, it does not follow of necessity that the state should disclose to the jury that the source of the information that led to the discovery of the body was the attorney; offering such testimony is a dangerous practice, and one the supreme court disapproves. However, in light of defendant's many admissions of guilt, such error was harmless. Williams v. State, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

Requested instruction not necessary. — In the defendant's trial on a charge of armed robbery, in violation of O.C.G.A. § 16-8-41, the trial court did not err in failing to provide the jury with a requested instruction on hindering the apprehension of a criminal as a lesser included offense pursuant to O.C.G.A. § 16-10-50 as the hindering offense was the equivalent of being an accessory after the fact; moreover, it was not a lesser included offense of the principal crime, but a separate offense. Windhom v. State, 315 Ga. App. 855, 729 S.E.2d 25 (2012).

Cited in Ford v. State, 232 Ga. 511, 207 S.E.2d 494 (1974); Downs v. State, 145 Ga. App. 588, 244 S.E.2d 113 (1978); Lemley v. State, 245 Ga. 350, 264 S.E.2d 881 (1980); Highfield v. State, 246 Ga. 478, 272 S.E.2d 62 (1980); Jones v. State, 250 Ga. 11, 295 S.E.2d 71 (1982); Tenner v. Wallace, 615 F. Supp. 40 (S.D. Ga. 1985); Thaxton v. State, 184 Ga. App. 779, 362 S.E.2d 510 (1987); Wheeler v. City of Macon, 52 F. Supp. 2d 1372 (M.D. Ga. 1999); Burnette v. State, 241 Ga. App. 682, 527 S.E.2d 276 (1999).

OPINIONS OF THE ATTORNEY GENERAL

Campus police officer must report commission of felony or presence of escaped convict to appropriate civil authority. 1970 Op. Att'y Gen. No. 70-69.

RESEARCH REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d, Harboring Criminals, § 1 et seq.

C.J.S. — 30A C.J.S., Escape, §§ 31, 32. 67 C.J.S., Obstructing Justice or Governmental Administration, § 35 et seq.

ALR. — Substitution or attempted substitution of another for one under sentence as a criminal offense, 28 A.L.R. 1381.

When statute of limitations begins to run on charge of obstructing justice or of conspiracy to do so, 77 A.L.R.3d 725.

16-10-51. Bail jumping.

(a) Any person who has been charged with or convicted of the commission of a felony under the laws of this state and has been set at liberty on bail or on his own recognizance upon the condition that he will subsequently appear at a specified time and place commits the offense of felony-bail jumping if, after actual notice to the defendant in open court or notice to the person by mailing to his last known address or otherwise being notified personally in writing by a court official or officer of the court, he fails without sufficient excuse to appear at that time and place. A person convicted of the offense of felony-bail jumping shall be punished by imprisonment for not less than one nor more than five years or by a fine of not more than $5,000.00, or both.

(b) Any person who has been charged with or convicted of the commission of a misdemeanor and has been set at liberty on bail or on his own recognizance upon the condition that he will subsequently appear at a specified time and place commits the offense of misdemeanor-bail jumping if, after actual notice to the defendant in open court or notice to the person by mailing to his last known address or otherwise being notified personally in writing by a court official or officer of the court, he fails without sufficient excuse to appear at that time and place. A person convicted of the offense of misdemeanor-bail jumping shall be guilty of a misdemeanor.

(c)(1) Any person who has been charged with or convicted of the commission of any of the misdemeanors listed in paragraph (2) of this subsection and has been set at liberty on bail or on his or her own recognizance upon the condition that he or she will subsequently appear at a specified time and place and who, after actual notice to the defendant in open court or notice to the defendant by mailing to the defendant's last known address or otherwise being notified personally in writing by a court official or officer of the court, leaves the state to avoid appearing in court at such time commits the offense of out-of-state-bail jumping. A person convicted of the offense of

out-of-state-bail jumping shall be guilty of a felony and shall be punished by imprisonment for not less than one year nor more than five years or by a fine of not less than $1,000.00 nor more than $5,000.00, or both.

(2) Paragraph (1) of this subsection shall apply only to the following misdemeanors:

(A) Abandonment, as provided in Code Sections 19-10-1 and 19-10-2;

(B) Simple assault, as provided in Code Section 16-5-20;

(C) Carrying a weapon or long gun in an unauthorized location, as provided in Code Section 16-11-127;

(D) Bad checks, as provided in Code Section 16-9-20;

(E) Simple battery, as provided in Code Section 16-5-23;

(F) Bribery, as provided in Code Section 16-10-3;

(G) Failure to report child abuse, as provided in Code Section 19-7-5;

(H) Criminal trespass, as provided in Code Section 16-7-21;

(I) Contributing to the delinquency of a minor, as provided in Code Section 16-12-1;

(J) Escape, as provided in Code Sections 16-10-52 and 16-10-53;

(K) Tampering with evidence, as provided in Code Section 16-10-94;

(L) Family violence, as provided in Code Section 19-13-6;

(M) Deceptive business practices, as provided in Code Section 16-9-50;

(N) Reserved;

(O) Fraud in obtaining public assistance, food stamps, or Medicaid, as provided in Code Section 49-4-15;

(P) Reckless conduct, as provided in Code Section 16-5-60;

(Q) Any offense under Chapter 8 of this title which is a misdemeanor;

(R) Any offense under Chapter 13 of this title which is a misdemeanor;

(S) Driving under the influence of alcohol or drugs, as provided in Code Section 40-6-391;

(T) Driving without a license in violation of Code Section 40-5-20 or driving while a license is suspended or revoked as provided in Code Section 40-5-121; and

(U) Any offense under Code Section 40-6-10, relating to requirement of the operator or owner of a motor vehicle to have proof of insurance.

(d) Subsections (b) and (c) of this Code section shall not apply to any person who has been charged or convicted of the commission of a misdemeanor under the laws of this state and has been set at liberty after posting a cash bond and fails to appear in court at the specified time and place where such failure to appear, in accordance with the rules of the court having jurisdiction over such misdemeanor, is construed as an admission of guilt and the cash bond is forfeited without the need for any further statutory procedures and the proceeds of the cash bond are applied and distributed as any fine imposed by the court would be. (Code 1933, § 26-2511, enacted by Ga. L. 1980, p. 387, § 1; Ga. L. 1988, p. 670, § 1; Ga. L. 1989, p. 14, § 16; Ga. L. 1989, p. 623, § 1; Ga. L. 1997, p. 973, § 1; Ga. L. 2010, p. 963, § 2-4/SB 308.)

Cross references. — Forfeiture of appearance bond or recognizance for failure to appear at time fixed for arraignment, § 17-6-17.

Editor's notes. — Ga. L. 2010, p. 963, § 3-1/SB 308, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 106 (1997). For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011).

JUDICIAL DECISIONS

Section not applicable to juvenile. — O.C.G.A. § 16-10-51 does not embrace the failure of a juvenile to appear as ordered. In re M.B., 217 Ga. App. 660, 458 S.E.2d 864 (1995).

Statute did not supersede common law fugitive disentitlement doctrine. — Following the defendant's trial for insurance fraud and other crimes, after the defendant failed to return to court on the fourth day of the trial, defense counsel's motion for new trial made in the defendant's absence was ineffective to preserve the defendant's right to make such a motion under the fugitive disentitlement doctrine, which was not superseded by O.C.G.A. § 16-10-51. Worthen v. State, 342 Ga. App. 612, 804 S.E.2d 139 (2017).

Evidence sufficient to sustain conviction of attempt to commit felony bail jumping. — See Harrison v. State, 201 Ga. App. 577, 411 S.E.2d 738 (1991).

Cited in Burnette v. State, 241 Ga. App. 682, 527 S.E.2d 276 (1999).

OPINIONS OF THE ATTORNEY GENERAL

Bail bondsman is entitled to restitution of the amount of the bond and costs upon the conviction of the accused of jumping bail pursuant to O.C.G.A. § 16-10-51. 1994 Op. Att'y Gen. No. U94-17.

RESEARCH REFERENCES

ALR. — State statutes making default on bail a separate criminal offense, 63 A.L.R.4th 1064.

16-10-52. Escape.

(a) A person commits the offense of escape when he or she:

(1) Having been convicted of a felony or misdemeanor or of the violation of a municipal ordinance, intentionally escapes from lawful custody or from any place of lawful confinement;

(2) Being in lawful custody or lawful confinement prior to conviction, intentionally escapes from such custody or confinement;

(3) Having been adjudicated of a delinquent act or a juvenile traffic offense, or as a child in need of services subject to lawful custody or lawful confinement, intentionally escapes from lawful custody or from any place of lawful confinement;

(4) Being in lawful custody or lawful confinement prior to adjudication, intentionally escapes from such custody or confinement; or

(5) Intentionally fails to return as instructed to lawful custody or lawful confinement or to any residential facility operated by the Georgia Department of Corrections after having been released on the condition that he or she will so return; provided, however, such person shall be allowed a grace period of eight hours from the exact time specified for return if such person can prove he or she did not intentionally fail to return.

(a.1) Revocation of probation for conduct in violation of any provision of subsection (a) of this Code section shall not preclude an independent criminal prosecution under this Code section based on the same conduct.

(b)(1) A person who, having been convicted of a felony, is convicted of the offense of escape shall be punished by imprisonment for not less than one nor more than ten years.

(2) Any person charged with a felony who is in lawful confinement prior to conviction or adjudication who is convicted of the offense of escape shall be punished by imprisonment for not less than one nor more than five years.

(3) Notwithstanding paragraphs (1) and (2) of this subsection, a person who commits the offense of escape while armed with a dangerous weapon shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than 20 years.

(4) Any other person convicted of the offense of escape shall be punished as for a misdemeanor. (Laws 1833, Cobb's 1851 Digest, p. 807; Code 1863, § 4378; Code 1868, § 4416; Code 1873, § 4484; Ga. L. 1876, p. 112, § 1; Ga. L. 1882-83, p. 48, § 1; Code 1882, §§ 4483a, 4484; Ga. L. 1884-85, p. 52, § 1; Penal Code 1895, §§ 314, 316; Penal Code 1910, §§ 319, 321; Code 1933, §§ 26-4507, 26-4509; Ga. L. 1953, Nov.-Dec. Sess., p. 187, § 1; Ga. L. 1955, p. 578, § 1; Ga. L. 1961, p. 491, § 1; Code 1933, § 26-2501, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1983, p. 645, § 1; Ga. L. 1989, p. 329, § 1; Ga. L. 1994, p. 852, § 1; Ga. L. 1997, p. 1064, § 10; Ga. L. 2001, p. 94, § 2; Ga. L. 2013, p. 294, § 4-8/HB 242.)

Cross references. — Conduct of trials of inmates charged with escaping from state or county correctional institution, § 17-8-50. Demand by Governor for return of fugitives by other states, § 17-13-42 et seq. Authority of Commissioner of Corrections to issue arrest warrant, § 42-2-8.

Editor's notes. — Ga. L. 1997, p. 1064, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Juvenile Justice Act of 1997'."

Ga. L. 1997, p. 1064, § 12, not codified by the General Assembly, provides that the provisions of that Act "shall not affect or abate the status of a crime or delinquent act or of any such act or omission which occurred prior to April 22, 1997, nor shall the prosecution of such crime or delinquent act be abated as a result of the provisions of this Act."

Ga. L. 2001, p. 94, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the '2001 Crime Prevention Act'."

Ga. L. 2001, p. 94, § 8, not codified by the General Assembly, provides that this Act shall apply to offenses of escape committed on or after July 1, 2001.

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Administrative rules and regulations. — Fugitive procedures, Official Compilation of the Rules and Regulations of the State of Georgia, Board of Corrections, Institutional and Center Operations, § 125-3-1-.07

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 69 (1997).

For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 122 (1994). For note on the 2001 amendment of this Code section, see 18 Ga. St. U.L. Rev. 47 (2001).

JUDICIAL DECISIONS

Analysis

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General Consideration

Former Code 1933, § 26-2501 (see now O.C.G.A. § 16-10-52) was not unconstitutionally vague and gives sufficient notice of prohibited conduct to persons of ordinary intelligence. Johnson v. State, 246 Ga. 126, 269 S.E.2d 18 (1980).

Challenge to the constitutionality of O.C.G.A. § 16-10-52(a.1) was rejected by the Supreme Court where the case, which was originally appealed to that court, was transferred to the Court of Appeals, indicating that no constitutional question was in fact properly raised or, if so raised, was not meritorious. Ashton v. State, 217 Ga. App. 337, 457 S.E.2d 226 (1995).

Former Penal Code 1895, § 314 (see now O.C.G.A. § 16-10-52) was inapplicable to one whose confinement was for safekeeping only, and was not part of court sentence. Welch v. State, 4 Ga. App. 388, 61 S.E. 496 (1908).

O.C.G.A. § 16-10-52 did not apply to juvenile's escape from custody. — Juvenile who was taken into custody by the police for a probation violation, and who escaped, could not be adjudicated delinquent based on the adult crime of misdemeanor escape since the juvenile was not in custody prior to or after having been convicted of a felony, misdemeanor, or violation of a municipal ordinance. In re J.B., 222 Ga. App. 252, 474 S.E.2d 111 (1996).

O.C.G.A. § 16-10-52 does not apply to persons in custody for contempt, either civil or criminal. Flanagan v. State, 212 Ga. App. 468, 442 S.E.2d 16 (1994).

One confined by lawful authority must submit until delivered by due process by law. Grimes v. Burch, 223 Ga. 856, 159 S.E.2d 69 (1968).

Word "escape," as used in former Penal Code 1895, § 314 (see now O.C.G.A. § 16-10-52), may include escape from constructive confinement. Smith v. State, 8 Ga. App. 297, 68 S.E. 1071 (1910).

Former Penal Code 1895, § 314 (see now O.C.G.A. § 16-10-52) applied to escape from place of confinement for violators of municipal ordinances. Collins v. State, 120 Ga. 849, 48 S.E. 312 (1904).

Former Penal Code 1910, § 319 (see now O.C.G.A. § 16-10-52) referred only to persons convicted in state courts and not to those convicted in federal courts who may be imprisoned, under authority of United States officials, in state jails. Brandon v. State, 37 Ga. App. 495, 141 S.E. 63 (1927).

Escape is completed when a prisoner intentionally escapes from custody or confinement. However, even when the use of a dangerous weapon is shown in an escape, it is not necessary to prove that the use of the weapon was with intent to inflict serious bodily harm, an essential element of the crime of mutiny (O.C.G.A. § 16-10-54). Rhine v. State, 174 Ga. App. 859, 332 S.E.2d 1 (1985).

Sole purpose of phrase, "prior to conviction" is to distinguish misdemeanor grade of escape from felony grade. Fears v. State, 138 Ga. App. 885, 227 S.E.2d 785 (1976).

Words "dangerous weapon" in O.C.G.A. § 16-10-52(b) are not words of art but rather are words of common understanding and meaning which require no definition themselves for understanding by the jury. Baird v. State, 201 Ga. App. 378, 411 S.E.2d 332 (1991).

Escape without dangerous weapon and prior to conviction constitutes misdemeanor. — When an indictment charging escape without a dangerous weapon does not affirmatively allege that defendant's prior confinement was pursuant to a felony or misdemeanor conviction, the indictment necessarily charges misdemeanor grade of escape and defendant cannot be subjected to felony punishment. Pruitt v. State, 135 Ga. App. 677, 218 S.E.2d 679 (1975).

Entry of a guilty plea was not a judgment of conviction until sentence was imposed; therefore, a defendant who walked away from the courthouse after entry of a plea but before sentencing was not guilty of felony escape, but could be convicted only of misdemeanor escape. Dorsey v. State, 259 Ga. App. 254, 576 S.E.2d 637 (2003).

When escape is made while in possession of dangerous weapon possible punishment is different than it is when there is no possession of such weapon.

Halm v. State, 125 Ga. App. 618, 188 S.E.2d 434 (1972).

Rule prohibiting references to other crimes of accused not fully applicable to trial for escape, which by its nature alludes to prior act resulting in incarceration or conviction; evidence of escapee's original crime is often an unavoidable aspect of state's proof with regard to lawfulness of confinement. Carter v. State, 155 Ga. App. 840, 273 S.E.2d 417 (1980).

Reference to conviction for original crime held error. — When the conviction for an original crime does not occur prior to escape and thus is not relied upon to establish felony grade of offense, reference to conviction is unnecessary and is error. Gillespie v. State, 140 Ga. App. 408, 231 S.E.2d 154 (1976); Carter v. State, 155 Ga. App. 840, 273 S.E.2d 417 (1980).

Authority for detention is an essential element of felony offense of escape. Smith v. State, 154 Ga. App. 608, 269 S.E.2d 100 (1980).

Admitting evidence of prior conviction not error. — Trial court did not err in admitting evidence of prior conviction for armed robbery since proof of lawful confinement is a necessary element in proving crime of escape. Ingram v. State, 237 Ga. 613, 229 S.E.2d 416 (1976).

Admission of evidence of first murder was a necessary element of the state's case of escape against the defendant to show that defendant had been in lawful custody. Thomas v. State, 256 Ga. 170, 345 S.E.2d 350 (1986).

Trial court did not err in admitting evidence of defendant's previous convictions after defendant offered to stipulate that he had been convicted of a felony. Norris v. State, 227 Ga. App. 616, 489 S.E.2d 875 (1997).

In an escape case, the state was properly allowed to mention the nature of the defendant's prior felony convictions for aggravated assault, robbery, battery, and theft by taking. The nature of the convictions was not likely to inflame the jury's passions, and as O.C.G.A. § 16-10-52(a) required that the state prove that the defendant was in lawful custody at the time of the escape, the purpose was not solely to prove the defendant's status as a convicted felon. Allen v. State, 292 Ga. App. 133, 663 S.E.2d 370 (2008), aff'd, 286 Ga. 273, 687 S.E.2d 417 (2009).

Reference to conviction is generally irrelevant and should be avoided in trials for misdemeanor escapes unless its relevancy to issues being tried outweighs its prejudicial impact. Fears v. State, 138 Ga. App. 885, 227 S.E.2d 785 (1976).

Statute applied even though defendant was on release at time of escape. — Defendant was properly convicted of escape under O.C.G.A. § 16-10-52(a)(5) even though defendant was on two days release to take care of personal matters when defendant committed the offense as the request for release was not granted until after the trial court pronounced sentence upon defendant, and the trial court released defendant from lawful custody. Suter v. State, 259 Ga. App. 28, 576 S.E.2d 10 (2002).

Escape from custody prior to probation revocation hearing. — When the party's confinement was not due to a criminal conviction but the person was a prisoner in lawful custody prior to conviction and under arrest warrant awaiting hearing as to revocation of the person's probation, the person may not be convicted of felonious escape. Smith v. State, 154 Ga. App. 608, 269 S.E.2d 100 (1980).

To obtain conviction of felony grade of escape, state must allege and prove prior conviction for felony or misdemeanor. Fears v. State, 138 Ga. App. 885, 227 S.E.2d 785 (1976).

Under O.C.G.A. § 16-10-52 a conviction of escape may be punished as a felony only if defendant's previous confinement was pursuant to a felony or misdemeanor conviction or if defendant escaped while armed with a dangerous weapon, without regard to the nature of the original crime or time of escape. Hornsby v. State, 159 Ga. App. 672, 284 S.E.2d 630 (1981).

Escape with dangerous weapon, or from confinement pursuant to conviction. — One may be convicted of felony offense of escape without dangerous weapon only where one's previous confinement was pursuant to a felony or misdemeanor conviction, all other escapes being misdemeanors. Pruitt v. State, 135 Ga. App. 677, 218 S.E.2d 679 (1975).

General Consideration (Cont'd)

Conviction of felonious escape requires escape from confinement pursuant to felony or misdemeanor conviction, and all other escapees must receive misdemeanor punishment. Smith v. State, 154 Ga. App. 608, 269 S.E.2d 100 (1980).

Use of dangerous weapon changes crime to felony. — When a number of prisoners combined in a criminal conspiracy to escape the jail, and one of the prisoners wielded a heavy stool striking a guard on the head causing serious injury, that prisoner used a dangerous weapon and all the escapees were equally guilty of the use of that weapon which changes the crime from a misdemeanor to a felony. Rhine v. State, 174 Ga. App. 859, 332 S.E.2d 1 (1985).

Possession of weapon by one of two escapees subjects both to felony charge. — When two persons jointly escape from lawful confinement but only one wielded a weapon, both may be convicted of escape while armed with a dangerous weapon. Davis v. State, 169 Ga. App. 601, 314 S.E.2d 257 (1984).

Effect of eventual acquittal on grade of escape when gun employed. — Fact that defendant was acquitted of murder offense, for which defendant was in pretrial custody and from which defendant escaped while armed with a gun, did not preclude defendant's conviction for felony grade of escape. Hawkins v. State, 163 Ga. App. 477, 294 S.E.2d 710 (1982).

Wearing prison uniform at trial. — When a defendant is being tried for escape, there is no harm in trying defendant in a prison uniform. Barton v. State, 184 Ga. App. 258, 361 S.E.2d 250 (1987).

Impeachment of witness. — Misdemeanor offense of escape does not involve moral turpitude, and a conviction is inadmissible to impeach a witness. Norley v. State, 170 Ga. App. 249, 316 S.E.2d 808 (1984).

Escape as crime of violence. — Because the offense of escape presents the potential risk of violence, even when it involves a "walk-away" from unsecured correctional facilities, the federal district court did not err in holding that escape conviction qualified as a "crime of violence" under the career offender guideline. United States v. Gay, 251 F.3d 950 (11th Cir. 2001).

Citing wrong version of statute not reversible error. — While the court of appeals cited the wrong version of O.C.G.A. § 16-10-52(b), the error was of no consequence because under both the July 2001 version of the statute and the pre-July 2001 version, anyone who, having been convicted of a felony at the time of escape, was subject to being sentenced for up to ten years for escape; because the circumstances of the defendant's case were unaffected by the July 2001 amendment to § 16-10-52(b), the failure of the court of appeals to cite the pre-July 2001 version of the statute was not reversible error. Allen v. State, 286 Ga. 273, 687 S.E.2d 417 (2009).

Sentence appropriate. — Although the judge did not indicate reasoning for sentencing defendant to the maximum penalty for defendant's crime, there was no evidence that the judge was motivated to do so merely because defendant refused to enter a guilty plea, and the sentence was within the minimum and maximum sentences prescribed by law. West v. State, 241 Ga. App. 877, 528 S.E.2d 287 (2000).

In an escape case, the defendant's prior aggravated assault, robbery, battery, and theft convictions were available to sentence the defendant as a recidivist under O.C.G.A. § 17-10-7(a) because any of the defendant's armed robbery convictions, which were pending at the time the defendant escaped, would support the defendant's being sentenced as a convicted felon under O.C.G.A. § 16-10-52(b). Allen v. State, 292 Ga. App. 133, 663 S.E.2d 370 (2008), aff'd, 286 Ga. 273, 687 S.E.2d 417 (2009).

Cited in Bolick v. State, 127 Ga. App. 542, 194 S.E.2d 302 (1972); Mincey v. Hopper, 233 Ga. 378, 211 S.E.2d 283 (1974); Carter v. State, 133 Ga. App. 446, 211 S.E.2d 401 (1974); Dixon v. State, 234 Ga. 157, 215 S.E.2d 5 (1975); Myers v. State, 143 Ga. App. 195, 237 S.E.2d 662 (1977); Bailey v. State, 146 Ga. App. 774, 247 S.E.2d 588 (1978); Lester v. State, 188 Ga. App. 211, 372 S.E.2d 486 (1988); Palmer v. State, 260 Ga. 330, 393 S.E.2d 251 (1990); Spencer v. State, 260 Ga. 640,

398 S.E.2d 179 (1990); Harden v. State, 197 Ga. App. 686, 399 S.E.2d 276 (1990); Bland v. State, 264 Ga. 610, 449 S.E.2d 116 (1994); Salters v. State, 244 Ga. App. 219, 535 S.E.2d 278 (2000); May v. State, 244 Ga. App. 201, 535 S.E.2d 252 (2000); Shearin v. State, 293 Ga. App. 794, 668 S.E.2d 300 (2008); Williams v. Morahan, No. 13-10303, 2013 U.S. App. LEXIS 18837 (11th Cir. Sept. 11, 2013) (Unpublished).

Indictment and Accusation

If indictment charges misdemeanor escape, evidence at trial cannot alter grade of offense charged. Pruitt v. State, 135 Ga. App. 677, 218 S.E.2d 679 (1975).

Failure to allege intentional escape. — Failure to allege intentional escape in accusation does not render a conviction void where accusation alleged that escape was contrary to laws of Georgia and where crime was otherwise clearly described. Fears v. State, 138 Ga. App. 885, 227 S.E.2d 785 (1976).

Escape may, under certain circumstances, be joined in multi-count indictment. — Escape may, under certain circumstances, be one of a series of acts connected together and joined in a multi-count indictment. Carter v. State, 155 Ga. App. 840, 273 S.E.2d 417 (1980).

No fatal variance between indictment and proof. — There was no fatal variance between an indictment for felony escape and the proof at trial. The allegation that the defendant was in custody for theft by taking was mere surplusage; the defendant's lawful confinement was both alleged and proven without regard to the theft allegation. Juhan v. State, 322 Ga. App. 620, 744 S.E.2d 910 (2013).

Defenses

It is no defense that escape was to avoid unmerited punishment. Johnson v. State, 122 Ga. 172, 50 S.E. 65 (1905).

Unlawful sentence as defense. — Defendant's claim of unlawful sentence as a defense to an escape charge failed because the sentence, imposed upon revocation of probation, to confinement in the county jail under work release was lawful since it did not require continuous and uninterrupted incarceration. Yother v. State, 243 Ga. App. 422, 532 S.E.2d 696 (2000).

Coercion as defense. — Coercion is no defense when any reasonable way to escape threat of harm is available. Proctor v. State, 139 Ga. App. 794, 229 S.E.2d 675 (1976); Vowell v. State, 174 Ga. App. 426, 330 S.E.2d 167 (1985).

Whether any reasonable way of escaping threat of harm is available is for jury determination. Proctor v. State, 139 Ga. App. 794, 229 S.E.2d 675 (1976).

Negligence of keeper of jail is no defense to charge of escape. Johnson v. State, 246 Ga. 126, 269 S.E.2d 18 (1980).

Effect of deprivation of procedural rights prior to conviction. — Fact that accused may have been deprived of various procedural rights prior to conviction or sentence does not render the accused's imprisonment so void as to justify escape. Grimes v. Burch, 223 Ga. 856, 159 S.E.2d 69 (1968).

Defendant not in lawful custody. — Defendant was not lawfully arrested for disorderly conduct because Georgia law did not criminalize obscene language; therefore, because the defendant was not in lawful custody, the defendant could not be charged with escape in violation of O.C.G.A. § 16-10-52(a)(2) when the defendant elbowed the chief of police during a pat down and ran from the scene. Meadows v. State, 303 Ga. App. 40, 692 S.E.2d 708 (2010).

Deprivation of counsel does not invalidate conviction so as to justify escape, and failure to promptly grant hearing or trial does not render imprisonment so unlawful as to excuse escape. Grimes v. Burch, 223 Ga. 856, 159 S.E.2d 69 (1968).

Escape by one deprived of right to jury trial. — When one is deprived of constitutional right to jury trial, or to preliminary examination required by statute, one's confinement may be so void that one's escape therefrom is justified. Grimes v. Burch, 223 Ga. 856, 159 S.E.2d 69 (1968).

That defendant is a chronic alcoholic is not an excuse for offense of escape. Grimes v. Burch, 223 Ga. 856, 159 S.E.2d 69 (1968).

Defenses (Cont'd)

Alcoholism is not involuntary intoxication and, consequently, is not a defense to offense of escape or any other criminal act or omission. Ford v. State, 164 Ga. App. 620, 298 S.E.2d 327 (1982).

Actions not result of drunken stupor. — Taking car and changing out of prison clothing indicate defendant had not merely wandered off in drunken stupor. Holt v. State, 143 Ga. App. 438, 238 S.E.2d 763 (1977).

Application

Inmate's unauthorized departure from unsupervised work site on state property. — Prisoner who due to good behavior was assigned to unconfined and unsupervised daily work for state outside of correctional institution was restricted to perimeters of state property upon which the prisoner worked and remained at all times in constructive custody of state. Unauthorized departure from work site constituted a violation of O.C.G.A. § 16-10-52. Hendrickson v. State, 159 Ga. App. 628, 284 S.E.2d 645 (1981).

City hospital administering emergency treatment is "place of lawful confinement." — Prisoner who left city hospital without authorization upon receiving emergency medical treatment escaped from "place of lawful confinement" within meaning of O.C.G.A. § 16-10-52. Hornsby v. State, 159 Ga. App. 672, 284 S.E.2d 630 (1981).

One convicted of violating municipal ordinances who escapes unarmed. — Where plaintiff was in confinement after being convicted of violating only certain municipal ordinances and there is absolutely no evidence that appellant was armed at time of appellant's escape, appellant must be considered to be within category of "any other person convicted of escape" and, thus, appellant is subject to misdemeanor punishment. Hornsby v. State, 159 Ga. App. 672, 284 S.E.2d 630 (1981).

Leaving treatment program and failing to report to probation officer did not constitute felony escape. — For purposes of probation revocation, a defendant had not committed a new felony offense, escape under O.C.G.A. § 16-10-52, by leaving a drug and alcohol treatment program and by failing to report to a probation officer; the defendant was not then in lawful custody or in a residential facility operated by the Georgia Department of Corrections. Chester v. State, 287 Ga. App. 70, 651 S.E.2d 360 (2007).

Underlying escape merged with felony murder. — Since the underlying felony charged to the jury for the felony murder charge was escape with a dangerous weapon, defendant's separate conviction for this escape was set aside as having merged with the felony murder.

Misdemeanor attempt, not felony, escape sentencing was proper when defendant was jailed for parole violation. — Defendant should have been sentenced for misdemeanor attempted escape under O.C.G.A. § 16-10-52(b)(4) since the defendant was in jail for a parole violation, not for a charge on another crime, when the defendant attempted to escape; because the defendant was not charged with any crime at the time the defendant was incarcerated for the parole violation when the defendant attempted to escape from custody, the defendant was erroneously sentenced for a felony under O.C.G.A. § 16-10-52(b)(2) and was entitled to resentencing for misdemeanor attempted escape under § 16-10-52(b)(4). Green v. State, 283 Ga. App. 541, 642 S.E.2d 167 (2007).

Failure to abide by diversion center's regulations. — It was error to hold that the appellant's failure to abide by the diversion center's regulations made appellant liable for the felony offense of escape rather than for the mere revocation of appellant's probation. Unsatisfactory performance in the program would subject the probationer to revocation of probation as specified by O.C.G.A. § 42-8-38; however, an alternative to revocation of probation would be the imposition of the more severe sanctions of O.C.G.A. § 16-10-52(a)(3) (redesignated (a)(5) in 1997). Where any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of two penalties administered. Chandler v. State, 257 Ga. 775, 364 S.E.2d 273 (1988).

Escape from diversion center. — Defendant was properly convicted of felony escape when, at the time of defendant's escape, defendant was residing in a diversion center in service of a misdemeanor sentence after defendant's probation was revoked, not as a condition of probation. Ashton v. State, 217 Ga. App. 337, 457 S.E.2d 226 (1995).

When the defendant failed to report back to a diversion center after defendant was allowed to leave for work, defendant was guilty of the felony offense of escape and thereby violated probation, which was conditioned upon, inter alia, not violating the criminal laws of any governmental unit. Echols v. State, 233 Ga. App. 578, 505 S.E.2d 55 (1998).

Defendant in house arrest program is in lawful custody or confinement. — Defendant participating in an electronically-monitored house arrest program is in lawful custody or lawful confinement, as provided in O.C.G.A. § 16-10-52, because the General Assembly explicitly recognized a defendant's home as a place where he or she could be kept within bounds or restricted in movement for purposes of the electronic pretrial release program. Brown v. State, 314 Ga. App. 1, 723 S.E.2d 112 (2012).

Evidence sufficient. — Prison security officer's testimony from the officer's personal knowledge, coupled with the unobjected to evidence of lawful confinement, was sufficient evidence from which a rational trier of fact could find defendant guilty of escape beyond a reasonable doubt. Smith v. State, 164 Ga. App. 463, 297 S.E.2d 378 (1982).

Evidence on escape conviction was sufficient, where defendant was separated from codefendant and placed in investigator's police vehicle for the trip to the jail to further investigate the matter, since the jury could reasonably conclude that a reasonable person in the suspect's position would have thought the detention would not be temporary. Likewise, when seated in the anteroom of the police station in the presence of the radio officer and told to wait by the investigator, a reasonable person would not have thought he or she was free to go. Truax v. State, 207 Ga. App. 506, 428 S.E.2d 611 (1993).

Defendant's departure from a jail after serving a few days of defendant's eight-year sentence constituted an escape since: defendant knew that the sentence had not yet been served; criminal intent could be inferred from the fact that defendant gave the bondsman inaccurate information regarding defendant's anticipated residence and place of employment; and defendant could not be found for over one year. Bridges v. State, 256 Ga. App. 355, 568 S.E.2d 574 (2002).

When the defendant committed escape by failing to return to the work release program where the defendant was confined, the defendant was properly convicted of felony escape, under O.C.G.A. § 16-10-52(b)(1), because the authority for the defendant's confinement in the work release program was the defendant's felony conviction for robbery by intimidation as the defendant's sentence for that offense had been modified to provide for the defendant's confinement in the work release program, and the defendant was not entitled to be convicted of and sentenced for misdemeanor escape under O.C.G.A. § 16-10-52(b)(4). Bond v. State, 263 Ga. App. 620, 588 S.E.2d 801 (2003).

Because, at the time of the defendant's escape, the defendant was being held in custody based on probable cause that the defendant had committed a felony as demonstrated by the valid arrest warrant issued by the State of Florida, there was sufficient evidence to find the defendant guilty of felony escape under O.C.G.A. § 16-10-52(a)(2). Joiner v. State, 299 Ga. App. 300, 682 S.E.2d 381 (2009).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty of escape beyond a reasonable doubt because the defendant was in a state of being restricted to or detained within the defendant's home, under the guard of an electronic monitor, and the defendant violated the conditions of the house arrest order by removing the monitor and leaving town. Brown v. State, 314 Ga. App. 1, 723 S.E.2d 112 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Crime of escape not completed until inmate departs from prison itself. — Crime of escape is not committed by inmate prior to the inmate's departure from custody, which would be a departure from the prison itself; a prisoner is merely attempting to escape from custody until the prisoner actually escapes. 1970 Op. Att'y Gen. No. 70-131.

Residents absconding from diversion centers. — Residents of diversion centers may be charged with escape when they abscond. 1986 Op. Att'y Gen. No. 86-3.

Force permitted in arresting escaping inmate. — Correctional officers are authorized to use their police power to arrest an escaping inmate who has previously been convicted of a felony or misdemeanor for felony of escape. In making this arrest, the officer is justified in using same reasonable force provided under law for arrest by police officers when felony has been committed in their presence. 1981 Op. Att'y Gen. No. 81-82.

Correctional officer making lawful arrest can use no more force than is reasonably necessary under circumstances and cannot use force disproportionate to resistance offered. 1981 Op. Att'y Gen. No. 81-82.

Prerequisites to use of deadly force. — There are several prerequisites to use of deadly force by correctional officer in preventing escape. First, inmate must have previously been convicted of felony or misdemeanor. Secondly, correctional officer must either know that inmate is trying to escape or be able to reasonably conclude in the officer's own mind from circumstances that inmate is trying to escape, thus committing felony offense of escape. Thirdly, circumstances must be such that a reasonable man would have felt that it was necessary to use deadly force at time to prevent escape. 1981 Op. Att'y Gen. No. 81-82.

One accused of escape is entitled to be released on bail. — Assuming that release of one accused of escape does not interrupt service of existing sentence, accused is entitled to be released on bail if offense is a misdemeanor, and if a felony, the accused is entitled to bail either before or after indictment. 1970 Op. Att'y Gen. No. U70-136.

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Escape, § 1 et seq.

C.J.S. — 30A C.J.S., Escape and Related Offenses; Rescue, § 1 et seq.

ALR. — Dispute over custody as affecting charge of obstructing or resisting arrest, 3 A.L.R. 1290.

What justifies escape or attempt to escape, or assistance in that regard, 70 A.L.R.2d 1430.

Escape or prison breach as affected by means employed, 96 A.L.R.2d 520.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine, 50 A.L.R.3d 397.

Escape from public employee or institution other than correctional or law enforcement employee or institution as criminal offense, 69 A.L.R.3d 625.

Escape from custody of private person as criminal offense, 69 A.L.R.3d 664.

Failure of prisoner to return at expiration of work furlough or other permissive release period as crime of escape, 76 A.L.R.3d 658.

Temporary unauthorized absence of prisoner as escape or attempted escape, 76 A.L.R.3d 695.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 A.L.R.3d 280.

Admissibility of evidence that defendant escaped or attempted to escape while being detained for offense in addition to that or those presently being prosecuted, 3 A.L.R.4th 1085.

Conviction for escape where prisoner fails to leave confines of prison or institution, 79 A.L.R.4th 1060.

Duress, necessity, or conditions of confinement as justification for escape from prison, 54 A.L.R.5th 141.

Construction and application of enhanced sentencing provision of Armed Career Criminal Act (ACCA), 18 U.S.C.A. § 924(e) — United States Supreme Court cases, 67 A.L.R. Fed. 2d 1.

16-10-53. Aiding or permitting another to escape lawful custody or confinement.

(a) A person who knowingly aids another in escaping from lawful custody or from any place of lawful confinement shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.

(b) A peace officer or employee of any place of lawful confinement who recklessly permits any person in his custody to escape is guilty of a misdemeanor. (Laws 1833, Cobb's 1851 Digest, p. 807; Code 1863, §§ 4376, 4377, 4379; Code 1868, §§ 4414, 4415, 4417; Code 1873, §§ 4482, 4483, 4485; Ga. L. 1876, p. 112, § 2; Code 1882, §§ 4482, 4483, 4483b, 4485; Penal Code 1895, §§ 312, 313, 315, 317; Penal Code 1910, §§ 317, 318, 320, 322; Code 1933, §§ 26-4505, 26-4506, 26-4508, 26-4510; Ga. L. 1955, p. 578, § 2; Code 1933, § 26-2502, enacted by Ga. L. 1968, p. 1249, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 4646 are included in the annotations for this Code section.

Preemption of section regarding parties to crimes. — O.C.G.A. § 16-10-53(a) preempts O.C.G.A. § 16-2-20(b)(3) (aiding and abetting the commission of an offense), insofar as escape from confinement is concerned. Harden v. State, 184 Ga. App. 371, 361 S.E.2d 696 (1987).

One who knowingly aids convict either to get away or stay away violates former Penal Code 1895, § 315 (see now O.C.G.A. § 16-10-53). Smith v. State, 8 Ga. App. 297, 68 S.E. 1071 (1910).

Defendant must know of or have good reason to believe legal character of custody. Habersham v. State, 56 Ga. 61 (1876) (decided under former Code 1873, § 4646); McBryar v. McElroy, 510 F. Supp. 706 (N.D. Ga. 1981).

Questions of legality of custody are for jury. Habersham v. State, 56 Ga. 61 (1876) (decided under former Code 1873, § 4646); McBryar v. McElroy, 510 F. Supp. 706 (N.D. Ga. 1981).

Creating impediment while prisoner is still in sight constitutes violation. Perry v. State, 63 Ga. 402 (1879).

As long as prisoner is in sight, escape is not complete. Smith v. State, 8 Ga. App. 297, 68 S.E. 1071 (1910).

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Force permitted in arresting persons reasonably suspected of aiding escape. — If correctional officer reasonably believes persons in aircraft landing inside perimeter of correctional facility are aiding or attempting to aid an escape, then the officer is entitled to make an arrest of those persons. To effectuate this arrest the officer is justified in using reasonable force. 1981 Op. Att'y Gen. No. 81-90.

Extent to which force may be uti-

lized in disabling aircraft landing inside perimeter of correctional facility. See 1981 Op. Att'y Gen. No. 81-90.

Maintenance by Georgia Crime Information Center of records regarding violations of provisions regarding aiding or permitting escape. See 1976 Op. Att'y Gen. No. 76-33.

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Escape, § 9.

C.J.S. — 30A C.J.S., Escape and Related Offenses; Rescue, § 24 et seq.

ALR. — What justifies escape or attempt to escape, or assistance in that regard, 70 A.L.R.2d 1430.

Escape or prison breach as affected by means employed, 96 A.L.R.2d 520.

When statute of limitation begins to run on charge of obstructing justice or of conspiracy to do so, 77 A.L.R.3d 725.

Immunity of public officer from liability for injuries caused by negligently released individual, 5 A.L.R.4th 773.

16-10-54. Assailing, opposing, or resisting officer of the law in a penal institution.

A person in the lawful custody of any penal institution of the state or of a political subdivision of the state who assails, opposes, or resists an officer of the law or of such penal institution or a member of the guard with intent to cause serious bodily injury commits the offense of mutiny and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years. (Laws 1833, Cobb's 1851 Digest, p. 810; Code 1863, § 4396; Code 1868, § 4437; Code 1873, § 4510; Code 1882, § 4510; Penal Code 1895, § 329; Penal Code 1910, § 334; Code 1933, § 26-4801; Code 1933, § 26-2507, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1993, p. 808, § 1.)

Cross references. — Admissibility of testimony of inmates in trials for crime of mutiny, § 17-8-51.

JUDICIAL DECISIONS

Mutiny in a penal institution and aggravated assault require proof of different elements and, therefore, the former offense cannot be a lesser included offense of the latter. Bierria v. State, 232 Ga. App. 622, 502 S.E.2d 542 (1998).

Insufficient foundation for eliciting testimony to show justification. — When the defendant, charged with violating O.C.G.A. § 16-10-54 by throwing boiling water on a prison guard, tried to elicit testimony of previous difficulties between the defendant and the guard during cross-examination in order to put forward a defense of justification, the trial court properly disallowed the line of questioning because the defendant had failed to lay a proper foundation for such entry. Taylor v. State, 180 Ga. App. 200, 348 S.E.2d 582 (1986).

Evidence sufficient to support conviction. — When a deputy testified that the defendant resisted the deputy's efforts to break up a prison fight, then turned on the deputy, punched the deputy, and swung at the deputy repeatedly, injuring the deputy, there was sufficient evidence of mutiny in a penal institution and felony obstruction of an officer; the trial court was authorized under O.C.G.A. § 16-2-6

to infer from the circumstances that the defendant both knowingly and willfully obstructed the deputy by the use of violence and intended to cause the deputy serious bodily injury by striking the deputy with a fist, and under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), it could rely solely on the deputy's account of the events. Butler v. State, 284 Ga. App. 802, 644 S.E.2d 898 (2007).

Cited in Jordan v. State, 247 Ga. 328, 276 S.E.2d 224 (1981); Suggs v. State, 164 Ga. App. 227, 296 S.E.2d 124 (1982); Weaver v. State, 170 Ga. App. 731, 318 S.E.2d 196 (1984); McCrainie v. State, 172 Ga. App. 188, 322 S.E.2d 360 (1984); Rhine v. State, 174 Ga. App. 859, 332 S.E.2d 1 (1985); Weaver v. State, 176 Ga. App. 639, 337 S.E.2d 420 (1985); McCord v. State, 182 Ga. App. 586, 356 S.E.2d 689 (1987); Jackson v. State, 182 Ga. App. 885, 357 S.E.2d 321 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Escape, §§ 2, 4.

C.J.S. — 30A C.J.S., Escape and Related Offenses; Rescue, § 21 et seq.

ALR. — When statute of limitation begins to run on charge of obstructing justice or of conspiracy to do so, 77 A.L.R.3d 725.

16-10-55. Persuading, enticing, instigating, aiding, or abetting person in a penal institution to commit mutiny.

A person who persuades, entices, instigates, counsels, aids, or abets a person in the lawful custody of any penal institution to commit the offense of mutiny shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years. (Laws 1833, Cobb's 1851 Digest, p. 810; Code 1863, § 4397; Code 1868, § 4438; Code 1873, § 4511; Code 1882, § 4511; Penal Code 1895, § 330; Penal Code 1910, § 335; Code 1933, § 26-4802; Code 1933, § 26-2508, enacted by Ga. L. 1968, p. 1249, § 1.)

RESEARCH REFERENCES

ALR. — When statute of limitation begins to run on charge of obstructing justice or of conspiracy to do so, 77 A.L.R.3d 725.

16-10-56. Unlawful acts of violence in a penal institution.

(a) As used in this Code section, the term "penal institution" means any place of confinement for persons accused of or convicted of violating a law of this state or an ordinance of a municipality or political subdivision of this state.

(b) No person legally confined to a penal institution shall commit an unlawful act of violence or any other act in a violent or tumultuous manner in a penal institution.

(c) Any person who violates this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one year nor more than 20 years. (Code 1981,

§ 16-10-56, enacted by Ga. L. 1995, p. 137, § 1.1; Ga. L. 2017, p. 500, § 3-5/SB 160.)

The 2017 amendment, effective July 1, 2017, added subsection (a); redesignated former subsection (a) as present subsection (b); substituted the present provisions of subsection (b) for the former provisions, which read: "Any person legally confined to any penal institution of this state or of any political subdivision of this state who commits an unlawful act of violence or any other act in a violent or tumultuous manner commits the offense of riot in a penal institution."; redesignated former subsection (b) as present subsection (c), and, in subsection (c), substituted "violates this Code section shall be guilty" for "violates subsection (a) of this Code section is guilty", and inserted "year" near the end.

Editor's notes. — Ga. L. 2017, p. 500, § 1-1/SB 160, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Back the Badge Act of 2017.'"

Law reviews. — For annual survey on criminal law, see 69 Mercer L. Rev. 73 (2017). For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 89 (2017).

For note on the 1995 enactment of this Code section, see 12 Ga. St. U.L. Rev. 112 (1995).

JUDICIAL DECISIONS

Construction with O.C.G.A. § 16-11-30. — Defendant, who was charged with riot in a penal institution in violation of O.C.G.A. § 16-10-56, was not similarly situated for equal protection purposes to persons charged with riot under O.C.G.A. § 16-11-30 because only those charged with the same crime as defendant could be similarly situated. Drew v. State, 285 Ga. 848, 684 S.E.2d 608 (2009).

Application with O.C.G.A. § 16-10-24. — Defendant's act of swinging the defendant's fist at the deputy satisfied the elements of both riot in a penal institution under O.C.G.A. § 16-10-56(a), and obstruction of a law enforcement officer by offering violence under O.C.G.A. § 16-10-24(b), and because the two defined crimes did not address the same criminal conduct, there was no ambiguity created by different punishments being set forth for the same crime and the rule of lenity did not apply. Chynoweth v. State, 331 Ga. App. 123, 768 S.E.2d 536 (2015), cert. denied, 2015 Ga. LEXIS 396 (Ga. 2015).

No fatal variance. — There was not a fatal variance between the indictment and the proof at trial because there was some evidence that the defendant used the defendant's arms, not just the defendant's legs, to apply the chokehold to the victim. Strapp v. State, 326 Ga. App. 264, 756 S.E.2d 333 (2014).

Sufficient evidence for conviction. — See Burge v. State, 243 Ga. App. 673, 534 S.E.2d 132 (2000).

Evidence that the detained defendant, after threatening a detention center sheriff's deputy with a cup of bleach solution and a mop, and after receiving two warnings from the deputy not to do so, threw the bleach on the deputy and threatened to hit the deputy with the mop, coupled with the defendant's act of refilling the cup with bleach solution and threatening to again throw the bleach onto the deputy was sufficient to support the defendant's conviction. Brown v. State, 288 Ga. App. 812, 655 S.E.2d 692 (2007).

Evidence was sufficient to allow a jury to conclude that the defendant had gouged the victim's eye as alleged in the indictment charging the defendant with riot in a penal institution under O.C.G.A. § 16-10-56 because the state presented evidence from which the jury could have concluded that while the defendant was wrestling with the victim, the defendant's thumb made contact with the victim's eye, cutting the eyelid, and perhaps the eye, and resulting in bleeding and bruising around the eye; the evidence indicated that the defendant was aware that the defendant had hurt the victim with the

defendant's thumb as the defendant showed it to several officers, noting the thumb's unusual angle and the defendant's long fingernail. Paul v. State, 308 Ga. App. 275, 707 S.E.2d 171 (2011).

Evidence that the defendant swung a fist at an officer was sufficient to sustain a conviction for riot in a penal institution for committing an act in a violent manner. Chynoweth v. State, 331 Ga. App. 123, 768 S.E.2d 536 (2015), cert. denied, 2015 Ga. LEXIS 396 (Ga. 2015).

One or more persons involved in crime. — Because there was clear evidence that in creating the offense of "riot in a penal institution," the Georgia General Assembly intended to criminalize certain conduct regardless of whether the conduct was committed by two or more persons acting in concert, and O.C.G.A. § 16-10-56 defined the offense without including any element of concerted action or reference to the general offense of riot, the defendant's conviction of the crime was upheld on appeal, despite a claim that the defendant acted alone. Glanton v. State, 283 Ga. App. 232, 641 S.E.2d 234 (2007).

Jury instruction proper. — Trial court fairly instructed the jury that the jury could convict the defendant only if the state proved the state's case of riot in a penal institution as charged in the indictment because the language of the charge merely tracked the relevant portion of O.C.G.A. § 16-10-56; even if the charge could be interpreted as broadening the jury's authorization, the trial court also specifically instructed the jury that the defendant could not be convicted unless each element of the crime "as charged" was proved beyond a reasonable doubt and that the state bore the burden of proving "every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt." Paul v. State, 308 Ga. App. 275, 707 S.E.2d 171 (2011).

Defendant not entitled to requested instructions. — Defendant was not entitled to jury instructions on simple battery, misdemeanor obstruction of an officer, or justification, as a lesser offense of riot, as simple battery required an unlawful touching and obstruction precluded a violent act, while riot required a violent act, and there was no evidence to support an instruction on justification as the defendant did not admit using violence against the victim. Strapp v. State, 326 Ga. App. 264, 756 S.E.2d 333 (2014).

Trial court violated O.C.G.A. § 17-8-57. — Trial court erred in convicting the defendant of riot in a penal institution under O.C.G.A. § 16-10-56 because the question of whether a county jail qualified as a penal institution under § 16-10-56 was properly for the jury, and the trial court violated O.C.G.A. § 17-8-57 in determining the issue as a matter of law; whether the jail constituted a penal institution was an element of the offense, and the trial court's direction went beyond clarifying the law on a particular issue because it involved applying the law to the evidence to draw a conclusion on an element of the state's case. Paul v. State, 308 Ga. App. 275, 707 S.E.2d 171 (2011).

Cited in Shearin v. State, 293 Ga. App. 794, 668 S.E.2d 300 (2008); Whatley v. State, 296 Ga. App. 72, 673 S.E.2d 510 (2009).

ARTICLE 4

PERJURY AND RELATED OFFENSES

RESEARCH REFERENCES

ALR. — False statement made under fear or compulsion as perjury, 4 A.L.R. 1319.

Perjury as predicated upon statements upon application for marriage license, 101 A.L.R. 1263.

Criminal offense of perjury as affected by fact that affidavit or statement under oath upon which charge of perjury was predicated was requirement not of statute, but of boards or officials in administration of statute, 108 A.L.R. 1240.

Recantation as defense in perjury prosecution, 64 A.L.R.2d 276.

Statement of belief or opinion as perjury, 66 A.L.R.2d 791.

Conviction of perjury where one or more of elements is established solely by circumstantial evidence, 88 A.L.R.2d 852.

Actionability of conspiracy to give or to procure false testimony or other evidence, 31 A.L.R.3d 1423.

Materiality of testimony forming basis of perjury charge as question for court or jury in state trial, 37 A.L.R.4th 948.

16-10-70. Perjury.

(a) A person to whom a lawful oath or affirmation has been administered commits the offense of perjury when, in a judicial proceeding, he knowingly and willfully makes a false statement material to the issue or point in question.

(b) A person convicted of the offense of perjury shall be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than ten years, or both. A person convicted of the offense of perjury that was a cause of another's being imprisoned shall be sentenced to a term not to exceed the sentence provided for the crime for which the other person was convicted. A person convicted of the offense of perjury that was a cause of another's being punished by death shall be punished by life imprisonment. (Laws 1833, Cobb's 1851 Digest, pp. 804, 805; Code 1863, §§ 4355, 4356, 4363; Code 1868, §§ 4393, 4394, 4401; Code 1873, §§ 4460, 4461, 4468; Code 1882, §§ 4460, 4461, 4468; Penal Code 1895, §§ 256, 257, 262; Penal Code 1910, §§ 259, 260, 265; Ga. L. 1933, p. 40, § 1; Code 1933, §§ 26-4001, 26-4002, 26-4007; Code 1933, § 26-2401, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1973, p. 159, § 2.)

Cross references. — Vacation of judgments, verdicts, rules, or orders obtained through perjury, § 17-1-4. False statements under oath to Commissioner of Labor, § 34-2-13.

JUDICIAL DECISIONS

Analysis

General Consideration
Oath
Judicial Proceeding
Intent
Materiality
Indictment
Application

General Consideration

Essential element of perjury is administering of lawful oath in judicial proceeding. Kirkland v. State, 140 Ga. App. 197, 230 S.E.2d 347 (1976).

Refusal to testify. — One can be convicted of perjury only for knowingly and willfully making materially false statement under oath and not for refusal to testify. King v. State, 238 Ga. 386, 233 S.E.2d 340 (1977).

Perjury defined. — Perjury is the willful assertion as to a matter of fact, opin-

ion, belief, or knowledge, made by a witness in a judicial proceeding as part of the witness's evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by the witness to mislead court, jury, or person holding proceeding. Hicks v. State, 67 Ga. App. 475, 21 S.E.2d 113 (1942).

"Knowingly" refers to time when witness gave alleged false testimony. Oxford v. State, 40 Ga. App. 511, 150 S.E. 466 (1929).

Gist of offense of perjury is disregard and corrupt violation of an oath. Black v. State, 13 Ga. App. 541, 79 S.E. 173 (1913); Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936).

Offense consists in swearing falsely and corruptly without probable cause of belief; not in swearing rashly or inconsiderately, according to belief. Hicks v. State, 67 Ga. App. 475, 21 S.E.2d 113 (1942).

Both intent to testify falsely and fact of false testimony are prerequisites to offense of perjury. Thomas v. State, 71 Ga. 252 (1883).

False oath to affidavit knowing that it will be used in judicial proceeding constitutes perjury. Rowe v. State, 99 Ga. 706, 27 S.E. 710 (1896); Davis v. State, 7 Ga. App. 680, 67 S.E. 839 (1910).

False verification of pleadings by oath is false swearing and constitutes perjury. Williford v. State, 53 Ga. App. 334, 185 S.E. 611 (1936), later appeal, 56 Ga. App. 40, 192 S.E. 93 (1937); Watson v. State, 235 Ga. App. 381, 509 S.E.2d 87 (1998).

False affidavits in support of pleadings. — Perjury may be committed by making false affidavits required in support of pleadings in civil matters. Williford v. State, 53 Ga. App. 334, 185 S.E. 611 (1936), later appeal, 56 Ga. App. 40, 192 S.E. 93 (1937).

Opinion in affidavit as to existence of fact as basis for offense of perjury. See Hicks v. State, 67 Ga. App. 475, 21 S.E.2d 113 (1942).

Charge of perjury may be predicated on affidavit made to procure issuance of arrest warrant. Williford v. State, 53 Ga. App. 334, 185 S.E. 611 (1936), later appeal, 56 Ga. App. 40, 192 S.E. 93 (1937).

Perjury may be assigned on false testimony going to credit of witness. Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936).

To establish perjury of one whose testimony was suborned, state must show: (1) that person alleged to have been suborned testified substantially to matters charged; (2) willful and absolute falsity of testimony; (3) that testimony was material; (4) that testimony was given in judicial proceeding and (5) that lawful oath was administered. Jones v. State, 70 Ga. App. 431, 28 S.E.2d 373 (1943).

Distinction between perjury and false swearing. — Perjury must be in some judicial proceeding and testimony must relate to matter material to issue or point in question, whereas false swearing may occur in proceeding other than judicial proceeding and apparently testimony need not be with respect to some material question. Plummer v. State, 90 Ga. App. 773, 84 S.E.2d 202 (1954).

Offense of perjury is not cumulative; a number of false swearings in same trial creates only one crime, but repetition of offense may be met with a heavier penalty. Black v. State, 13 Ga. App. 541, 79 S.E. 173 (1913).

Separate false statements by same witness in same proceeding do not constitute separate perjury offenses. Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936).

Two trials, same statement, two offenses. — Because two separate trials occurred, with administration of the oath for each trial, two separate acts of perjury were committed after defendant made the same false statement in each trial. West v. State, 228 Ga. App. 713, 492 S.E.2d 576 (1997).

Acquittal on charged offense irrelevant to perjury. — Prior acquittals in two trials for child molestation had no probative value in a trial for perjury committed at those trials because evidence of the acquittals was neither relevant nor material to any issue in the perjury case. West v. State, 228 Ga. App. 713, 492 S.E.2d 576 (1997).

Cited in Richards v. State, 131 Ga. App. 362, 206 S.E.2d 93 (1974); Gregg v. Geor-

General Consideration (Cont'd)

gia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Dansby v. State, 140 Ga. App. 104, 230 S.E.2d 64 (1976); Y.C. v. State, 146 Ga. App. 293, 246 S.E.2d 518 (1978); Bromley v. State, 259 Ga. 377, 380 S.E.2d 694 (1989); State v. Lampl, 296 Ga. 892, 770 S.E.2d 629 (2015).

Oath

Presumption that lawful or statutory oath was administered. — When there is evidence that an oath was administered to the witness, it will be presumed in absence of proof to the contrary that lawful or statutory oath was administered. Kirkland v. State, 140 Ga. App. 197, 230 S.E.2d 347 (1976).

Oath materially different from prescribed statutory oath. — When it is affirmatively shown that an oath administered to the witness was materially different in both form and substance than the prescribed statutory oath, the administered oath is not a lawful one and cannot properly be the basis for a perjury prosecution. Kirkland v. State, 140 Ga. App. 197, 230 S.E.2d 347 (1976).

No particular oath is required for witnesses in civil investigations, thus, it was error to dismiss a perjury indictment on the basis of a deficient oath where the oath administered named the grand jury, specified the type of investigation, named the subject entities being investigated, and contained accepted language regarding the promise and obligation to testify truthfully. State v. Bartel, 223 Ga. App. 696, 479 S.E.2d 4 (1996).

Burden of proof that witness was duly sworn rests upon state. Cox v. State, 13 Ga. App. 687, 79 S.E. 909 (1913).

Oath must be lawful, but no greater formality than to render it legal is required. See Pennaman v. State, 58 Ga. 336 (1877); Johnson v. State, 76 Ga. 790 (1886); Cox v. State, 13 Ga. App. 687, 79 S.E. 909 (1913); Sistrunk v. State, 18 Ga. App. 42, 88 S.E. 796 (1916).

Conduct and language of defendant signifying defendant consciously took upon oneself obligation of oath. — If at time of tendering papers upon which perjury indictment is based to officer administering oath, defendant used language signifying that defendant consciously took a personal obligation of an oath, and officer so understood, and immediately signed jurat, this amounts to such concurrence of act and intention as will constitute a legal swearing. Williford v. State, 56 Ga. App. 40, 192 S.E. 93 (1937).

Judicial Proceeding

To constitute perjury, false swearing must have been done in judicial proceeding. Crow v. State, 55 Ga. App. 288, 190 S.E. 65 (1937); Plummer v. State, 90 Ga. App. 773, 84 S.E.2d 202 (1954).

Judicial proceeding is a proceeding in a legally constituted court. Garrett v. State, 18 Ga. App. 360, 89 S.E. 380 (1856); Crow v. State, 55 Ga. App. 288, 190 S.E. 65 (1937); Plummer v. State, 90 Ga. App. 773, 84 S.E.2d 202 (1954).

Termination of judicial proceedings not necessary. — Judicial proceeding from which perjury charge stems need not be finally terminated before indictment for perjury will lie. Williford v. State, 53 Ga. App. 334, 185 S.E. 611 (1936), later appeal, 56 Ga. App. 40, 192 S.E. 93 (1937).

Lack of jurisdiction. — Fact that evidence adduced at trial of defendant for perjury may disclose that disbarment proceeding is subject to general demurrer, or must fail for some reason other than jurisdiction of court over subject-matter or legality of court in which it was filed, does not remove its character as a "judicial proceeding," so as to prevent conviction for perjury committed in pleadings filed therein. Williford v. State, 56 Ga. App. 40, 192 S.E. 93 (1937).

Hearing before State Board of Workers' Compensation. — Indictment does not legally charge defendant with having committed offense of perjury, where hearing was before State Board of Workmen's (now Workers') Compensation, an administrative body and not a judicial tribunal. Plummer v. State, 90 Ga. App. 773, 84 S.E.2d 202 (1954).

Intent

Knowledge of falsity at time of oath is element of perjury. — Gist of offense of perjury is not only that what was sworn

to was false, but that swearer knew, at time the swearer made oath, that it was false and that oath was itself false. Stokes v. State, 59 Ga. App. 878, 2 S.E.2d 674 (1939).

Scienter is tested like intention generally, by sound mind and discretion, and by all circumstances. McCord v. State, 83 Ga. 521, 10 S.E. 437 (1889); Rowe v. State, 99 Ga. 706, 27 S.E. 710 (1896).

Swearing to something consciously thought to be false constitutes perjury although it turns out to actually be true. Davis v. State, 7 Ga. App. 680, 67 S.E. 839 (1910).

Efforts by defendant to ascertain whether facts justify oath as precluding perjury conviction. — When one accused of perjury or false swearing has in good faith, before instance alleged, and without seeking thereby to be cloaked personally with immunity, laid before counsel facts, to best of accused's knowledge, and has been advised by counsel that facts in law will justify oath or affirmation, it cannot be said that oath or affirmation is willfully, knowingly, and corruptly false, and charge of perjury cannot be predicated thereon. Stokes v. State, 59 Ga. App. 878, 2 S.E.2d 674 (1939).

Materiality

False statement need not necessarily be material to main issue in case. — It is not essential that fact sworn to should be material to main issue in case, but it is sufficient if it relates to issue which is only collaterally involved. Wilson v. State, 115 Ga. 206 (1860) (decided prior to codification of this principle).

Matter relevant to credibility of witness testifying on material issue in case becomes collaterally material to issue, upon which perjury may be assigned. Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936).

Whether particular statements were material depends upon nature of proceeding and matters at issue, and can be determined in each case for that case only. Black v. State, 13 Ga. App. 541, 79 S.E. 173 (1913); Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936).

Showing materiality by direct averment or necessary inference. — In indictment for perjury, materiality of alleged false oaths, may be shown by a direct averment of that fact, or by setting forth facts from which materiality is made apparent or necessarily inferred. Williford v. State, 53 Ga. App. 334, 185 S.E. 611 (1936), later appeal, 56 Ga. App. 40, 192 S.E. 93 (1937).

How materiality of false testimony may be shown. — Materiality of false testimony may be shown by record of proceedings in which testimony was given, or by testimony there given, or by all or so much of pleadings therein as show issues, together with such other facts proved on trial as tend to show testimony to be on a material issue. Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936).

One test of materiality is whether alleged false statements could have influenced decision on question at issue. Black v. State, 13 Ga. App. 541, 79 S.E. 173 (1913); Darnell v. State, 63 Ga. App. 582, 11 S.E.2d 692 (1940).

Material issue found. — In a prosecution for child molestation, defendant's false statement as to the time defendant's alibi witness was with defendant was a material issue of fact constituting an essential element of the crime of perjury. West v. State, 228 Ga. App. 713, 492 S.E.2d 576 (1997).

False statement was material. — In a prosecution for perjury under O.C.G.A. § 16-10-70, there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that the defendant's false statement given in the defendant's trial on a charge of running a red light about the location of the officer's patrol car was material as the defendant's false statement went to the issue of whether the officer could have observed the alleged red light violation and, thus, whether the officer's testimony was credible. As such, the defendant's testimony clearly could have influenced the jury's decision over whether the defendant actually ran the red light. Walker v. State, 314 Ga. App. 714, 725 S.E.2d 771 (2012).

False statements immaterial. — Defendant's allegedly false testimony in a will contest was immaterial to the issues presented in the proceeding in which it

Materiality (Cont'd)

occurred and was not sufficient to support defendant's conviction for perjury. DeVine v. State, 229 Ga. App. 346, 494 S.E.2d 87 (1997).

Jury instruction on materiality. — Since the trial judge's jury charge on the element of materiality in the perjury charge included an instruction on the principle that, when a witness gave testimony material to an issue in the case, the witness's credibility became collaterally material to the issue and, therefore, false testimony going to the credibility of that witness likewise could be considered material, nothing in the trial judge's charge to the jury assumed facts with respect to the issue of materiality or expressed an opinion that materiality had been proved. Sneiderman v. State, 336 Ga. App. 153, 784 S.E.2d 18 (2016), overruled on other grounds by Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391 (2016).

Indictment

Indictment need not set out, literally or in substance, the form of oath administered in judicial investigation in which perjury is alleged to have been committed. It is sufficient to allege that oath administered to defendant was a lawful oath. Hicks v. State, 67 Ga. App. 475, 21 S.E.2d 113 (1942).

Sufficiency of indictment for perjury arising from false statements in pleadings. — When an indictment for perjury sets out and charges the defendant with perjury in that certain parts of the defendant's pleas and answers which were under oath, contained false statements, it is not necessary to attach to indictment or set out therein the entire plea or plea and answer of defendant. Williford v. State, 53 Ga. App. 334, 185 S.E. 611 (1936), later appeal, 56 Ga. App. 40, 192 S.E. 93 (1937).

Indictment need only set out substance of alleged false statement. — In indictment for perjury it is not necessary that exact language of defendant in former trial be set out; substance of false statement is all that is necessary. Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936).

Indictment must indicate truth of matter to which alleged perjury related. — Though it is not indispensable to validity of indictment for perjury that it should, after stating what alleged false testimony, in terms set out what was truth in that regard, it is essential that an indictment for this offense wanting in this respect should, by clear and necessary implication, show what must have been truth of matter to which alleged false testimony related. Darnell v. State, 65 Ga. App. 582, 11 S.E.2d 692 (1940).

Materiality of testimony need not be demonstrated by argument incorporated in indictment. Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936).

It is generally sufficient in indictment for perjury to charge that testimony alleged to have been false was in relation to matter material to point or question in issue, without setting forth in detail facts showing how such testimony was material. Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936); Darnell v. State, 63 Ga. App. 582, 11 S.E.2d 692 (1940).

Indictment may join a number of statements in single count. — In prosecution for perjury, it is permissible to join in a single count of indictment a number of separate and distinct material statements alleged to have been falsely sworn to by defendant in same legal investigation. Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936).

Application

Application to divorce proceeding. — Assuming a charge requested by a wife in a domestic proceeding on the elements of the crime of perjury was apt, correct, and pertinent, it was not error to fail to give the requested charge as the charge given by the trial court sufficiently and substantially covered the principles of law. Chubbuck v. Lake, 281 Ga. 218, 635 S.E.2d 764 (2006).

Perjury in swearing out warrants for bad checks. — Owners of a small loan company committed perjury when the owners swore out warrants under O.C.G.A. § 16-9-20(a) on customers who gave the owners checks as collateral for loans and then failed to repay the loans, when the checks were not intended to be

deposited and honored by banks, rendering impossible the requisite knowledge/intent required under the bad check statute. Watson v. State, 235 Ga. App. 381, 509 S.E.2d 87 (1998).

Evidence sufficient for conviction. — See Williams v. State, 244 Ga. App. 692, 536 S.E.2d 572 (2000).

Evidence was sufficient to convict the defendant of perjury because there was evidence that the man that the defendant was romantically involved with shot and killed the husband; during the man's murder trial, the defendant wilfully and knowingly gave false statements under oath denying that the defendant had any romantic relationship with the man; and the defendant's false statement denying any romantic relationship with the man was material as it could have influenced the decision on the man's insanity defense. Sneiderman v. State, 336 Ga. App. 153, 784 S.E.2d 18 (2016), overruled on other grounds by Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391 (2016).

Evidence insufficient, lack of corroboration. — A single witness is insufficient to sustain a perjury conviction unless there are other independent, corroborating circumstances. In the Interest of C.H., 262 Ga. App. 630, 585 S.E.2d 921 (2003).

Evidence insufficient. — There was no evidence that a motorist intentionally provided an incorrect answer to an interrogatory concerning the motorist's employment or conspired with the motorist's employers to prevent them from being added as parties; therefore, no perjury was shown. M.J.E.S. Enters. v. Martin, 265 Ga. App. 652, 595 S.E.2d 367 (2004).

RESEARCH REFERENCES

Am. Jur. 2d. — 60A Am. Jur. 2d, Perjury, § 1 et seq.

C.J.S. — 70 C.J.S., Perjury, § 1 et seq.

ALR. — Assignment of perjury on affidavit for continuance, 1 A.L.R. 1138.

False statement made under fear or compulsion as perjury, 4 A.L.R. 1319.

May conviction of perjury rest on circumstantial evidence, 15 A.L.R. 634; 27 A.L.R. 857; 42 A.L.R. 1063; 88 A.L.R.2d 852.

Fraud or perjury as to physical condition resulting from injury as ground for relief from or injunction against a judgment for personal injuries, 16 A.L.R. 397.

Rule against conviction of perjury upon contradictory statements as affected by defendant's admission in second statement, 25 A.L.R. 416.

Perjury as predicated upon statements upon application for marriage license, 101 A.L.R. 1263.

Corroboration by circumstantial evidence of testimony of single witness in prosecution for perjury, 111 A.L.R. 825.

Former jeopardy as regards successive prosecutions for perjury charged to have been committed in the same action or proceeding, 120 A.L.R. 1171.

Necessity and sufficiency of proof, in prosecution for perjury during trial, that oath was administered, 132 A.L.R. 1311.

Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury, 156 A.L.R. 499.

Imputation of perjury or false swearing as actionable per se, 38 A.L.R.2d 161.

Recantation as defense in perjury prosecution, 64 A.L.R.2d 276.

Statement of belief or opinion as perjury, 66 A.L.R.2d 791.

Conviction of perjury where one or more of elements is established solely by circumstantial evidence, 88 A.L.R.2d 852.

Perjury or false swearing as contempt, 89 A.L.R.2d 1258.

Invalidity of statute or ordinance giving rise to proceeding in which false testimony was received as defense to prosecution for perjury, 34 A.L.R.3d 413.

Offense of perjury as affected by lack of jurisdiction by court or governmental body before which false testimony was given, 36 A.L.R.3d 1038.

Rights and duties of attorney in a criminal prosecution where client informs him of intention to present perjured testimony, 64 A.L.R.3d 385.

Incomplete, misleading, or unresponsive but literally true statement as perjury, 69 A.L.R.3d 993.

Acquittal as bar to prosecution of accused for perjury committed at trial, 89 A.L.R.3d 1098.

Admonitions against perjury or threats to prosecute potential defense witness, inducing refusal to testify, as prejudicial error, 88 A.L.R.4th 388.

Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury — state cases, 41 A.L.R.5th 1.

What amounts to habitual intemperance, drunkenness, excessive drug use, and the like within statute relating to substantive grounds for divorce, 101 A.L.R.6th 455.

16-10-71. False swearing.

(a) A person to whom a lawful oath or affirmation has been administered or who executes a document knowing that it purports to be an acknowledgment of a lawful oath or affirmation commits the offense of false swearing when, in any matter or thing other than a judicial proceeding, he knowingly and willfully makes a false statement.

(b) A person convicted of the offense of false swearing shall be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both. (Laws 1833, Cobb's 1851 Digest, p. 804; Code 1863, §§ 4357, 4358; Code 1868, §§ 4395, 4396; Code 1873, §§ 4462, 4463; Code 1882, §§ 4462, 4463; Penal Code 1895, §§ 258, 259; Penal Code 1910, §§ 261, 262; Code 1933, §§ 26-4003, 26-4004; Code 1933, § 26-2402, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — False swearing in connection with candidacy for election, § 21-2-565.

JUDICIAL DECISIONS

Analysis

General Consideration
Oath or Affirmation

General Consideration

Purpose of former Penal Code 1895, § 258 (see now O.C.G.A. § 16-10-71) was to cover cases which did not amount to perjury. Gammage v. State, 119 Ga. 380, 46 S.E. 409 (1909).

Former Code 1933, §§ 26-2402 and 26-2408 (see now O.C.G.A. § 16-10-71 and 16-10-20) distinguished. See Carl E. Jones Dev., Inc. v. Wilson, 149 Ga. App. 679, 225 S.E.2d 135 (1979).

Intent to testify falsely and falsity of testimony must both appear to constitute false swearing. Smith v. State, 66 Ga. App. 669, 19 S.E.2d 168 (1942).

Knowledge either express or implied is absolutely indispensable to impute willful purpose to swear falsely. Carroll v. Morrison, 224 Ga. 277, 161 S.E.2d 269 (1968).

Former Penal Code 1895, § 258 (see now O.C.G.A. § 16-10-71) covered false swearing in returns made by election officials. Norton v. State, 5 Ga. App. 586, 63 S.E. 662 (1909).

Indictment for false swearing need not charge that testimony was material to issues being heard, but mere fact that indictment under review contains such charge does not have effect of

changing basic allegation that defendant is guilty of false swearing. Plummer v. State, 90 Ga. App. 773, 84 S.E.2d 202 (1954).

Indictment need not allege materiality or intent to influence or mislead. — Indictment need not allege that affidavit was material, nor that it was made for purpose of influencing or misleading anyone or under circumstances that would influence or mislead anyone. Gammage v. State, 119 Ga. 380, 46 S.E. 409 (1904).

Motive not an element. — Although motive is not an element of false swearing, where evidence of motive was relevant to an issue in the case, it was not rendered inadmissible merely by the fact that it incidentally placed the defendant's character in issue. Mulkey v. State, 237 Ga. App. 880, 517 S.E.2d 362 (1999).

There is no civil cause of action for damages for perjury or conspiracy to commit perjury. Sun v. Bush, 179 Ga. App. 140, 345 S.E.2d 873 (1986).

Private cause of action recognized for false swearing. — Although no statute contained an express provision for a civil remedy for the crime of false swearing, case law held that O.C.G.A. § 51-1-6 provided a civil remedy. However, summary judgment was not warranted in favor of either the creditor or the debtor on the creditor's nondischargeability claims because there was an issue of fact as to whether the debtor knowingly and willfully signed a false affidavit. Thomas Concrete of Ga., Inc. v. Osbourne (In re Osbourne), No. 10-06621, 2017 Bankr. LEXIS 2414 (Bankr. N.D. Ga. Aug. 24, 2017).

Conviction of contractor for making false affidavit regarding contractor's work. — Contractor can be convicted under former Code 1933, § 26-2402 (see now O.C.G.A. § 16-10-71) if the contractor signs an affidavit referring to the contractor's construction work and swears that all labor, services and material have been fully and completely paid for. Carl E. Jones Dev., Inc. v. Wilson, 149 Ga. App. 679, 255 S.E.2d 135 (1979).

False statements in an application for a county-appointed attorney were not given as evidence in a judicial proceeding even though those statements were undeniably ancillary to a judicial proceeding. Carter v. State, 237 Ga. App. 703, 516 S.E.2d 556 (1999).

Declaration of candidacy for political office. — In a case in which defendant appealed a conviction for false swearing, in violation of O.C.G.A. § 16-10-71(a), challenging the sufficiency of the evidence, the state failed to prove that defendant had the requisite criminal intent to support the conviction when defendant signed a declaration of candidacy for county commissioner as set forth in O.C.G.A. §§ 21-2-132 and 21-2-153. Pursuant to O.C.G.A. § 17-7-95(c), a judgment imposing a sentence following a plea of nolo contendere was considered a conviction for some purposes; however, such a conviction did not disqualify defendant from holding public office or otherwise deprive defendant of any civil or political rights, and there was no evidence that defendant intended to deceive the election board or the voters as defendant believed that the 1986 nolo contendere conviction to a charge of aggravated assault was generally known in the county. Spillers v. State, 299 Ga. App. 854, 683 S.E.2d 903 (2009).

False deposition testimony. — Poultry grower's giving of false testimony in a deposition involved the illegal act of false swearing. Blockum v. Fieldale Farms Corp., 275 Ga. 798, 573 S.E.2d 36 (2002).

False affidavits sufficient to support conviction for false swearing even though no oath administered. — Although no one administered an oath to the defendant prior to the defendant's execution of affidavits at a real estate closing, the affidavits recited that the defendant was duly sworn and that the defendant "on oath deposes and says" the facts stated in the affidavit. The false affidavits were therefore sufficient to support the defendant's conviction for false swearing under O.C.G.A. § 16-10-71(a). Finch v. State, 326 Ga. App. 141, 756 S.E.2d 265 (2014).

Merger of convictions. — Defendant's convictions for false swearing under O.C.G.A. § 16-10-71, proven by evidence that defendant made false statements in an affidavit seeking an involuntary commitment order for the vic-

General Consideration (Cont'd)

tim, and malicious confinement under O.C.G.A. § 16-5-43, supported by proof apart from the execution of the false affidavit, did not merge as a matter of fact. Washington v. State, 271 Ga. App. 764, 610 S.E.2d 692 (2005).

Charge barred by statute of limitations. — Trial court did not err by granting the defendant's motion for a plea in bar dismissing the charges of conversion of sales and use taxes, theft by taking, and false swearing against the defendant because the charges were not brought within four years of the dates on which the crimes were allegedly committed as required by O.C.G.A. § 17-3-1. State v. Crowder, 338 Ga. App. 642, 791 S.E.2d 423 (2016).

Sentence affirmed because the offense constituted a felony. — Defendant was not entitled to relief from defendant's sentence for false swearing, in violation of O.C.G.A. § 21-2-565, because the rule of lenity did not apply in that there was no uncertainty as to the applicable sentence for the crime, and the imposition of a five-year sentence was appropriate and within the sentencing range, under O.C.G.A. § 16-10-71, for the offense, which constituted a felony under O.C.G.A. § 16-1-3. Hogan v. State, 316 Ga. App. 708, 730 S.E.2d 178 (2012).

Cited in Roberts v. State, 137 Ga. App. 208, 223 S.E.2d 208 (1976); Smith v. State, 148 Ga. App. 634, 252 S.E.2d 62 (1979); Ramsey v. Powell, 244 Ga. 745, 262 S.E.2d 61 (1979); Farmer v. Dillard, 171 Ga. App. 321, 319 S.E.2d 515 (1984); Holland v. State, 172 Ga. App. 444, 323 S.E.2d 632 (1984); Benbow v. Wiggin, 173 Ga. App. 336, 326 S.E.2d 538 (1985); State v. Kindberg, 211 Ga. App. 117, 438 S.E.2d 116 (1993).

Oath or Affirmation

It must be alleged and proved that lawful oath or affirmation was administered to accused. — In prosecution for false swearing, it must be both alleged and proved that a lawful oath or affirmation had been administered to accused. Where the indictment fails to comply with this requirement, and defect is specifically pointed out, court commits error in overruling demurrer to indictment. Booth v. State, 43 Ga. App. 279, 158 S.E. 612 (1931).

Oaths to affidavits ordinarily are not required to be administered with any particular ceremony, but affiant must perform some corporal act before officer whereby the affiant consciously takes personally the obligation of an oath; but it is not essential that the affiant raise a hand. Brooks v. State, 63 Ga. App. 575, 11 S.E.2d 688 (1940).

Affiant need not hold up hand and swear, in order to render act an oath; if both affiant and officer understand that what is done is all that is necessary to complete act of swearing, his act is an oath in legal contemplation. Brooks v. State, 63 Ga. App. 575, 11 S.E.2d 688 (1940).

Act of officer and of affiant must be concurrent, and must conclusively indicate that it was purpose of one to administer and of other to take oath, in order to make an affidavit valid. Brooks v. State, 63 Ga. App. 575, 11 S.E.2d 688 (1940).

Knowledge by officer administering oath that it is false will not invalidate it, so as to prevent prosecution under former Penal Code 1895, § 258 (see now O.C.G.A. § 16-10-71). Thompson v. State, 120 Ga. 132, 47 S.E. 577 (1904).

One accused of crime cannot administer oath to oneself regarding matters involved in prosecution. Phillips v. State, 5 Ga. App. 597, 63 S.E. 667 (1909).

Oath on which this offense may be predicated may be a promissory oath. Norton v. State, 5 Ga. App. 586, 63 S.E. 662 (1909).

RESEARCH REFERENCES

Am. Jur. 2d. — 60A Am. Jur. 2d, Perjury, § 2.

C.J.S. — 70 C.J.S., Perjury, §§ 1, 3, 10, 13 et seq., 27, 44 et seq.

ALR. — Assignment of perjury on affidavit for continuance, 1 A.L.R. 1138.

Fraud or perjury as to physical condition resulting from injury as ground for relief from or injunction against a judgment for personal injuries, 16 A.L.R. 397.

Perjury as predicated upon statements upon application for marriage license, 101 A.L.R. 1263.

Criminal offense of perjury as affected by fact that affidavit or statement under oath upon which charge of perjury was predicated was requirement not of statute, but of boards or officials in administration of statute, 108 A.L.R. 1240.

Corroboration by circumstantial evidence of testimony of single witness in prosecution for perjury, 111 A.L.R. 825.

Former jeopardy as regards successive prosecutions for perjury charged to have been committed in the same action or proceeding, 120 A.L.R. 1171.

Imputation of perjury or false swearing as actionable per se, 38 A.L.R.2d 161.

Perjury or false swearing as contempt, 89 A.L.R.2d 1258.

Civil liability of witness falsely attesting signature to document, 96 A.L.R.2d 1346.

Invalidity of statute or ordinance giving rise to proceeding in which false testimony was received as defense to prosecution for perjury, 34 A.L.R.3d 413.

Offense of perjury as affected by lack of jurisdiction by court or governmental body before which false testimony was given, 36 A.L.R.3d 1038.

Perjury conviction as affected by notary's nonobservance of formalities for administration of oath to affiant, 80 A.L.R.3d 278.

What amounts to habitual intemperance, drunkenness, excessive drug use, and the like within statute relating to substantive grounds for divorce, 101 ALR6th 455.

16-10-72. Subornation of perjury or false swearing.

A person commits the offense of subornation of perjury or false swearing when he procures or induces another to commit the offense of perjury or the offense of false swearing and, upon conviction thereof, shall be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than ten years, or both. (Laws 1833, Cobb's 1851 Digest, p. 804; Code 1863, §§ 4359, 4360; Code 1868, §§ 4397, 4398; Code 1873, §§ 4464, 4465; Code 1882, §§ 4464, 4465; Penal Code 1895, §§ 260, 261; Penal Code 1910, §§ 263, 264; Code 1933, §§ 26-4005, 26-4006; Code 1933, § 26-2403, enacted by Ga. L. 1968, p. 1249, § 1.)

JUDICIAL DECISIONS

There can be no subornation of perjury when perjury is not committed. Hicks v. State, 67 Ga. App. 475, 21 S.E.2d 113 (1942).

Mere attempt to induce another to swear falsely regarding a given matter is insufficient, in and of itself, to establish offense under former Code 1873, § 4464 (see now O.C.G.A. § 16-10-72). Nicholson v. State, 97 Ga. 672, 25 S.E. 360 (1896).

Cited in Hill v. State, 315 Ga. App. 833, 729 S.E.2d 1 (2012).

RESEARCH REFERENCES

Am. Jur. 2d. — 60A Am. Jur. 2d, Perjury, § 107 et seq.

C.J.S. — 70 C.J.S., Perjury, § 11 et seq.

ALR. — Civil liability of witness falsely

attesting signature to document, 96 A.L.R.2d 1346.

Actionability of conspiracy to give or to procure false testimony or other evidence, 31 A.L.R.3d 1423.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely, 79 A.L.R.3d 1156.

16-10-73. Impersonating another in the acknowledgment of recognizance, bail, or judgment.

Any person except an attorney of record who shall acknowledge or cause to be acknowledged, in any of the courts of the state or before any authorized officer, any recognizance, bail, or judgment in the name of any person not privy or consenting thereto commits the offense of impersonating in a legal proceeding and, upon conviction thereof, shall be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both. (Laws 1833, Cobb's 1851 Digest, p. 806; Code 1863, § 4369; Code 1868, § 4407; Code 1873, § 4475; Code 1882, § 4475; Penal Code 1895, § 305; Penal Code 1910, § 310; Code 1933, § 26-4301; Code 1933, § 26-2404, enacted by Ga. L. 1968, p. 1249, § 1.)

JUDICIAL DECISIONS

Elements of crime. — Conviction under O.C.G.A. § 16-10-73 required proof that defendant represented the defendant or another person to be an actual person. Brown v. State, 225 Ga. App. 750, 484 S.E.2d 795 (1997).

Cited in Spears v. Johnson, 256 Ga. 518, 350 S.E.2d 468 (1986).

RESEARCH REFERENCES

C.J.S. — 35 C.J.S., False Personation, § 1 et seq.

ALR. — Intent as affecting false personation, as regards criminal offense, 97 A.L.R. 1510.

Civil liability of witness falsely attesting signature to document, 96 A.L.R.2d 1346.

Validity, construction, and application of state statutes relating to offense of identity theft, 125 A.L.R.5th 537.

ARTICLE 5

OFFENSES RELATED TO JUDICIAL AND OTHER PROCEEDINGS

RESEARCH REFERENCES

ALR. — Misconduct of officers in selection or summoning of jurors or grand jurors as contempt of court, 7 A.L.R. 345.

Fabrication or suppression of evidence as ground of disciplinary action against attorney, 40 A.L.R.3d 169.

Criminal liability of attorney for tampering with evidence, 49 A.L.R.5th 619.

16-10-90. Compounding a crime.

(a) A person commits the offense of compounding a crime when, after institution of criminal proceedings and without leave of the court or of the prosecuting attorney of the court where the criminal proceedings are pending, he accepts or agrees to accept any benefit in consideration of a promise, express or implied, not to prosecute or aid in the prosecution of a criminal offense.

(b) A person convicted of the offense of compounding a crime which is a felony shall be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both. A person convicted of the offense of compounding a crime which is a misdemeanor is guilty of a misdemeanor. (Laws 1833, Cobb's 1851 Digest, p. 808; Code 1863, § 4385; Code 1868, § 4423; Code 1873, § 4491; Code 1882, § 4491; Penal Code 1895, § 323; Penal Code 1910, § 328; Code 1933, § 26-4603; Code 1933, § 26-2504, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Agreements relating to compensation of person injured by tort which constitutes a crime, § 51-11-20.

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Relation to underlying crime. — Offense of compounding a crime is separate and apart from the underlying offense, and is not, per se, based upon the successful prosecution of the offense attempted to be compounded. If, on the date of the consummated agreement to conceal the crime, or abstain from prosecution, or to withhold evidence, the underlying criminal proceedings have been instituted, and are then pending, and the unlawful agreement is reached, the offense is complete. State v. Reese, 184 Ga. App. 413, 361 S.E.2d 507 (1987).

It is immaterial that compounding may have been done in good faith. Hays v. State, 15 Ga. App. 386, 83 S.E. 502 (1914).

It is unnecessary to constitute the offense of compounding a crime that consideration shall accrue to defendant; it may be for benefit of another. Hays v. State, 15 Ga. App. 386, 83 S.E. 502 (1914).

When consideration does not appear in written agreement, actual agreement may be inquired into. Hays v. State, 15 Ga. App. 386, 83 S.E. 502 (1914).

Conviction of compounding a felony requires proof of commission of felony compounded. Hays v. State, 142 Ga. 592, 83 S.E. 236 (1914).

OPINIONS OF THE ATTORNEY GENERAL

Maintenance of records by Georgia Crime Information Center regarding violations of provisions concerning compounding a crime, see 1976 Op. Att'y Gen. No. 76-33.

RESEARCH REFERENCES

Am. Jur. 2d. — 15B Am. Jur. 2d, Compounding Crimes, § 1 et seq.

C.J.S. — 15A C.J.S., Compounding Offenses, § 1 et seq.

ALR. — Innocence of the person threatened as affecting the rights or remedies in respect of contracts made, or money paid, to prevent or suppress a criminal prosecution, 17 A.L.R. 325.

When statute of limitation begins to run on charge of obstructing justice or of conspiracy to do so, 77 A.L.R.3d 725.

16-10-91. Embracery.

(a) A person commits the offense of embracery when he:

(1) With intent to influence a person summoned or serving as a juror, communicates with him otherwise than is authorized by law in an attempt to influence his action as a juror; or

(2) Summoned as a juror, accepts anything of value offered to him with the understanding that it is given with the intent of influencing his action as a juror.

(b) A person convicted of the offense of embracery shall be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both. (Laws 1833, Cobb's 1851 Digest, p. 809; Code 1863, § 4390; Code 1868, § 4431; Code 1873, § 4503; Code 1882, § 4503; Penal Code 1895, § 328; Penal Code 1910, § 333; Code 1933, § 26-4702; Code 1933, § 26-2407, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Juries, § 15-12-1.

Law reviews. — For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986).

JUDICIAL DECISIONS

Civil liability. — Person who commits embracery is liable in civil damages to one who is thereby injured. LaBarre v. Payne, 174 Ga. App. 32, 329 S.E.2d 533 (1985).

Evidence of defendant's reputation. — In a trial for embracery, where the state sought to elicit the victim's perception of whether the defendant's statements were threatening and, after answering affirmatively the question of whether the victim was familiar with defendant's reputation, the witness did not say what that reputation was, the error, if any, in permitting the question did not contribute to the judgment. Stevens v. State, 195 Ga. App. 324, 393 S.E.2d 482 (1990).

Jury need not be impaneled and sworn at time of attempted influence. — It is not essential to constitute offense of embracery that juror sought to be influenced be, at the time, a member of a jury impaneled and sworn to try case in question. Martin v. State, 43 Ga. App. 287, 158 S.E. 635 (1931).

Crime of embracery may be committed by approaching a prospective juror who has been neither sworn nor impaneled in case, and who may never have anything to do with the case in which the juror is attempted to be influenced. Jones v. State, 101 Ga. App. 851, 115 S.E.2d 576 (1960).

Embracery may be perpetrated by attempting to influence grand juror, although no indictment was returned, and even perhaps by influencing the juror on a matter before the grand jury which did not include finding of a true bill. Jones v. State, 101 Ga. App. 851, 115 S.E.2d 576 (1960).

Embracery constitutes a contempt of court, but for contempt of court by attempting to improperly influence a juror

designate (one who has been drawn as a juror) one does not necessarily have to be guilty of embracery. Summers v. State ex rel. Boykin, 66 Ga. App. 648, 19 S.E.2d 28 (1942).

Attempt to influence juror designated as contempt of court. — See Summers v. State ex rel. Boykin, 66 Ga. App. 648, 19 S.E.2d 28 (1942).

Cited in Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir. 1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Embracery, § 1 et. seq.

C.J.S. — 29A C.J.S., Embracery, § 1 et seq.

ALR. — Agreement to use one's influence to have punishment for crime mitigated as contrary to public policy, 24 A.L.R. 1453.

Contract between juror and party or attorney during trial of civil case as ground for new trial, 55 A.L.R. 750; 62 A.L.R.2d 298.

Shadowing, or tampering or communicating with, jurors as contempt, 63 A.L.R. 1269.

Attempt to bribe juror as ground for new trial or reversal, 126 A.L.R. 1260.

Assertion of defense of champerty in action by champertous assignee, 22 A.L.R.2d 1000.

Recovery of money paid, or property transferred, as a bribe, 60 A.L.R.2d 1273.

Contact or communication between juror and party or counsel during trial of civil case as ground for mistrial, new trial, or reversal, 62 A.L.R.2d 298.

Contact or communication between juror and outsider during trial of civil case as ground for mistrial, new trial, or reversal, 64 A.L.R.2d 158.

16-10-92. Acceptance of benefit, reward, or consideration by witness for changing testimony or being absent from trial, hearing, or other proceeding.

A person who is or may be a witness at a trial, hearing, or other proceeding before any court or any officer authorized by the law to hear evidence or take testimony and who receives or agrees or offers to receive any benefit, reward, or consideration to which he is not entitled, pursuant to an agreement or understanding that his testimony will be influenced thereby or that he will absent himself from the trial, hearing, or other proceeding, shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years. (Ga. L. 1959, p. 34, § 25; Code 1933, § 26-2312, enacted by Ga. L. 1968, p. 1249, § 1.)

JUDICIAL DECISIONS

Cited in Gardner v. Gwinnett Circuit Bar Ass'n, 241 Ga. 614, 247 S.E.2d 64 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Bribery, §§ 18, 19. 58 Am. Jur. 2d, Obstructing Justice, §§ 37 et seq., 46.

C.J.S. — 11 C.J.S., Bribery, § 9.

ALR. — Procuring or attempting to procure witness to leave jurisdiction as contempt, 33 A.L.R. 607.

Falsity of contemplated testimony as condition of offense of bribery of, attempt to bribe, or acceptance of bribe or gift by, prospective witness, 110 A.L.R. 582.

16-10-93. Influencing witnesses.

(a) A person who, with intent to deter a witness from testifying freely, fully, and truthfully to any matter pending in any court, in any administrative proceeding, or before a grand jury, communicates, directly or indirectly, to such witness any threat of injury or damage to the person, property, or employment of the witness or to the person, property, or employment of any relative or associate of the witness or who offers or delivers any benefit, reward, or consideration to such witness or to a relative or associate of the witness shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.

(b)(1) It shall be unlawful for any person knowingly to use intimidation, physical force, or threats; to persuade another person by means of corruption or to attempt to do so; or to engage in misleading conduct toward another person with intent to:

(A) Influence, delay, or prevent the testimony of any person in an official proceeding;

(B) Cause or induce any person to:

(i) Withhold testimony or a record, document, or other object from an official proceeding;

(ii) Alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(iii) Evade legal process summoning that person to appear as a witness or to produce a record, document, or other object in an official proceeding; or

(iv) Be absent from an official proceeding to which such person has been summoned by legal process; or

(C) Hinder, delay, or prevent the communication to a law enforcement officer, prosecuting attorney, or judge of this state of information relating to the commission or possible commission of a criminal offense or a violation of conditions of probation, parole, or release pending judicial proceedings.

(2) Any person convicted of a violation of this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than two nor more than ten years or by a fine of not less than $10,000.00 nor more than $20,000.00, or both.

(3)(A) For the purposes of this Code section, the term "official proceeding" means any hearing or trial conducted by a court of this state or its political subdivisions, a grand jury, or an agency of the executive, legislative, or judicial branches of government of this state or its political subdivisions or authorities.

(B) An official proceeding need not be pending or about to be instituted at the time of any offense defined in this subsection.

(C) The testimony, record, document, or other object which is prevented or impeded or attempted to be prevented or impeded in an official proceeding in violation of this Code section need not be admissible in evidence or free of a claim of privilege.

(D) In a prosecution for an offense under this Code section, no state of mind need be proved with respect to the circumstance:

(i) That the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of this state, a magistrate, a grand jury, or an agency of state or local government; or

(ii) That the judge is a judge of this state or its political subdivisions or that the law enforcement officer is an officer or employee of the State of Georgia or a political subdivision or authority of the state or a person authorized to act for or on behalf of the State of Georgia or a political subdivision or authority of the state.

(E) A prosecution under this Code section may be brought in the county in which the official proceeding, whether or not pending or about to be instituted, was intended to be affected or in the county in which the conduct constituting the alleged offense occurred.

(c) Any crime committed in violation of subsection (a) or (b) of this Code section shall be considered a separate offense. (Ga. L. 1959, p. 34, § 24; Code 1933, § 26-2313, enacted by Ga. L. 1975, p. 34, § 1; Ga. L. 1988, p. 316, § 1; Ga. L. 1998, p. 270, § 5.)

Law reviews. — For review of 1998 legislation relating to crimes and offenses, see 15 Ga. St. U.L. Rev. 80 (1998).

JUDICIAL DECISIONS

Warning as to consequences of perjury. — Party's warning to a witness that if the witness knowingly made false statements under oath, the witness could be prosecuted for perjury, did not constitute an attempt to illegally influence a witness. Hodges v. Tomberlin, 170 Ga. App. 842, 319 S.E.2d 11 (1984).

Admission of indictment for other offenses. — In a prosecution for influencing witnesses and criminal trespass, a copy of an indictment in another case charging defendant with aggravated child molestation of witnesses was admissible. Thomas v. State, 227 Ga. App. 469, 489 S.E.2d 561 (1997).

No abuse of discretion in refusing to sever charges. — Trial court did not abuse the court's discretion by refusing to sever the defendant's drug charges from the defendant's trial on a charge of influencing a witness because evidence of either crime would have been admissible at the trial of the other and the charged offenses were neither so numerous nor so complex that the jury was unable to parse the evidence and correctly apply the law with regard to each charge. Perry v. State, 317 Ga. App. 885, 733 S.E.2d 57 (2012).

Special demurrer properly granted as term "intimidation" generic. — Trial court properly granted a defendant's special demurrer as to one count of a two count indictment charging the defendant with influencing a witness as the use of the term "intimidation," without specifying the way the defendant allegedly did so, was generic and did not adequately inform the defendant of the facts constituting the offense. State v. Delaby, 298 Ga. App. 723, 681 S.E.2d 645 (2009).

Evidence of intent sufficient. — Because the state presented evidence that a defendant confronted a witness behind an apartment complex and telephoned the witness on another occasion at a time when criminal charges were pending against a codefendant, the defendant acted with the requisite criminal intent to deter the witness from properly testifying against the codefendant, in violation of O.C.G.A. § 16-10-93(a). Johnson v. State, 277 Ga. App. 499, 627 S.E.2d 116 (2006).

State's alleged coercion of victim. — Because the defendant failed to present any evidence that the state ever threatened the victim into testifying against the defendant, and the defendant failed to acknowledge that the victim's statement to police would have been tendered into evidence regardless of what version of events were recounted on the stand, the appeals court rejected the defendant's claim that the state's coercion of the victim warranted reversal of a simple assault conviction. Wheeler v. State, 281 Ga. App. 158, 635 S.E.2d 415 (2006).

There was sufficient evidence to support defendant's conviction for use of intimidation with the intent of influencing a witness to change the witness's testimony in an official proceeding because the evidence established that, at the time in question, the defendant's relative was allowing the witness to reside on certain property free of charge and that the defendant stated that the witness would be removed from the house if the witness refused the defendant's demand not to go to court to testify against the defendant. Shelnutt v. State, 289 Ga. App. 528, 657 S.E.2d 611 (2008), cert. denied, No. S08C0977, 2008 Ga. LEXIS 518 (Ga. 2008).

Evidence sufficient to support conviction. — Trial court did not err in finding that the defendant was guilty beyond a reasonable doubt of influencing a witness because the state presented sufficient evidence that the defendant acted with the requisite criminal intent to deter the victim from testifying and that the defendant directly communicated a threat to the victim; pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the trial court was entitled to rely on the victim's testimony that the defendant threatened to kill the victim if the victim testified against the defendant. Futch v. State, 316 Ga. App. 376, 730 S.E.2d 14 (2012).

As the jury was authorized to infer from the evidence, including the defendant's menacing actions toward a witness and a threat to tell law enforcement that the witness was engaged in criminal activity,

that the defendant acted with the requisite intent to intimidate the witness so that the witness would not testify against the defendant at trial, the evidence was sufficient to support the defendant's conviction for influencing a witness. Burke v. State, 333 Ga. App. 738, 776 S.E.2d 821 (2015).

Threatening to file lawsuit not within ambit of statute. — Defendant was improperly convicted of influencing witnesses in violation of O.C.G.A. § 16-10-93(a) because the mere threat of potential monetary damage and public humiliation were inextricably intertwined with the defendant's threat of a lawsuit, which was not a per se threat to person nor to property; threatening to (ostensibly) exercise one's legitimate right to file a lawsuit is not encompassed by this statute. DeLong v. State, 310 Ga. App. 518, 714 S.E.2d 98 (2011).

Threat of lawsuit insufficient. — Georgia Court of Appeals concludes that actually exercising one's right to file a lawsuit, conspiring with others to file a lawsuit, in and of itself, does not constitute a threat as required to support the crimes under O.C.G.A. §§ 16-10-93(a), 16-10-93(b)(1)(A), 16-10-32(b)(1), or 16-10-32(b)(4). Brown v. State, 322 Ga. App. 446, 745 S.E.2d 699 (2013).

Trial court erred by denying the defendant's demurrer to two counts in a second indictment, which charged the defendant with the offense of influencing witnesses under O.C.G.A. § 16-10-93(a) with the intent to influence, delay, or prevent the witnesses' testimony in an official proceeding because actually exercising one's right to file a lawsuit, which was alleged in the case, did not constitute a threat as required to support the crimes under § 16-10-93(a). Brown v. State, 322 Ga. App. 446, 745 S.E.2d 699 (2013).

Cited in Morgan v. State, 240 Ga. 845, 242 S.E.2d 611 (1978); Gonzalez v. State, 175 Ga. App. 84, 332 S.E.2d 904 (1985); Griffin v. State, 204 Ga. App. 270, 419 S.E.2d 115 (1992); Carter v. State, 237 Ga. App. 703, 516 S.E.2d 556 (1999); Markowitz v. Wieland, 243 Ga. App. 151, 532 S.E.2d 705 (2000); Draper v. Reynolds, 278 Ga. App. 401, 629 S.E.2d 476 (2006); Hargett v. State, 285 Ga. 82, 674 S.E.2d 261 (2009); Murray v. State, 297 Ga. App. 571, 677 S.E.2d 745 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Bribery, § 4. 17 Am. Jur. 2d, Contempt, § 81 et seq. 58 Am. Jur. 2d, Obstructing Justice, § 37 et seq.

C.J.S. — 11 C.J.S., Bribery, § 9. 67 C.J.S., Obstructing Justice or Governmental Administration, § 31 et seq.

ALR. — Procuring or attempting to procure witness to leave jurisdiction as contempt, 33 A.L.R. 607.

Falsity of contemplated testimony as condition of offense of bribery of, attempt to bribe, or acceptance of bribe or gift by, prospective witness, 110 A.L.R. 582.

Procuring perjury as contempt, 29 A.L.R.2d 1157.

Recovery of money paid, or property transferred, as a bribe, 60 A.L.R.2d 1273.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely, 79 A.L.R.3d 1156.

Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness, 8 A.L.R.4th 769.

Admonitions against perjury or threats to prosecute potential defense witness, inducing refusal to testify, as prejudicial error, 88 A.L.R.4th 388.

Validity, construction, and application of federal witness tampering statute, 18 U.S.C.A. § 1512(b), 183 A.L.R. Fed. 611.

Construction and application of federal witness tampering statute, § 18 U.S.C.A. 1512(b), 185 A.L.R. Fed. 1.

16-10-94. Tampering with evidence.

(a) A person commits the offense of tampering with evidence when, with the intent to prevent the apprehension or cause the wrongful apprehension of any person or to obstruct the prosecution or defense of any person, he knowingly destroys, alters, conceals, or disguises physical evidence or makes, devises, prepares, or plants false evidence.

(b) Nothing in this Code section shall be deemed to abrogate or alter any privilege which any person is entitled to claim under existing laws.

(c) Except as otherwise provided in this subsection, any person who violates subsection (a) of this Code section involving the prosecution or defense of a felony and involving another person shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than three years; provided, however, that any person who violates subsection (a) of this Code section involving the prosecution or defense of a serious violent felony as defined in subsection (a) of Code Section 17-10-6.1 and involving another person shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten years. Except as otherwise provided in this subsection, any person who violates subsection (a) of this Code section involving the prosecution or defense of a misdemeanor shall be guilty of a misdemeanor. (Code 1933, § 26-2510, enacted by Ga. L. 1974, p. 423, § 1; Ga. L. 2001, p. 982, § 1.)

Law reviews. — For article, "Truth and Uncertainty: Legal Control of the Destruction of Evidence," see 36 Emory L.J. 1085 (1987). For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

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State need not negate all possibility of tampering with evidence, but need only show that it is reasonably certain there was no alteration. Barfield v. State, 160 Ga. App. 228, 286 S.E.2d 516 (1981).

When there is only bare speculation of tampering, it is proper to admit evidence and let remaining doubt go to its weight. Barfield v. State, 160 Ga. App. 228, 286 S.E.2d 516 (1981).

Evidentiary issues. — Question of whether the defendant legally possessed a gun or used the gun to shoot the victim was independent of whether the gun was evidence that the defendant attempted to conceal to obstruct the defendant's prosecution. Williams v. State, 261 Ga. App. 410, 582 S.E.2d 556 (2003).

Swallowing of drugs as tampering with evidence. — Evidence supported the defendant's conviction for tampering with evidence as the defendant swallowed the contents of baggies, later identified as cocaine, as officers approached. Defendant told an emergency room doctor that the defendant had eaten cocaine. Dulcio v. State, 297 Ga. App. 600, 677 S.E.2d 758 (2009).

Evidence sufficient to sustain conviction. — There was sufficient evidence to support defendant's conviction for tampering with evidence after a ballistics expert testified that the revolver found hidden under a mattress fired the bullet that killed the victim, and the jury could reasonably infer that defendant hid the

weapon shortly after the shooting. Chastain v. State, 255 Ga. 723, 342 S.E.2d 678 (1986).

Defendant's defense to a tampering with evidence charge was that no one saw defendant pull up and destroy marijuana plants, but police officers saw defendant on the property with the plants, advised defendant not to remove them, returned in two hours to find them missing, and saw no one else around the premises at either time, thus, the jury could reasonably infer that defendant at the very least participated in the destruction and that in itself would justify conviction. Parrish v. State, 182 Ga. App. 247, 355 S.E.2d 682 (1987).

Evidence that defendant supplied photographs conveying a false impression of the scene of a crime was sufficient to sustain defendant's conviction for tampering with evidence. Gurr v. State, 238 Ga. App. 1, 516 S.E.2d 553 (1999).

Evidence that defendant attempted to destroy cocaine in defendant's home by placing the plastic bag in which it was contained in the disposal was sufficient for conviction. Phillips v. State, 242 Ga. App. 404, 530 S.E.2d 1 (2000).

There was sufficient evidence to convict defendant of tampering with evidence in violation of O.C.G.A. § 16-10-94(a) after defendant attempted to flush defendant's boxer shorts, which had been seen in the videotape of an armed robbery, down the toilet in the police station and the boxer shorts were later discovered after a problem with the bathroom plumbing developed. Williams v. State, 259 Ga. App. 265, 576 S.E.2d 647 (2003).

Evidence that defendant tried to slide a bag of marijuana into a pool table pocket in order to conceal it was sufficient, and defendant's reasonable ability to conceal the marijuana was irrelevant; the test was whether defendant performed an act which constituted a substantial step toward concealing the evidence, not whether defendant was likely to succeed. Taylor v. State, 260 Ga. App. 890, 581 S.E.2d 386 (2003).

Evidence supported defendant's conviction of tampering with evidence because defendant pointed a loaded revolver at the victim and pulled its trigger twice, the revolver had a hammer block, preventing it from firing unless pressure was applied to the trigger and, when police recovered the revolver, the hammer was resting on an empty chamber next to the chamber containing a spent brass shell, indicating that the cylinder was advanced after the fatal shot. Reed v. State, 279 Ga. 81, 610 S.E.2d 35 (2005).

Sufficient evidence supported convictions of aggravated assault, tampering with evidence, and felony misuse of a firearm while hunting, and negated the defense of accident when the victim who was shot by defendant while hunting waved to signal defendant before the gun was fired and since the defendant was hunting while on medication that could have caused mental and physical impairment; the jury also could have considered defendant's actions after the shooting in removing the victim's orange vest, hiding two guns, failing to aid the victim, and failing to alert paramedics of the victim's location. Wilson v. State, 279 Ga. App. 136, 630 S.E.2d 640 (2006).

Evidence was sufficient to support a defendant's conviction for tampering with evidence after the defendant admitted to cleaning up the crime scene, and after there was evidence that the defendant concealed bloody bed sheets and a mattress by making the bed after removing the victim's body from the scene and concealed scraps of bloody cardboard in the backseat of a patrol car. White v. State, 287 Ga. 713, 699 S.E.2d 291 (2010).

Georgia Lottery for Education Act, O.C.G.A. § 50-27-27(b), applied to the defendant's conduct because the defendant's actions were for the purpose of influencing the winning of a prize offered by the Georgia Lottery Corporation; the defendant took lottery tickets in order to win lottery prizes personally, even though such conduct deprived other customers of the opportunity to lawfully purchase those tickets, and the defendant's action of leaning over the counter that stored the tickets, rolling the tickets off the plastic wheels on which the tickets were housed, ripping the tickets off the rolls, and taking the tickets for the defendant's own use constituted tampering with lottery materials in violation of O.C.G.A.

§ 16-10-94(a). Doe v. State, 306 Ga. App. 348, 702 S.E.2d 669 (2010), aff'd, 290 Ga. 667, 725 S.E.2d 234 (2012).

Evidence that baggies containing what appeared to be marijuana residue were found in the dishwasher supported the defendant's conviction for tampering with evidence. Kirchner v. State, 322 Ga. App. 275, 744 S.E.2d 802 (2013).

Convictions for malice murder, felony murder, aggravated assault with a deadly weapon, tampering with evidence, and two counts of cruelty to children in the third degree were supported by evidence that, while two of the victim's children were in a closet, the defendant shot the victim and told the children the victim shot herself; the testimony of the medical examiner that it was not possible for the victim to have self-inflicted the type of wound the victim sustained, which appeared to have been inflicted from two feet away; the defendant's statement to police that the defendant threw the gun in the woods; and testimony that the defendant made the children help the defendant put the victim in the car to go to the hospital. Durden v. State, 293 Ga. 89, 744 S.E.2d 9 (2013), overruled on other grounds, Jeffrey v. State, 296 Ga. 713, 770 S.E.2d 585 (2015).

Defendant's admission that the defendant helped the defendant's son hold down the victim as the son penetrated the victim, that the defendant rubbed the defendant's own penis against the victim and ejaculated on the victim, that the defendant put the defendant's hands over the son's as the son choked the victim, that the defendant helped dump the victim's body, and the testimony of the defendant's wife that the defendant helped undress the victim, the defendant put the defendant's mouth on the victim's penis, and the defendant attempted to put the defendant's penis in the victim's anus was sufficient to support defendant's convictions for murder, false imprisonment, two counts of aggravated child molestation, child molestation, cruelty to children in the first degree, concealing the death of another, and tampering with evidence. Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738 (2013).

Evidence that the defendant found a bullet shell casing in the bedroom where the victim was shot and that, during a trash pull, a spent casing was found inside a soft drink can that had been cut in half belied the defendant's claim that the defendant did not realize the importance of the casing and supported a conviction for tampering with evidence. Thornton v. State, 331 Ga. App. 191, 770 S.E.2d 279 (2015), aff'd, 298 Ga. 709, 784 S.E.2d 417 (2016).

Evidence insufficient to sustain conviction. — There was insufficient evidence to support defendant's conviction for tampering with evidence by placing a knife in a murder victim's hand, where no fingerprints were submitted into evidence, the knife was never introduced, and any inferences as to how the knife reached the victim's hand were mere speculation. Chastain v. State, 255 Ga. 723, 342 S.E.2d 678 (1986).

Evidence was insufficient to convict defendant of tampering with evidence under O.C.G.A. § 16-10-94(a) because the fact that defendant moved the victim's body and a pillow, that was behind the victim's head, did not show an intent to frustrate the defendant's apprehension or to obstruct the prosecution. Merritt v. State, 285 Ga. 778, 683 S.E.2d 855 (2009).

Evidence was insufficient to convict defendant of tampering with evidence in regard to the gun when although the indictment alleged that defendant, with the intent to obstruct the prosecution of another, did knowingly conceal physical evidence, to wit, a gun, and at trial there was evidence that defendant had a gun on the defendant's person at the victim's home, the state did not present any evidence as to what, if anything, defendant did with the gun. In the absence of any evidence that defendant intentionally and knowingly destroyed, altered, concealed, or disguised physical evidence, O.C.G.A. § 16-10-94(a), defendant could not be convicted for tampering with evidence, and the state's reliance on the mere fact that the police did not recover the gun was insufficient to prove defendant tampered with evidence in order to obstruct the prosecution of another as alleged in the indictment; accordingly, defendant's conviction for tampering with evidence re-

garding the gun was reversed. Cooper v. State, 287 Ga. 861, 700 S.E.2d 593 (2010), overruled on other grounds, Smith v. State, 290 Ga. 768, 723 S.E.2d 915 (2012).

Evidence was not sufficient to support the defendant's conviction for tampering with evidence with intent to prevent the apprehension and obstruct the prosecution of another person in violation of O.C.G.A. § 16-10-94 because the evidence did not prove beyond a reasonable doubt that the defendant created and posted a video with the specific intent to prevent the apprehension or obstruct the prosecution of some other person. Haley v. State, 289 Ga. 515, 712 S.E.2d 838 (2011), cert. denied, U.S. , 133 S. Ct. 60, 183 L. Ed. 2d 711 (2012).

There was not sufficient evidence to support the tampering with evidence conviction as there was no evidence to show the substance in the defendant's mouth, that was destroyed, was marijuana. King v. State, 317 Ga. App. 834, 733 S.E.2d 21 (2012).

Void sentence. — Construing O.C.G.A. § 16-10-94(c), and in order to avoid rendering the terms "and involving another person" meaningless, the court had to interpret that language as imposing felony punishment when the person committed the tampering offense involving the prosecution or defense of a third person; hence, because the state did not present any allegations or evidence indicating that the defendant committed the tampering offense to prevent the apprehension or prosecution of anyone other than himself, the felony sentence imposed was void, and had to be vacated. English v. State, 282 Ga. App. 552, 639 S.E.2d 551 (2006).

While sufficient evidence was presented to support the defendant's conviction of tampering with evidence, as the statute, by its own terms, contemplated that a person could commit the offense by tampering with evidence in their own case or that of another person, the three-year sentence imposed for the same had to be reversed, as the defendant did not tamper with the evidence in another person's case; the defendant committed a misdemeanor for tampering with evidence in his own case. Perry v. State, 283 Ga. App. 520, 642 S.E.2d 141 (2007).

Felony sentence vacated. — Defendant's felony sentence for tampering with evidence in violation of O.C.G.A. § 16-10 -94 was vacated and the case was remanded for misdemeanor sentencing because the verdict form simply contained a finding of guilty on the tampering count, making it impossible to determine if the jury found the defendant guilty of misdemeanor or felony tampering; the defendant had to be given the benefit of the doubt in construing the ambiguous verdict. Hampton v. State, 289 Ga. 621, 713 S.E.2d 851 (2011).

Indictment accused the defendant and an alleged accomplice of tampering with evidence with the intent to prevent the apprehension of each of the accused; however, because "each said accused" could mean either of the accused, and the verdict form and the jury charge did not require any further specificity, the jury could have found the defendant guilty of tampering to prevent the defendant's own apprehension (a misdemeanor) or the apprehension of the alleged accomplice (a felony); thus, the defendant had to be given the benefit of the doubt in construing the ambiguous verdict, and the defendant's felony tampering sentence was vacated. Haynes v. State, 331 Ga. App. 104, 769 S.E.2d 801 (2015).

Crime was misdemeanor because tampering involved defendant's own case. — Imposition of a three-year sentence for tampering with evidence was erroneous because the defendant tampered with evidence in the defendant's own case and not to prevent the apprehension or prosecution of anyone other than the defendant, and, therefore, the crime was a misdemeanor. White v. State, 287 Ga. 713, 699 S.E.2d 291 (2010).

Because the defendant tampered with evidence in the defendant's own case by throwing the murder weapon away, the defendant could only be convicted of a misdemeanor; therefore, the trial court erred in finding the defendant guilty of a felony. DeLeon v. State, 289 Ga. 782, 716 S.E.2d 173 (2011).

Cited in Gurr v. State, 238 Ga. App. 1, 516 S.E.2d 553 (1999); Draper v. Reynolds, 278 Ga. App. 401, 629 S.E.2d 476 (2006).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting. — Georgia Crime Information Center is authorized to collect and file fingerprints of persons charged with a violation of O.C.G.A. § 16-10-94(b). 2001 Op. Att'y Gen. No. 2001-11.

RESEARCH REFERENCES

C.J.S. — 67 C.J.S., Obstructing Justice or Governmental Administration, § 35 et seq.

16-10-94.1. Willful destruction, alteration, or falsification of medical records.

(a) As used in this Code section, the term:

(1) "Patient" means any person who has received health care services from a provider.

(2) "Provider" means all hospitals, including public, private, osteopathic, and tuberculosis hospitals; other special care units, including podiatric facilities, skilled nursing facilities, and kidney disease treatment centers, including freestanding hemodialysis units; intermediate care facilities; ambulatory surgical or obstetrical facilities; health maintenance organizations; and home health agencies. Such term shall also mean any person licensed to practice under Chapter 9, 11, 26, 34, 35, or 39 of Title 43.

(3) "Record" means a patient's health record, including, but not limited to, evaluations, diagnoses, prognoses, laboratory reports, X-rays, prescriptions, and other technical information used in assessing the patient's condition, or the pertinent portion of the record relating to a specific condition or a summary of the record.

(b) Any person who, with intent to conceal any material fact relating to a potential claim or cause of action, knowingly and willfully destroys, alters, or falsifies any record shall be guilty of a misdemeanor. (Code 1981, § 16-10-94.1, enacted by Ga. L. 1988, p. 412, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, "under" was substituted for "Under" in the second sentence of paragraph (a)(2).

16-10-95. Barratry; penalty.

Reserved. Repealed by Ga. L. 2006, p. 69, § 1/HB 804, effective July 1, 2006.

Editor's notes. — This Code section was based on Laws 1833, Cobb's 1851 Digest, p. 808; Code 1863, §§ 4388, 4389; Code 1868, §§ 4429, 4430; Code 1873, §§ 4501, 4502; Code 1882, §§ 4501, 4502; Ga. L. 1895, p. 64, § 1; Penal Code 1895,

§§ 325, 327; Penal Code 1910, §§ 330, 332; Code 1933, § 26-4701; Ga. L. 1960, p. 1135, § 3; Code 1933, § 26-2406, enacted by Ga. L. 1968, p. 1249, § 1.

16-10-96. Impersonating another in the course of an action, proceeding, or prosecution.

Any person who shall falsely represent or impersonate another and in such assumed character answer as a witness to interrogatories or do any other act in the course of any action, proceeding, or prosecution or in any other way, matter, or thing, whereby the person so impersonated or represented, or any other person, might suffer damage, loss, or injury shall, upon conviction thereof, be punished by confinement for not less than one year nor more than five years. (Laws 1833, Cobb's 1851 Digest, p. 822; Code 1863, § 4464; Code 1868, § 4508; Code 1873, § 4596; Code 1882, § 4596; Penal Code 1895, § 666; Penal Code 1910, § 711; Code 1933, § 38-9901.)

JUDICIAL DECISIONS

Cited in Goodyear Tire & Rubber Co. v. Vandergriff, 52 Ga. App. 662, 184 S.E. 452 (1936).

OPINIONS OF THE ATTORNEY GENERAL

Former Code 1933, § 38-9901 (see now O.C.G.A. § 16-10-96) was extremely broad and all inclusive and, provided only that the person so personated or represented might suffer damage, loss, or injury, the statute applied whether the true identity of the impersonator was discovered before, during, or after arraignment, trial, and conviction on other charges. 1954-56 Op. Att'y Gen. p. 128.

16-10-97. Intimidation or injury of any officer in or of any court.

(a) A person who by threat or force or by any threatening action, letter, or communication:

(1) Endeavors to intimidate or impede any grand juror or trial juror or any officer in or of any court of this state or any court of any county or municipality of this state or any officer who may be serving at any proceeding in any such court while in the discharge of such juror's or officer's duties;

(2) Injures any grand juror or trial juror in his or her person or property on account of any indictment or verdict assented to by him or her or on account of his or her being or having been such juror; or

(3) Injures any officer in or of any court of this state or any court of any county or municipality of this state or any officer who may be serving at any proceeding in any such court in his or her person or property on account of the performance of his or her official duties

shall, upon conviction thereof, be punished by a fine of not more than $5,000.00 or by imprisonment for not more than 20 years, or both.

(b) As used in this Code section, the term "any officer in or of any court" means a judge, attorney, clerk of court, deputy clerk of court, court reporter, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42.

(c) A person who by threat or force or by any threatening action, letter, or communication endeavors to intimidate any law enforcement officer, outside the scope and course of his or her employment, or his or her immediate family member in retaliation or response to the discharge of such officer's official duties shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years, a fine not to exceed $5,000.00, or both. (Code 1981, § 16-10-97, enacted by Ga. L. 1988, p. 391, § 1; Ga. L. 1989, p. 14, § 16; Ga. L. 1992, p. 6, § 16; Ga. L. 2010, p. 999, § 2/HB 1002; Ga. L. 2011, p. 59, § 1-63/HB 415; Ga. L. 2012, p. 623, § 1/HB 541; Ga. L. 2015, p. 422, § 5-25/HB 310.)

Editor's notes. — Ga. L. 2011, p. 59, § 1-1/HB 415, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Jury Composition Reform Act of 2011.'"

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

JUDICIAL DECISIONS

O.C.G.A. § 16-10-97(a)(1) was unconstitutional as applied to the defendant, because there was no reference to any form of violence in the defendant's communications, not even an intimation of such. Harrell v. State, 297 Ga. 884, 778 S.E.2d 196 (2015).

Phrase "while in the discharge of such ... officer's duties" was intended simply to limit the application of O.C.G.A. § 16-10-97(1) to those situations which arise out of or are related to the performance of the court officer's official duties, whether the proscribed activities occur while the court officer is actively engaged on the matter giving rise to the offense or whether the proscribed activities occur at some other juncture. Moon v. State, 199 Ga. App. 94, 404 S.E.2d 273 (1991), cert. denied, 199 Ga. App. 906, 404 S.E.2d 273 (1991).

Contract probation employee is officer of the court. — Trial court did not err in determining that a contract probation employee is an officer of the court within the meaning of O.C.G.A. § 16-10-97. Edwards v. State, 247 Ga. App. 835, 545 S.E.2d 143 (2001).

RESEARCH REFERENCES

ALR. — Threats of violence against juror in criminal trial as ground for mistrial or dismissal of juror, 3 A.L.R.5th 963.

Construction and application of § 2A6.1 of United States Sentencing Guidelines (USSG § 2A6.1), pertaining to sentence to be imposed for making threatening communications, 148 A.L.R. Fed. 501.

16-10-98. Illegal remuneration of judges and law enforcement officials.

(a) It shall be unlawful for a judge, prosecuting attorney, investigating officer, or law enforcement officer who is a witness in a case to receive or agree to receive remuneration during the period of time between indictment and the completion of direct appeal in any criminal case in which the judge, prosecuting attorney, or law enforcement officer is involved for any of the following activities:

(1) Publishing a book or article concerning the case;

(2) Making a public appearance concerning the case; or

(3) Participating in any commercial activity concerning the case.

(b) A person convicted of a violation of subsection (a) of this Code section shall be guilty of a misdemeanor.

(c) For purposes of this Code section remuneration shall not be deemed to include customary and ordinary salary and benefits of the individual or customary and ordinary expenses paid for public appearances. (Code 1981, § 16-10-98, enacted by Ga. L. 1997, p. 1310, § 1.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 81 (1997).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting of offenders. — Offense covered by O.C.G.A. § 16-10-98 is not currently designated as an offense requiring fingerprinting. 1997 Op. Att'y Gen. No. 97-330.

CHAPTER 11

OFFENSES AGAINST PUBLIC ORDER AND SAFETY

Article 1

Treason and Other Subversive Activities

Part 1

General Provisions

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16-11-1. Treason.
16-11-2. Insurrection.
16-11-3. Inciting to insurrection.
16-11-4. Advocating overthrow of government.

Part 2

Sedition and Subversive Activities

16-11-5. Short title.
16-11-6. Definitions.
16-11-7. Special assistant attorney general for investigation and prosecution of subversive activities.
16-11-8. Duties imposed on prosecuting attorneys, commissioner of public safety, sheriffs, and police to furnish information and assistance; establishment of special enforcement agencies.
16-11-9. Maintenance of records by special assistant; classification of records.
16-11-10. Grand jury investigations.
16-11-11. Dissolution of subversive organizations; revocation of charter, funds, books, and records.
16-11-12. Eligibility of subversive persons to hold office or position in government.
16-11-13. Investigation of all state employees prior to appointment or employment; questionnaire; promulgation of orders, rules, and regulations.
16-11-14. False swearing in written statement.
16-11-15. Information concerning membership of relative in a subversive organization.
16-11-16. Filing written statement.

Article 2

Offenses Against Public Order

16-11-30. Riot.
16-11-31. Inciting to riot.
16-11-32. Affray.
16-11-33. Unlawful assembly.
16-11-34. Preventing or disrupting lawful meetings, gatherings, or processions.
16-11-34.1. Preventing or disrupting General Assembly sessions or other meetings of members; unlawful activities within the state capitol or certain Capitol Square buildings.
16-11-34.2. Disorderly or disruptive conduct at any funeral or memorial service.
16-11-35. Removal from campus or facility of unit of university system or school; failure to leave.
16-11-36. Loitering or prowling.
16-11-37. Terroristic threats and acts; penalties.
16-11-37.1. Dissemination of information relating to terroristic acts.
16-11-38. Wearing mask, hood, or device which conceals identity of wearer.
16-11-39. Disorderly conduct.
16-11-39.1. Harassing communications; venue; separate offenses; impact on free speech.
16-11-39.2. Unlawful conduct during 9-1-1 call.
16-11-40. Unlawful use of emergency exit door; penalty.
16-11-40.1. Definitions; identification of minors; criminal offense.
16-11-41. Public drunkenness.
16-11-42. Refusal to relinquish telephone party line in case of

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emergency; false request on party line as to emergency; warning printed in telephone books.
16-11-43. Obstructing highways, streets, sidewalks, or other public passages.
16-11-44. Maintaining a disorderly house.
16-11-45. Use of laser against aircraft.

Article 3

Invasions of Privacy

PART 1

WIRETAPPING, EAVESDROPPING, SURVEILLANCE, AND RELATED OFFENSES

16-11-60. Definitions.
16-11-61. Peeping Toms.
16-11-62. Eavesdropping, surveillance, or intercepting communication which invades privacy of another; divulging private message.
16-11-63. Possession, sale, or distribution of eavesdropping devices.
16-11-64. Interception of wire or oral transmissions by law enforcement officers.
16-11-64.1. Application and issuance of order authorizing installation and use of pen register or trap and trace device.
16-11-64.2. Emergency situation and other grounds authorizing installation and use of pen register or trap and trace device prior to order; time for order approving installation or use.
16-11-64.3. Emergency situation; application for an investigation warrant.
16-11-65. License to intercept telephonic communications for business service improvement; regulatory powers of Georgia Public Service Commission.
16-11-66. Interception of wire, oral, or electronic communication by party thereto; consent requirements for recording and divulging conversations to which child under 18 years is a party; parental exception.
16-11-66.1. Disclosure of stored wire or electronic communications; records; search warrants; issuance of subpoena; violation.
16-11-67. Admissibility of evidence obtained in violation of part.
16-11-68. Admissibility of privileged communications.
16-11-69. Penalty for violations of part.
16-11-70. Telephone records privacy protection.

PART 2

PREPARATION OF FEDERAL AND STATE INCOME TAX RETURNS

16-11-80. "Business of preparing federal or state income tax returns or assisting taxpayers in preparing such returns" defined.
16-11-81. Disclosure of information obtained in business of preparing federal or state income tax returns or assisting in preparation.
16-11-82. Contacting taxpayer to obtain written consent.
16-11-83. Penalty for violations of part.

PART 3

INVASION OF PRIVACY

16-11-90. Prohibition on nude or sexually explicit electronic transmissions.
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Article 4

Dangerous Instrumentalities and Practices

PART 1

GENERAL PROVISIONS

16-11-100. Abandoning, discarding, or

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leaving unattended containers which lock or fasten automatically; abandoning or discarding motor vehicle which does not have door or window removed.
16-11-101. Furnishing knuckles or a knife to person under the age of 18 years.
16-11-101.1. Furnishing pistol or revolver to person under the age of 18 years.
16-11-102. Pointing or aiming gun or pistol at another.
16-11-103. Discharge of gun or pistol near public highway; penalty.
16-11-104. Discharge of firearms on property of another.
16-11-105. Discharge of firearm on Sunday; exceptions; penalty [Repealed].
16-11-106. Possession of firearm or knife during commission of or attempt to commit certain crimes.
16-11-107. Harming a law enforcement animal.
16-11-107.1. Harassment of assistance dog by humans or other dogs; penalty.
16-11-108. Misuse of firearm or archery tackle while hunting.
16-11-109. Activities prohibited to person charged with violation of subsection (a) of Code Section 16-11-108; penalty for violation of Code section; surrender of hunting license.
16-11-110. Revocation of hunting license for violation of subsection (a) of Code Section 16-11-108 or subsection (a) of Code Section 16-11-109.
16-11-111. "Anhydrous ammonia" defined; crime for possession.
16-11-112. Vehicles with false or secret compartments.
16-11-113. Offense of transferring firearm to individual other than actual buyer; penalty.

PART 2

POSSESSION OF DANGEROUS WEAPONS

16-11-120. Short title.
16-11-121. Definitions.
16-11-122. Possession of sawed-off shotgun or rifle, machine gun, silencer, or dangerous weapon prohibited.
16-11-123. Unlawful possession of firearms or weapons.
16-11-124. Exemptions from application of part.
16-11-125. Burden of proof as to exemptions.

PART 3

CARRYING AND POSSESSION OF FIREARMS

16-11-125.1. Definitions.
16-11-126. Having or carrying handguns, long guns, or other weapons; license requirement; exceptions for homes, motor vehicles, private property, and other locations and conditions.
16-11-127. Carrying weapons in unauthorized locations.
16-11-127.1. Carrying weapons within school safety zones, at school functions, or on a bus or other transportation furnished by a school.
16-11-127.2. Weapons on premises of nuclear power facility.
16-11-128. Carrying pistol without license.
16-11-129. Weapons carry license; gun safety information; temporary renewal permit; mandamus; verification of license.
16-11-130. Exemptions from Code Sections 16-11-126 through 16-11-127.2.
16-11-130.1. Allowing personnel to carry weapons within certain school safety zones and at school functions.
16-11-130.2. Carrying a weapon or long gun at a commercial service airport.

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16-11-131. Possession of firearms by convicted felons and first offender probationers.
16-11-132. Possession of handgun by person under the age of 18 years.
16-11-133. Minimum periods of confinement for persons convicted who have prior convictions.
16-11-134. Discharging firearm while under the influence of alcohol or drugs.
16-11-135. Public or private employer's parking lots; right of privacy in vehicles in employer's parking lot or invited guests on lot; severability; rights of action.
16-11-136. Restrictions on possession, manufacture, sale, or transfer of knives.
16-11-137. Required possession of weapons carry license or proof of exemption when carrying a weapon; detention for investigation of carrying permit.
16-11-138. Defense of self or others as absolute defense.

PART 4

ANTITERRORISTIC TRAINING

16-11-150. Short title.
16-11-151. Prohibited training.
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PART 4A

ENHANCED CRIMINAL PENALTIES

16-11-160. Use of machine guns, sawed-off rifles, sawed-off shotguns, or firearms with silencers during commission of certain offenses; enhanced criminal penalties.
16-11-161. Consistent local laws or ordinances authorized.
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PART 5

BRADY LAW REGULATIONS

16-11-170. Intent to provide state background check law; construction of part [Repealed].
16-11-171. Definitions.
16-11-172. Transfers or purchases of firearms subject to the NICS; information concerning persons who have been involuntarily hospitalized to be forwarded to the FBI; penalties for breach of confidentiality; exceptions.
16-11-173. Legislative findings; preemption of local regulation and lawsuits; exceptions.
16-11-174 through 16-11-184. [Repealed].

Article 5

Offenses Involving Illegal Aliens

16-11-200. Definitions; offense of transporting or moving illegal aliens; exceptions; penalties.
16-11-201. Definitions; offense of concealing, harboring, or shielding an illegal alien; penalties; exceptions.
16-11-202. Illegal alien defined; offense of inducing an illegal alien to enter state; penalties.
16-11-203. Authority of law enforcement officers to enforce federal immigration laws; documentation.

Article 6

Domestic Terrorism

16-11-220. Definitions.
16-11-221. Penalties.
16-11-222. Persons and conduct subject to prosecution for offense of domestic terrorism.
16-11-223. Jurisdiction for prosecutions.
16-11-224. Construction; constitutional protections.

Law reviews. — For annual survey article discussing developments in criminal law, see 52 Mercer L. Rev. 167 (2000).

ARTICLE 1

TREASON AND OTHER SUBVERSIVE ACTIVITIES

Cross references. — Misuse and abuse of the state or Confederate flag or emblem, §§ 50-3-8, 50-3-9, and 50-3-11.

JUDICIAL DECISIONS

Cited in Georgia Conference of Am. Ass'n of Univ. Professors v. Board of Regents, 246 F. Supp. 553 (N.D. Ga. 1965).

PART 1

GENERAL PROVISIONS

RESEARCH REFERENCES

ALR. — Validity of legislation directed against social or industrial propaganda deemed to be of a dangerous tendency, 1 A.L.R. 336; 20 A.L.R. 1535; 73 A.L.R. 1494.

16-11-1. Treason.

(a) A person owing allegiance to the state commits the offense of treason when he knowingly levies war against the state, adheres to her enemies, or gives them aid and comfort. No person shall be convicted of the offense of treason except on the testimony of two witnesses to the same overt act or on confession in open court. When the overt act of treason is committed outside this state, the person charged therewith may be tried in any county in this state.

(b) A person convicted of the offense of treason shall be punished by death or by imprisonment for life or for not less than 15 years. (Laws 1833, Cobb's 1851 Digest, p. 782; Code 1863, § 4212; Code 1868, § 4247; Code 1873, § 4313; Code 1882, §§ 4313, 5019; Penal Code 1895, §§ 51, 52, 53; Penal Code 1910, §§ 51, 52, 53; Code 1933, §§ 26-801, 26-802, 26-803; Code 1933, § 26-2201, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1982, p. 3, § 16.)

Cross references. — Treason generally, Ga. Const. 1983, Art. I, Sec. I, Para. XIX. Time limitation on prosecutions for crimes punishable by death or life imprisonment, § 17-3-1.

JUDICIAL DECISIONS

Punishment of death does not invariably violate Constitution. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 70 Am. Jur. 2d, Sedition, Subversive Activities, and Treason, §§ 1, 3.

C.J.S. — 87 C.J.S., Treason, § 1 et seq.

16-11-2. Insurrection.

(a) A person commits the offense of insurrection when he combines with others to overthrow or attempt to overthrow the representative and constitutional form of government of the state or any political subdivision thereof when the same is manifested by acts of violence.

(b) A person convicted of the offense of insurrection shall be punished by imprisonment for not less than one nor more than ten years. Insurrection shall be bailable only in the discretion of a judge of the superior court. (Ga. L. 1866, p. 152, §§ 1, 3; Code 1868, §§ 4249, 4251; Ga. L. 1871-72, p. 19, § 1; Code 1873, §§ 4315, 4317; Code 1882, §§ 4315, 4317; Penal Code 1895, §§ 55, 57; Penal Code 1910, §§ 55, 57; Code 1933, §§ 26-901, 26-903; Code 1933, § 26-2202, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1981, p. 868, § 1.)

Cross references. — Mutiny and sedition by persons subject to Georgia Code of Military Justice, § 38-2-1094.

RESEARCH REFERENCES

Am. Jur. 2d. — 44B Am. Jur. 2d, Insurrection, § 1 et seq. 70 Am. Jur. 2d, Sedition, Subversive Activities, and Treason, § 3 et seq.

ALR. — Pretrial preventive detention by state court, 75 A.L.R.3d 956.

16-11-3. Inciting to insurrection.

(a) A person commits the offense of inciting to insurrection when he incites others to overthrow or attempt to overthrow the representative and constitutional form of government of the state or any political subdivision thereof and he or they commit any violent act in furtherance thereof.

(b) A person convicted of the offense of inciting to insurrection shall be punished by imprisonment for not less than one nor more than ten years. Inciting to insurrection shall be bailable only in the discretion of a judge of the superior court. (Ga. L. 1866, p. 152, §§ 2, 4; Code 1868,

§§ 4250, 4251; Ga. L. 1871-72, p. 19, § 1; Code 1873, §§ 4316, 4317; Code 1882, §§ 4316, 4317; Penal Code 1895, §§ 56, 57; Penal Code 1910, §§ 56, 57; Code 1933, §§ 26-902, 26-903; Code 1933, § 26-2203, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 10; Ga. L. 1981, p. 868, § 2.)

Cross references. — Constitutional guarantee of free speech and press, Ga. Const. 1983, Art. I, Sec. I, Para. V.

16-11-4. Advocating overthrow of government.

(a) As used in this Code section, the term:

(1) "Organization" means any corporation, company, partnership, association, trust, foundation, fund, club, society, committee, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject.

(2) "Subversive organization" means any organization which engages in or advocates, abets, advises, or teaches, or which has a purpose of engaging in or advocating, abetting, advising, or teaching activities intended to overthrow, to destroy, or to assist in the overthrow or destruction of the government of the state or of any political subdivision thereof by force or violence.

(b) A person commits the offense of advocating the overthrow of the government if he knowingly and willfully commits any of the following acts:

(1) Advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the state or any political subdivision thereof by force or violence;

(2) Prints, publishes, edits, issues, circulates, sells, distributes, exhibits, or displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the state or of any political subdivision thereof by force or violence;

(3) Assists in the formation, participates in the management, or contributes to the support of any subversive organization, knowing the purpose thereof;

(4) Becomes a member or continues to be a member of a subversive organization, knowing the purpose thereof;

(5) Destroys any books, records, or files or secretes any funds in this state of a subversive organization, knowing the organization to be such; or

(6) Conspires with one or more persons to commit any of the acts prohibited by this Code section.

(c) A person convicted of violating any provision of this Code section shall be punished by a fine of not more than $20,000.00 or by imprisonment for not less than one nor more than 20 years, or both. (Code 1933, § 26-2204, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Constitutional guarantee of free speech and press, Ga. Const. 1983, Art. I, Sec. I, Para. V.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Penal Code 1910, § 58 are included in the annotations for this Code section.

Basis of offense is involvement in circulation of printed material, not its contents. — Gist of offense is circulating or being concerned in circulating or printing any writing for purpose stated in the statute. Contents of writing do not form gist or basis of offense and need not be stated in indictment. Dalton v. State, 176 Ga. 645, 169 S.E. 198 (1933) (decided under former Penal Code 1910, § 58).

RESEARCH REFERENCES

Am. Jur. 2d. — 70 Am. Jur. 2d, Sedition, Subversive Activities, and Treason, §§ 3 et seq., 49 et seq.

PART 2

SEDITION AND SUBVERSIVE ACTIVITIES

Cross references. — Domestic terrorism, § 16-4-10. Eligibility of subversive persons for nomination or election to public office, § 21-2-7. Bioterrorism and public health emergencies, § 31-12-1.1.

OPINIONS OF THE ATTORNEY GENERAL

Public educational institutions are subject to this Act. — Public educational institutions supported in whole or part by state funds are subject to provisions of Sedition and Subversive Activities Act, O.C.G.A. § 16-11-5 et seq. 1954-56 Op. Att'y Gen. p. 619.

RESEARCH REFERENCES

ALR. — Political principles or affiliations as ground for refusal of government officials to file certificate of nomination or take other steps necessary to representation of party or candidate upon official ticket, 130 A.L.R. 1471.

16-11-5. Short title.

This part may be cited as the "Sedition and Subversive Activities Act of 1953." (Ga. L. 1953, Jan.-Feb. Sess., p. 216, § 12; Ga. L. 1953, Nov.-Dec. Sess., p. 73, § 1.)

16-11-6. Definitions.

As used in this part, the term:

(1) "Foreign government" means the government of any country, nation, or group of nations other than the government of the United States of America or of one of the states thereof.

(2) "Foreign subversive organizations" means any organization directed, dominated, or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach activities intended to overthrow, to destroy, or to assist in the overthrow or destruction of the government of the United States or of this state or of any political subdivision of either of them and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual.

(3) "Organization" means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

(4) "Subversive organization" means an organization which engages in or advocates, abets, advises, or teaches, or a purpose for which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, to destroy, or to assist in the overthrow or destruction of the government of the United States, government of this state, or of any political subdivision of either of them by revolution, force, or violence.

(5) "Subversive person" means any person who commits, attempts to commit, or aids in the commission or advocates, abets, advises, or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, to destroy, or to assist in the overthrow or destruction of the government of the United States or of this state or any political subdivision of either of them by revolution, force, or violence; or who is a knowing member of a subversive organization or a foreign subversive organization. (Ga.

L. 1953, Jan.-Feb. Sess., p. 216, § 1; Ga. L. 1953, Nov.-Dec. Sess., p. 73, § 1.)

16-11-7. Special assistant attorney general for investigation and prosecution of subversive activities.

The Governor, with the concurrence of the Attorney General, is authorized and directed to appoint a special assistant attorney general for investigating and prosecuting subversive activities, whose responsibility it shall be, under the supervision of the Attorney General, to assemble, arrange, and deliver to the district attorney of any county, together with a list of necessary witnesses for presentation to the next grand jury in the county, all information and evidence of matters within the county which have come to his or her attention relating in any manner to the acts prohibited by this part and relating generally to the purpose, processes, and activities of subversive organizations, associations, groups, or persons. Such evidence may be presented by the Attorney General or the special assistant attorney general to the grand jury of any county directly, and he or she may represent the state on the trial of such a case, should he or she feel the ends of justice would be best served thereby, and the special assistant attorney general may testify before any grand jury as to matters referred to in this part as to which he or she may have information. (Ga. L. 1953, Jan.-Feb. Sess., p. 216, § 6; Ga. L. 1953, Nov.-Dec. Sess., p. 73, § 3; Ga. L. 2015, p. 385, § 5-1/HB 252.)

Editor's notes. — Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

16-11-8. Duties imposed on prosecuting attorneys, commissioner of public safety, sheriffs, and police to furnish information and assistance; establishment of special enforcement agencies.

For the collection of any evidence and information referred to in this part, the Governor and the Attorney General are authorized and directed to call upon all prosecuting attorneys, the commissioner of public safety, sheriffs, and county and municipal police authorities to furnish to the special assistant, provided for in Code Section 16-11-7, such assistance as may from time to time be required. Such police authorities are directed to furnish information and assistance as may be from time to time so requested. The police authorities shall transmit immediately to the special assistant attorney general any information coming to their notice and attention regarding the activities of any subversive persons, subversive organizations, or foreign subversive organizations. The Governor by executive order is authorized to establish within existing departments such special enforcement agencies,

designate such personnel, and fix such duties as may from time to time be required to perform any of the functions and duties required by this part. (Ga. L. 1953, Jan.-Feb. Sess., p. 216, § 7; Ga. L. 1953, Nov.-Dec. Sess., p. 73, § 4; Ga. L. 1972, p. 1015, § 1602.)

16-11-9. Maintenance of records by special assistant; classification of records.

The Attorney General shall require the special assistant to maintain complete records of all information received by him and all matters handled by him under the requirements of this part. Such records as may reflect on the loyalty of any resident of this state shall not be made public or divulged to any person except with permission of the Governor or the Attorney General to effectuate the purposes of this part. All such records shall be classified as confidential state secrets until declassified by the Governor or the Attorney General. (Ga. L. 1953, Jan.-Feb. Sess., p. 216, § 8; Ga. L. 1953, Nov.-Dec. Sess., p. 73, § 5.)

16-11-10. Grand jury investigations.

The judge of any court exercising general criminal jurisdiction, when in his or her discretion it appears appropriate or when informed by the Attorney General or district attorney that there is information or evidence of the character described in Code Section 16-11-7 to be considered by the grand jury, shall charge the grand jury to inquire into violations of this part for the purpose of proper action and further to inquire generally into the purposes, processes, and activities, and any other matters affecting subversive organizations, associations, groups, or persons. (Ga. L. 1953, Jan.-Feb. Sess., p. 216, § 9; Ga. L. 2015, p. 385, § 5-2/HB 252.)

Cross references. — Grand juries, T. 15, C. 12, A. 4.

Editor's notes. — Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

16-11-11. Dissolution of subversive organizations; revocation of charter, funds, books, and records.

It shall be unlawful for any subversive organization or foreign subversive organization to exist or function in this state. Any organization which by a court of competent jurisdiction is found to have violated this Code section shall be dissolved and, if it is a corporation organized and existing under the laws of this state, a finding by a court of competent jurisdiction that it has violated this Code section shall constitute legal cause for revocation of its charter and its charter shall be revoked. All funds, books, records, and files of every kind and all other property of any organization found to have violated this Code

section shall be seized by and for this state, the funds to be deposited in the state treasury and the books, records, files, and other property to be turned over to the Attorney General. (Ga. L. 1953, Jan.-Feb. Sess., p. 216, § 5; Ga. L. 2015, p. 693, § 2-11/HB 233.)

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).

RESEARCH REFERENCES

ALR. — Validity of legislation directed against political, social, or industrial propaganda deemed to be of a dangerous tendency, 20 A.L.R. 1535; 73 A.L.R. 1494.

16-11-12. Eligibility of subversive persons to hold office or position in government.

No subversive person shall be eligible for employment in or appointment to any office or any position of trust or profit in the government of this state or in the administration of the business of this state or of any county, municipality, or other political subdivision thereof. (Ga. L. 1953, Jan.-Feb. Sess., p. 216, § 10; Ga. L. 1953, Nov.-Dec. Sess., p. 73, § 6.)

Cross references. — Ineligibility of subversive persons to be nominated or elected to public office, § 21-2-7.

RESEARCH REFERENCES

C.J.S. — 67 C.J.S., Officers and Public Employees, § 25.

16-11-13. Investigation of all state employees prior to appointment or employment; questionnaire; promulgation of orders, rules, and regulations.

(a) Every person and every board, commission, council, department, or other agency of the state or any political subdivision thereof which appoints, employs, or supervises in any manner the appointment or employment of public officials or employees shall establish, by rules, regulations, or otherwise, procedures designated to ascertain before any person, including teachers and other employees of any public educational institution in this state, is appointed or employed, that he is not a subversive person and that there are no reasonable grounds to believe such person is a subversive person. In the event such reasonable grounds exist, he shall not be appointed or employed. In securing any

facts necessary to ascertain the information required by this Code section, all applicants and employees shall be required to sign a written statement or questionnaire containing answers to such inquiries as may be material and containing the following questions:

(1) Full name including maiden name, names of former marriages, former names changed legally or otherwise, aliases, and nicknames, and the dates used;

(2) Address;

(3)(A) Are you now or have you been within the last ten years a member of any organization which to your knowledge at the time of membership advocates or has as one of its objectives the overthrow of the government of the United States or of the government of the State of Georgia by force or violence? Yes ____ No ____. If "Yes," state the name of the organization and your past and present membership status including any offices held therein.

(B) If the answer to (A) is "Yes" and the employing authority deems further inquiry necessary, you will be notified of such determination. No action adverse to your application will be taken because of an affirmative answer until after such an inquiry, with notice to you and an opportunity for you to present evidence, and only if the result of such inquiry brings your application within the prohibition within the "Sedition and Subversive Activities Act of 1953."

(4)(A) Have you ever been convicted or are any charges now pending against you by federal, state, or other law enforcement authorities, for any violation of any federal law, state law, county or municipal law, regulation, or ordinance? (Do not include anything that happened before your sixteenth birthday. Do not include minor traffic violations for which a fine of $35.00 or less was imposed. All other convictions must be included even if they were pardoned.) Yes ____ No ____.

(B) If the answer to (A) is "Yes," state the reason convicted, the date convicted, and the place where convicted.

(b) The written statement or questionnaire shall contain notice that it is subject to the penalties of false swearing.

(c) The Governor is authorized to make appropriate orders, rules, and regulations to effectuate the purposes of Code Section 16-11-12, this Code section, and Code Section 16-11-14. (Ga. L. 1953, Jan.-Feb. Sess., p. 216, § 11; Ga. L. 1953, Nov.-Dec. Sess., p. 73, § 7; Ga. L. 1974, p. 411, § 1; Ga. L. 1992, p. 6, § 16.)

Cross references. — Loyalty oath for state employees, § 45-3-11 et seq.

Law reviews. — For comment on Baggett v. Bullitt, 377 U.S. 360, 84 S. Ct.

1316, 12 L. Ed. 2d 377 (1964), see 2 Ga. St. B.J. 123 (1965).

16-11-14. False swearing in written statement.

(a) Every written statement made pursuant to this part by an applicant for appointment or employment or by any employee shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of false swearing. Any person who makes a material misstatement of fact in any such written statement, in any affidavit made pursuant to this part, under oath in any hearing conducted by any agency of this state or of any of its political subdivisions pursuant to this part, or in any written statement by an applicant for appointment or employment or by an employee in any state-aided or private institution of learning in this state intended to determine whether or not such applicant or employee is a subversive person, which statement contains notice that it is subject to the penalties of false swearing, shall be subject to the penalties of false swearing as prescribed in Code Section 16-10-71.

(b) Nothing contained in subsection (a) of this Code section shall be construed to repeal in any way the laws of this state dealing with perjury and false swearing. (Ga. L. 1953, Nov.-Dec. Sess., p. 73, § 9; Ga. L. 1974, p. 411, § 2.)

16-11-15. Information concerning membership of relative in a subversive organization.

No person giving any information, whether by answering a questionnaire or otherwise, as provided in Code Section 16-11-13 shall be required to give any information or answer any questions relative to the membership in any organization of any relative of such person. (Ga. L. 1956, p. 67, § 1.)

16-11-16. Filing written statement.

Any questionnaires or statements prepared as provided in Code Section 16-11-13 shall be filed at the place of employment rather than with a central state agency. (Ga. L. 1956, p. 67, § 2.)

ARTICLE 2

OFFENSES AGAINST PUBLIC ORDER

Cross references. — Power of organized militia to maintain public order generally, § 38-2-300 et seq.

RESEARCH REFERENCES

ALR. — Admissibility in civil case of testimony by one charged with willful misconduct as to his intention or state of mind at time in question, 171 A.L.R. 683.

Vagueness as invalidating statutes or ordinances dealing with disorderly persons or conduct, 12 A.L.R.3d 1448.

Validity of vagrancy statutes and ordinances, 25 A.L.R.3d 792.

Larceny as within disorderly conduct statute or ordinance, 71 A.L.R.3d 1156.

16-11-30. Riot.

(a) Any two or more persons who shall do an unlawful act of violence or any other act in a violent and tumultuous manner commit the offense of riot.

(b) Any persons who violate subsection (a) of this Code section are guilty of a misdemeanor. (Laws 1833, Cobb's 1851 Digest, p. 811; Code 1863, § 4400; Ga. L. 1865-66, p. 233, § 1; Code 1868, § 4441; Code 1873, § 4514; Code 1882, § 4514; Penal Code 1895, § 354; Penal Code 1910, § 360; Code 1933, § 26-5302; Code 1933, § 26-2601, enacted by Ga. L. 1968, p. 1249, § 1.)

JUDICIAL DECISIONS

One person alone cannot commit crime of riot. Robinson v. State, 84 Ga. 674, 11 S.E. 544 (1890); Martin v. State, 115 Ga. 255, 41 S.E. 576 (1902); Lewis v. State, 5 Ga. App. 496, 63 S.E. 570 (1909).

One or more persons involved in crime. — Because there was clear evidence that in creating the offense of "riot in a penal institution," the Georgia General Assembly intended to criminalize certain conduct regardless of whether the conduct was committed by two or more persons acting in concert, and O.C.G.A. § 16-10-56 defined the offense without including any element of concerted action or reference to the general offense of riot, the defendant's conviction of the crime was upheld on appeal, despite a claim that the defendant acted alone. Glanton v. State, 283 Ga. App. 232, 641 S.E.2d 234 (2007).

Riot requires common intent and concert of action in furtherance of such intent. Smith v. State, 72 Ga. App. 108, 33 S.E.2d 120 (1945); Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948).

Crime of riot requires joint action by two or more persons springing from a common intent. Dixon v. State, 105 Ga. 787, 31 S.E. 750 (1898); Tripp v. State, 109 Ga. 489, 34 S.E. 1021 (1900); Convey v. State, 113 Ga. 1060, 39 S.E. 425 (1901); Croy v. State, 4 Ga. App. 457, 61 S.E. 847 (1908); Nowell v. State, 32 Ga. App. 505, 123 S.E. 908 (1924).

Riot requires violence in doing of unlawful act or violence and tumultuousness in doing of lawful act. Taylor v. State, 8 Ga. App. 241, 68 S.E. 945 (1910).

Construction with O.C.G.A. § 16-10-56. — Defendant, who was charged with riot in a penal institution in violation of O.C.G.A. § 16-10-56, was not similarly situated for equal protection purposes to persons charged with riot under O.C.G.A. § 16-11-30 because only those charged with the same crime as defendant could be similarly situated.

Drew v. State, 285 Ga. 848, 684 S.E.2d 608 (2009).

Merely making noise or behaving tumultuously does not constitute riot, in absence of violence. Smith v. State, 72 Ga. App. 108, 33 S.E.2d 120 (1945).

Liability for acts of other rioters. — Rioters are fellow principals, each of whom is responsible for acts of the other, on theory that riot is not the act of any one of the rioters. Loomis v. Edwards, 80 Ga. App. 396, 56 S.E.2d 183 (1949), cert. denied, 339 U.S. 970, 70 S. Ct. 989, 94 L. Ed. 1377 (1950).

All persons sharing in riot are guilty whether or not their conduct was violent and tumultuous. Green v. State, 109 Ga. 536, 35 S.E. 97 (1900).

All persons connected with and sharing in common purpose of the assembly are guilty of riot, whether their conduct was violent and tumultuous or not. O'Quinn v. State, 39 Ga. App. 829, 148 S.E. 618 (1929).

Riot is a misdemeanor. Loomis v. State, 78 Ga. App. 336, 51 S.E.2d 33 (1948).

Conviction precluded unless evidence establishes commission of criminal acts specified in accusation. — In prosecution for riot, where court instructs jury that defendant would be guilty if, on occasion in question, defendant and other persons had jointly committed any unlawful act of violence or any act in a violent and tumultuous manner, but nowhere in charge tells jury clearly and distinctly that defendant cannot be convicted unless evidence shows beyond a reasonable doubt that defendant committed one or more of the particular criminal acts specified in the accusation, failure so to instruct jury is error. Moore v. State, 55 Ga. App. 157, 189 S.E. 551 (1937).

Indictment naming two rioters suffices. — When there are two rioters named, such would be a perfect indictment whether there was a third party or many others than the two named. Loomis v. Edwards, 80 Ga. App. 396, 56 S.E.2d 183 (1949), cert. denied, 339 U.S. 970, 70 S. Ct. 989, 94 L. Ed. 1377 (1950).

Participants whose names are unknown may be included in indictment, but it must be alleged that their names are unknown. Martin v. State, 115 Ga. 255, 41 S.E. 576 (1902); Lewis v. State, 5 Ga. App. 496, 63 S.E. 570 (1909).

Conviction of one of two rioters will stand, though other is acquitted, if evidence shows that any other person capable of committing the crime participated with person convicted in criminal act charged in indictment. Martin v. State, 115 Ga. 255, 41 S.E. 576 (1902).

Cited in Sutton v. State, 158 Ga. App. 856, 282 S.E.2d 410 (1981); Powell v. State, 218 Ga. App. 556, 462 S.E.2d 447 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 53A Am. Jur. 2d, Mobs and Riots, § 1 et seq.

C.J.S. — 77 C.J.S., Riot; Insurrection, § 1 et seq.

ALR. — Unlawful parade as riot, 9 A.L.R. 552.

What constitutes riot within criminal law, 49 A.L.R. 1135.

What constitutes a "riot," "civil commotion," etc., within provisions of insurance policy, 121 A.L.R. 250.

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 A.L.R.3d 551.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault, 24 A.L.R.4th 243.

What constitutes sufficiently violent, tumultuous, forceful, aggressive, or terrorizing conduct to establish crime of riot in state courts, 38 A.L.R.4th 648.

Prosecutions of inmates of state or local penal institutions for crime of riot, 39 A.L.R.4th 1170.

16-11-31. Inciting to riot.

(a) A person who with intent to riot does an act or engages in conduct which urges, counsels, or advises others to riot, at a time and place and under circumstances which produce a clear and present danger of a riot, commits the offense of inciting to riot.

(b) Any person who violates subsection (a) of this Code section is guilty of a misdemeanor. (Code 1933, § 26-2602, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 20.)

Cross references. — Constitutional guarantee of free speech and press, Ga. Const. 1983, Art. I, Sec. I, Para. V.

JUDICIAL DECISIONS

Section not unconstitutionally vague or broad. — O.C.G.A. § 16-11-31 is neither unconstitutionally vague in that the statute provides overall fair warning to persons of ordinary intelligence as to what conduct is prohibited so that persons may act accordingly, nor is the statute overbroad in that the statute proscribes only certain intentional behavior which produces a clear and present danger of achieving riotous results. Land v. State, 262 Ga. 898, 426 S.E.2d 370, cert. denied, 509 U.S. 909, 113 S. Ct. 3008, 125 L. Ed. 2d 699 (1993); Mastroianni v. Deering, 835 F. Supp. 1577 (S.D. Ga. 1993).

Cited in McElroy v. Williams Bros. Motors, 104 Ga. App. 435, 121 S.E.2d 917 (1961); Sutton v. State, 158 Ga. App. 856, 282 S.E.2d 410 (1981); Powell v. State, 218 Ga. App. 556, 462 S.E.2d 447 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 53A Am. Jur. 2d, Mobs and Riots, § 20.

C.J.S. — 77 C.J.S., Riot; Insurrection, §§ 4 et seq., 11, 37 et seq.

ALR. — Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 A.L.R.3d 551.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault, 24 A.L.R.4th 243.

16-11-32. Affray.

(a) An affray is the fighting by two or more persons in some public place to the disturbance of the public tranquility.

(b) A person who commits the offense of affray is guilty of a misdemeanor. (Laws 1833, Cobb's 1851 Digest, p. 811; Code 1863, § 4401; Ga. L. 1865-66, p. 233, § 2; Code 1868, § 4442; Code 1873, § 4515; Code 1882, § 4515; Penal Code 1895, § 355; Penal Code 1910, § 361; Code 1933, § 26-5303; Code 1933, § 26-2603, enacted by Ga. L. 1968, p. 1249, § 1.)

JUDICIAL DECISIONS

Reversal required when venue not established. — Although the evidence was sufficient to support the delinquency adjudication, the judgment was reversed where the testimony relating to the street where the fight occurred failed to specify either the municipality or the county in which the street was located and was not sufficient to establish venue beyond a reasonable doubt. In the Interest of N.T.S., 242 Ga. App. 109, 528 S.E.2d 876 (2000).

It is essential to conviction of affray that fighting occurred in public place. Gamble v. State, 113 Ga. 701, 39 S.E. 301 (1901).

What constitutes a public place. — See Gamble v. State, 113 Ga. 701, 39 S.E. 301 (1910).

Jail is not a public place. — Defendant's conviction for affray in violation of O.C.G.A. § 16-11-32 was reversed because the altercation occurred in the Hall County Jail, which was not a "public place" as required for conviction pursuant to O.C.G.A. §§ 16-1-3(15) and 16-6-8(d). Singletary v. State, 310 Ga. App. 570, 713 S.E.2d 698 (2011).

What acts in public place amount to affray. — See Blackwell v. State, 119 Ga. 314, 46 S.E. 432 (1904).

Relationship between affray and mutual combat. — See Cone v. State, 193 Ga. 420, 18 S.E.2d 850 (1942).

Intent. — Despite defendant's claims that the evidence supported only one of two conclusions — that defendant attacked another, who responded in self-defense, or that the other person attacked defendant, who acted in self-defense — the jury was not required to conclude that either defendant or the other person acted entirely in self defense; thus, the jury could reasonably have determined that both intended to fight and that defendant was guilty of affray. Watson v. State, 261 Ga. App. 562, 583 S.E.2d 228 (2003).

Affray requires intent to fight on part of both parties, and trial court should so charge jury. Johnson v. State, 135 Ga. App. 360, 217 S.E.2d 618 (1975).

When evidence shows that one party acted entirely in self-defense, while the other assaulted and beat that party, the aggressor may be guilty of an assault and battery, but neither is guilty of an affray. Drake v. State, 159 Ga. App. 606, 284 S.E.2d 109 (1981).

Violation of the affray statute, O.C.G.A. § 16-11-32, requires an accompanying "intention to act." A jury charge which as a whole adequately and fairly conveyed that merely fighting to repel an unprovoked attack did not constitute the "combat by agreement" exception to justification was proper. O'Connor v. State, 255 Ga. App. 893, 567 S.E.2d 29 (2002).

Affray in violation of O.C.G.A. § 16-11-32 fell within the definition of criminal gang activity in O.C.G.A. § 16-15-3(1)(J). — Delinquency petition properly charged that a juvenile participated in criminal street gang activity pursuant to O.C.G.A. § 16-15-4(e) because the petition stated that the juvenile did engage in, directly or indirectly, criminal gang activity, a crime of violence in the State of Georgia, as defined in O.C.G.A. § 16-15-3(1)(J), and the juvenile was also adjudicated delinquent for organizing and promoting an affray in violation of O.C.G.A. § 16-11-32, which fell within the criminal conduct contemplated by § 16-15-3(1)(J); the juvenile instructed a student on becoming a gang member, organized a fight for them, and gave the student a booklet containing gang history and jargon, and there was also evidence that the student paid the juvenile a "gang tax" and that the juvenile referred to being a lieutenant in the gang. In re X. W., 301 Ga. App. 625, 688 S.E.2d 646 (2009).

Evidence was sufficient to support a juvenile's conviction of participation in criminal street gang activity and the crime of affray because the juvenile told the investigating officer that the juvenile was a member of a gang and admitted to committing the affray with a student, and the investigating officer further testified that he was familiar with the gang, the gang was operating in the county, and that there were more than three people in the gang; the offense of affray meets the definition of criminal gang activity under O.C.G.A. § 16-15-3(1)(J) because the fact

that the combatants consent to fight does not negate that fighting is an act of violence. In re X. W., 301 Ga. App. 625, 688 S.E.2d 646 (2009).

Cited in McElroy v. Williams Bros. Motors, 104 Ga. App. 435, 121 S.E.2d 917 (1961); Bert v. State, 169 Ga. App. 628, 314 S.E.2d 466 (1984); Rhodes v. State, 170 Ga. App. 473, 317 S.E.2d 285 (1984); State v. Perry, 261 Ga. App. 886, 583 S.E.2d 909 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct, § 17 et seq. 53A Am. Jur. 2d, Mobs and Riots, §§ 6, 9.

C.J.S. — 2A C.J.S., Affray, § 1 et seq.

ALR. — Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault, 24 A.L.R.4th 243.

16-11-33. Unlawful assembly.

A person who knowingly participates in either of the following acts or occurrences is guilty of a misdemeanor:

(1) The assembly of two or more persons for the purpose of committing an unlawful act and the failure to withdraw from the assembly on being lawfully commanded to do so by a peace officer and before any member of the assembly has inflicted injury to the person or property of another; or

(2) The assembly of two or more persons, without authority of law, for the purpose of doing violence to the person or property of one supposed by the accused to have been guilty of a violation of the law, or for the purpose of exercising correctional or regulative powers over any person by violence; provided, however, that it shall be an affirmative defense to a prosecution under this paragraph that the accused withdrew from the assembly on being lawfully commanded to do so by a peace officer or before any member of the assembly had inflicted injury to the person or property of another. (Laws 1833, Cobb's 1851 Digest, p. 810; Code 1863, § 4399; Code 1868, § 4440; Code 1873, § 4513; Code 1882, § 4513; Penal Code 1895, § 353; Penal Code 1910, § 359; Code 1933, § 26-5301; Code 1933, § 26-2604, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1989, p. 14, § 16.)

Cross references. — Freedom of assembly, Ga. Const. 1983, Art. I, Sec. I, Para. IX.

Law reviews. — For comment on Wright v. State, 217 Ga. 453, 122 S.E.2d 737 (1961), see 25 Ga. B.J. 99 (1962). For comment on Wright v. Georgia, 373 U.S. 284, 83 S. Ct. 1240, 10 L. Ed. 2d 349 (1963), see 26 Ga. B.J. 99 (1963).

JUDICIAL DECISIONS

Unlawful assembly for the purpose of committing criminal trespass is included in the crime of criminal trespass. Kerr v. State, 193 Ga. App. 165, 387 S.E.2d 355 (1989).

Possibility of disorder by others cannot justify exclusion of persons otherwise entitled to be present under equal protection clause of United States Constitution. Wright v. Georgia, 373 U.S. 284, 83 S. Ct. 1240, 10 L. Ed. 2d 349 (1963).

Cited in Hoover v. State, 198 Ga. App. 481, 402 S.E.2d 92 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 53A Am. Jur. 2d, Mobs and Riots, § 21 et seq.

C.J.S. — 91 C.J.S, Unlawful Assembly, § 1 et seq.

ALR. — Public speaking in street, 62 A.L.R. 404.

Failure or refusal to obey police officer's order to move on, on street, as disorderly conduct, 65 A.L.R.2d 1152.

What constitutes offense of unlawful assembly, 71 A.L.R.2d 875.

Nonlabor picketing or boycott, 93 A.L.R.2d 1284.

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 A.L.R.3d 551.

Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 A.L.R.3d 340.

Validity, construction, and operation of statute or regulation forbidding, regulating, or limiting peaceful residential picketing, 113 A.L.R.5th 1.

16-11-34. Preventing or disrupting lawful meetings, gatherings, or processions.

(a) A person who recklessly or knowingly commits any act which may reasonably be expected to prevent or disrupt a lawful meeting, gathering, or procession is guilty of a misdemeanor.

(b) This Code section shall not be construed to affect the powers delegated to counties or to municipal corporations to pass laws to punish disorderly conduct within their respective limits. (Code 1933, § 26-2605, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Open and public meetings, § 50-14-1 et seq.

Law reviews. — For annual survey of criminal law, see 58 Mercer L. Rev. 83 (2006). For survey article on local government law, see 59 Mercer L. Rev. 285 (2007).

JUDICIAL DECISIONS

Provisions of Ga. L. 1968, p. 1249, § 1 (see now O.C.G.A. § 16-11-34) were satisfied where defendants were at center of larger group, singing and shouting emanated from center of group, and noise caused students in classes to come to windows which necessarily disrupted normal activity of the school. Washington v. State, 126 Ga. App. 180, 190 S.E.2d 138 (1972).

Constitutionality. — O.C.G.A. § 16-11-34(a) was overbroad and was unconstitutional; the literal language of the statute was so overbroad in its scope that

it led to an absurdity manifestly not intended by the legislature, and its constitutionality could not have been preserved by judicial construction. State v. Fielden, 280 Ga. 444, 629 S.E.2d 252 (2006).

Statute as basis for probable cause to arrest. — Fourth Amendment to the U.S. Constitution was not violated by the arrest of citizens who attended a city council meeting to express views on renaming a public park but refused to obey the rules of order because probable cause to arrest existed, even though O.C.G.A. § 16-11-34, which criminalized the disruption of a public meeting, was later struck down as unconstitutionally overbroad. Harris v. City of Valdosta, 616 F. Supp. 2d 1310 (M.D. Ga. 2009).

Cited in Evans v. City of Tifton, 138 Ga. App. 374, 226 S.E.2d 471 (1976); Porter v. State, 141 Ga. App. 602, 234 S.E.2d 100 (1977); Davis v. State, 147 Ga. App. 107, 248 S.E.2d 181 (1978); Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982); In re D.H., 283 Ga. 556, 663 S.E.2d 139 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Disturbing Meetings, § 3 et seq.

ALR. — Conduct amounting to offense of disturbing public or religious meeting, 12 A.L.R. 650.

Criminal offense of bribery as affected by lack of legal qualification of person assuming or alleged to be an officer, 115 A.L.R. 1263.

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 A.L.R.3d 551.

16-11-34.1. Preventing or disrupting General Assembly sessions or other meetings of members; unlawful activities within the state capitol or certain Capitol Square buildings.

(a) It shall be unlawful for any person recklessly or knowingly to commit any act which may reasonably be expected to prevent or disrupt a session or meeting of the Senate or House of Representatives, a joint session thereof, or any meeting of any standing or interim committee, commission, or caucus of members thereof.

(b) It shall be unlawful for any person, other than those persons who are exempt from the provisions of Code Sections 16-11-126 through 16-11-127.2, to enter, occupy, or remain within the state capitol building or any building housing committee offices, committee rooms, or offices of members, officials, or employees of the General Assembly or either house thereof while in the possession of any firearm; knife, as such term is defined in Code Section 16-11-125.1; explosive or incendiary device or compound; bludgeon; knuckles, whether made from metal, thermoplastic, wood, or other similar material; or any other dangerous or deadly weapon, instrument, or device.

(c) It shall be unlawful for any person purposely or recklessly and without authority of law to obstruct any street, sidewalk, hallway, office, or other passageway in that area designated as Capitol Square by

Code Section 50-2-28 in such a manner as to render it impassable without unreasonable inconvenience or hazard or to fail or refuse to remove such obstruction after receiving a reasonable official request or the order of a peace officer to do so.

(d) It shall be unlawful for any person willfully and knowingly to enter or to remain upon the floor of the Senate or the floor of the House of Representatives or within any cloakroom, lobby, or anteroom adjacent to such floor unless such person is authorized, pursuant to the rules of the Senate or House of Representatives or pursuant to authorization given by the Senate or House of Representatives, to enter or remain upon the floor or within such area.

(e) It shall be unlawful for any person willfully and knowingly to enter or to remain in the gallery of the Senate or the gallery of the House of Representatives in violation of rules governing admission to such gallery adopted by the Senate or the House of Representatives or pursuant to authorization given by such body.

(f) It shall be unlawful for any person willfully and knowingly to enter or to remain in any room, chamber, office, or hallway within the state capitol building or any building housing committee offices, committee rooms, or offices of members, officials, or employees of the General Assembly or either house thereof with intent to disrupt the orderly conduct of official business or to utter loud, threatening, or abusive language or engage in any disorderly or disruptive conduct in such buildings or areas.

(g) It shall be unlawful for any person to parade, demonstrate, or picket within the state capitol building or any building housing committee offices, committee rooms, or offices of members, officials, or employees of the General Assembly or either house thereof with intent to disrupt the orderly conduct of official business or to utter loud, threatening, or abusive language or engage in any disorderly or disruptive conduct in such buildings or areas.

(h)(1) Any person violating this Code section for the first time shall be guilty of a misdemeanor.

(2) Any person violating this Code section for the second time shall be guilty of a misdemeanor of a high and aggravated nature.

(3) Any person violating this Code section for the third or any subsequent time shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than three years.

(i) The enactment of this Code section shall not repeal any other provision of law proscribing or regulating any conduct otherwise prohibited by this Code section. (Code 1981, § 16-11-34.1, enacted by

Ga. L. 1987, p. 614, § 1; Ga. L. 2008, p. 533, § 3/SB 366; Ga. L. 2009, p. 8, § 16/SB 46; Ga. L. 2010, p. 963, § 2-5/SB 308.)

Cross references. — Open and public meetings, § 50-14-1 et seq.

Editor's notes. — Ga. L. 2010, p. 963, § 3-1, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011).

16-11-34.2. Disorderly or disruptive conduct at any funeral or memorial service.

(a) The General Assembly declares that the interest of persons in planning, participating in, and attending a funeral or memorial service for a deceased relative or loved one without unwanted impediment, disruption, disturbance, or interference is a substantial interest and the General Assembly further recognizes the need to impose content neutral time, place, and manner restrictions on unwanted acts carried out with the intent to impede, disrupt, disturb, or interfere with such funeral or memorial service.

(b) It shall be unlawful to engage in any disorderly or disruptive conduct with the intent to impede, disrupt, disturb, or interfere with the orderly conduct of any funeral or memorial service or with the normal activities and functions carried on in the facilities or buildings where such funeral or memorial service is taking place. Any or all of the following shall constitute such disorderly or disruptive conduct:

(1) Displaying any visual images that convey fighting words or actual or imminent threats of harm directed to any person or property associated with said funeral or memorial service within 500 feet of the ceremonial site or location being used for the funeral or memorial service at any time one hour prior to, during, or one hour after the posted time for said funeral or memorial service;

(2) Uttering loud, threatening, or abusive language or singing, chanting, whistling, or yelling with or without noise amplification including, but not limited to, bullhorns, automobile horns, and microphones, such as would tend to impede, disrupt, disturb, or interfere with a funeral or memorial service within 500 feet of the ceremonial site or location being used for the funeral or memorial service;

(3) Attempting to block or blocking pedestrian or vehicular access to the ceremonial site or location being used for a funeral or memorial service at any time one hour prior to, during, or one hour after the posted time for said funeral or memorial service; or

(4) Conducting a public assembly, parade, demonstration, or other like event, either fixed or processional, within 500 feet of the ceremonial site or location being used for a funeral or memorial service at any time one hour prior to, during, or one hour after the posted time for said funeral or memorial service.

(c) Any person who violates any provision of subsection (b) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 16-11-34.2, enacted by Ga. L. 2006, p. 256, § 1/SB 606.)

Cross references. — Restriction on registered offenders residing, working, or loitering within certain distance of child care facilities, churches, schools, or areas where minors congregate; penalty for violations; civil causes of action, § 42-1-15.

Editor's notes. — Ga. L. 2006, p. 256, § 2/SB 606, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2006, and shall apply to all offenses committed on or after such date."

JUDICIAL DECISIONS

Standing to challenge constitutionality. — Pursuant to cardinal rule of statutory construction of O.C.G.A. § 1-3-1(a), plaintiffs had no standing to challenge facial constitutionality of O.C.G.A. § 16-11-34.2(b)(2), (4), funeral picketing statute, because the plaintiffs admitted that the plaintiffs did not intend to impede, disrupt, or interfere with any funerals; thus, without mens rea, there was no real risk of being prosecuted and the plaintiffs had not been threatened with arrest. Hood v. Perdue, 540 F. Supp. 2d 1350 (N.D. Ga. 2008).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — Those charged with offenses under O.C.G.A. § 16-11-34.2 are to be fingerprinted. 2007 Op. Att'y Gen. No. 2007-1.

RESEARCH REFERENCES

ALR. — Actions by or against individuals or groups protesting or picketing at funerals, 40 A.L.R.6th 375.

16-11-35. Removal from campus or facility of unit of university system or school; failure to leave.

(a) As used in this Code section, the term:

(1) "Chief administrative officer," in the case of a public school, means the principal of the school or an officer designated by the superintendent or board of education having jurisdiction of the school to be the officer in charge of the public school.

(2) "Chief administrative officer," in the case of a unit of the university system, means the president of the unit of the university system or the officer designated by the Board of Regents of the

University System of Georgia to administer and be the officer in charge of a campus or other facility of a unit of the university system.

(3) "Public school" means any school under the control and management of a county, independent, or area board of education supported by public funds and any school under the control and management of the State Board of Education or department or agency thereof supported by public funds.

(4) "Unit of the university system" means any college or university under the government, control, and management of the Board of Regents of the University System of Georgia.

(b) In any case in which a person who is not a student or officer or employee of a unit of the university system or of a public school and who is not required by his or her employment to be on the campus or any other facility of any such unit or of any public school enters the campus or facility, and it reasonably appears to the chief administrative officer of the campus or facility, or to any officer or employee designated by him or her to maintain order on the campus or facility, that such person is committing any act likely to interfere with the peaceful conduct of the activities of the campus or facility, or has entered the campus or facility for the purpose of committing any such act, the chief administrative officer or the officers or employees designated by him or her to maintain order on the campus or facility may direct the person to leave the campus or facility, and, if the person fails to do so, he or she shall be guilty of a misdemeanor of a high and aggravated nature. (Code 1933, § 26-2615, enacted by Ga. L. 1972, p. 134, § 1; Ga. L. 1985, p. 149, § 16; Ga. L. 1994, p. 1012, § 10.)

Cross references. — Loitering on school property or interfering with operation of public school, §§ 20-2-1180, 20-2-1181.

Editor's notes. — Ga. L. 1994, p. 1012, § 1, not codified by the General Assembly, provides that the Act shall be known and may be cited as the "School Safety and Juvenile Justice Reform Act of 1994".

Ga. L. 1994, p. 1012, § 2, not codified by the General Assembly, sets forth legislative findings and determinations for the "School Safety and Juvenile Justice Reform Act of 1994".

Ga. L. 1994, p. 1012, § 29, not codified by the General Assembly, provides for severability.

JUDICIAL DECISIONS

Section does not preempt general criminal trespass statute. — Appellants who were charged under the general criminal trespass statute for knowingly and without authority remaining on the premises of a junior college could not get their convictions overturned by arguing that the charge should have been brought under O.C.G.A. § 16-11-35, since that section was not intended to preempt the general criminal trespass statute. Brooks v. State, 170 Ga. App. 440, 317 S.E.2d 552 (1984).

Cited in Spruell v. Jarvis, 654 F.2d 1090 (5th Cir. 1981); State v. Pattee, 201 Ga. App. 690, 411 S.E.2d 751 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 75 Am. Jur. 2d, Trespass, § 76 et seq.

C.J.S. — 11 C.J.S., Breach of the Peace, § 4.

ALR. — Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 A.L.R.3d 551.

16-11-36. Loitering or prowling.

(a) A person commits the offense of loitering or prowling when he is in a place at a time or in a manner not usual for law-abiding individuals under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

(b) Among the circumstances which may be considered in determining whether alarm is warranted is the fact that the person takes flight upon the appearance of a law enforcement officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the person or other circumstances make it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this Code section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting the person to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Code section if the law enforcement officer failed to comply with the foregoing procedure or if it appears at trial that the explanation given by the person was true and would have dispelled the alarm or immediate concern.

(c) A person committing the offense of loitering or prowling shall be guilty of a misdemeanor.

(d) This Code section shall not be deemed or construed to affect or limit the powers of counties or municipal corporations to adopt ordinances or resolutions prohibiting loitering or prowling within their respective limits. (Code 1933, § 26-2616, enacted by Ga. L. 1980, p. 388, § 1.)

Cross references. — Loitering on school property, § 20-2-1180. Restriction on registered offenders residing, working, or loitering within certain distance of child care facilities, churches, schools, or areas where minors congregate; penalty for violations; civil causes of action, § 42-1-15.

Law reviews. — For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

JUDICIAL DECISIONS

Section not void for vagueness. — Prohibition of loitering and prowling in the total context of O.C.G.A. § 16-11-36 is not void for vagueness insofar as the stat-

ute is limited to activity which amounts to a threat to the safety of persons or property. Bell v. State, 252 Ga. 267, 313 S.E.2d 678 (1984); State v. Burch, 264 Ga. 231, 443 S.E.2d 483 (1994).

Venue. — Juvenile's adjudications on the charges of loitering and obstruction of an officer arising out of the July 18 incident were reversed for failure to prove venue because, although the officer testified that the officer observed two individuals loitering outside the apartment complex, the officer never testified that the complex was in Spalding County or that the officer's pursuit of the juvenile occurred there; the state presented no other evidence of venue, and nothing in the record indicated that the trial court took judicial notice of the location of the apartment complex; and defense counsel's statements were not intended to be a stipulation of venue or that the juvenile authorized a stipulation as to venue. In the Interest of A. A., 334 Ga. App. 37, 778 S.E.2d 28 (2015).

No probable cause for arrest. — In the plaintiff's action for false arrest, malicious prosecution, and excessive force, the plaintiff's explanation to the officer that the plaintiff was in the parking lot only looking to switch out the plaintiff and plaintiff's spouse's vehicles precluded finding that the officer had probable cause to arrest the plaintiff for loitering under O.G.C.A. § 16-11-36(a); therefore, the officer's actions in arresting the plaintiff constituted a violation of clearly established Fourth Amendment rights. Perkins v. Thrasher, No. 16-16292, 2017 U.S. App. LEXIS 12945 (11th Cir. July 19, 2017) (Unpublished).

Evidence of flight. — Flight is circumstantial evidence of consciousness of guilt, and the weight to be given to such evidence is for the jury to decide. St. Louis v. State, 328 Ga. App. 837, 763 S.E.2d 126 (2014).

Offering opportunity to explain not violation of self-incrimination privilege. — Offering an opportunity under O.C.G.A. § 16-11-36 for someone suspected of loitering and prowling to explain their presence and conduct does not abrogate the right against self-incrimination. Bell v. State, 252 Ga. 267, 313 S.E.2d 678 (1984).

Opportunity to explain under subsection (b). — Given the defendant's flight, combined with the defendant's peculiar behavior and appearance, the investigating officer might well have considered the circumstances impracticable for seeking an explanation from the defendant concerning the defendant's presence and conduct as required under O.C.G.A. § 16-11-36(b). O'Hara v. State, 241 Ga. App. 855, 528 S.E.2d 296 (2000).

Defendant's conviction for loitering was not invalid on the ground that the arresting officer failed to give defendant an opportunity to dispel any alarm or immediate concern for the safety of the persons or property in the vicinity where defendant was crouching in the bushes because, given defendant's flight and furtive behavior in a known drug area, the arresting officer might have considered the circumstances impracticable under O.C.G.A. § 16-11-36(b) for seeking an explanation from defendant concerning defendant's presence and conduct. Dukes v. State, 275 Ga. App. 442, 622 S.E.2d 587 (2005).

Probable cause found for arrest for loitering or prowling. Hansen v. State, 168 Ga. App. 304, 308 S.E.2d 643 (1983).

After stopping a car which was driving slowly in a shopping center parking lot because the car had a defective headlight, officers found a screwdriver in a pat down of one of the defendants, and the defendants made misleading claims as to how long the defendants had been in the parking lot, the officers had probable cause to arrest the defendants for loitering, prowling, and for possession of tools for commission of a crime. Evans v. State, 216 Ga. App. 21, 453 S.E.2d 100 (1995).

Given the evidence that the defendant was unable to offer a credible explanation for being on the grounds of a housing project, and failed to provide a law enforcement officer with a clear answer when asked about the ownership of a car the defendant had been leaning on, the officer had probable cause to make a warrantless arrest of the defendant for loitering. Boyd v. State, 290 Ga. App. 34, 658 S.E.2d 782 (2008).

Fingerprint card improperly admitted. — Trial court erred in admitting into evidence over objection a fingerprint

card taken following a felony arrest of defendant for violation of, inter alia, O.C.G.A. § 16-11-36, since the violation of that statute was another crime not shown to be connected with the one on trial, served no useful or relevant purpose, placed the defendant's character in evidence, and was prejudicial to the defendant. Strawder v. State, 207 Ga. App. 365, 427 S.E.2d 792 (1993).

Attempt to enter an automobile did not merge with loitering. — Merging of sentences for attempt to enter an automobile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18, and loitering under O.C.G.A. § 16-11-36 was not warranted because loitering required proof of presence in a place at a time or in a manner not usual for law-abiding individuals, and attempt to enter an automobile required performance of an act which constituted a substantial step toward the commission of entering an automobile, both elements not required by the other crime. Brown v. State, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Evidence of intent to loiter. — Trial court erred in convicting the defendants of burglary in violation of O.C.G.A. § 16-7-1(a) for entering property with intent to take electrical wiring and copper piping because the trial court should have charged the jury on the lesser included offense of criminal trespass, O.C.G.A. § 16-7-21(b)(1), when the jury could have concluded that the defendants were guilty of criminal trespass since the jury could have found that the defendants entered a house with the intent to loiter there in violation of O.C.G.A. § 16-11-36(a); the defendants were on the property without permission, one of the defendants stated that the defendants were not there to steal anything but rather to "look around," and the defendants thought the house was about to be bulldozed, police officers did not find any tools in the building or in the immediate possession of either of the defendants, and the defendants were not found in immediate possession of any purported stolen items. Waldrop v. State, 300 Ga. App. 281, 684 S.E.2d 417 (2009).

Evidence supports conviction for loitering or prowling. McFarren v. State, 210 Ga. App. 889, 437 S.E.2d 869 (1993); Blair v. State, 216 Ga. App. 545, 455 S.E.2d 97 (1995); Griffin v. State, 223 Ga. App. 796, 479 S.E.2d 21 (1996).

Evidence was sufficient to support the conviction as any rational trier of fact could have found beyond a reasonable doubt that defendant and the companion were in a place at a time and in a manner not usual for law-abiding individuals, that the circumstances warranted a justifiable and reasonable alarm or immediate concern for the safety of property and persons in the area, and that defendant's explanation, that they were in the business park after hours because they were looking for the home of a woman they met on the Internet and had become lost, simply did not dispel the deputy's alarm or concern. Franklin v. State, 258 Ga. App. 281, 574 S.E.2d 361 (2002).

Officer's testimony that the officer encountered a group of juveniles, including the appellant, at 1:30 A.M., that the juveniles could not explain their presence in the area, that the juveniles did not have identification, and that the juveniles gave conflicting stories about the owner of a vehicle the juveniles were standing around was sufficient to prove the offenses of curfew violation, loitering, and prowling beyond a reasonable doubt; it was immaterial that the appellant did not attempt to flee from the officer, did not refuse to identify oneself, or did not attempt to conceal oneself. In the Interest of R.F., 279 Ga. App. 708, 632 S.E.2d 452 (2006).

Conviction for loitering under O.C.G.A. § 16-11-36 was upheld based on the defendant, a male, being present in a sorority house parking lot at 2:00 A.M. repeatedly pulling on a vehicle's door handle. Brown v. State, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Trial court did not err by denying the defendant's motion for a new trial because a rational jury was entitled to find the defendant guilty of loitering or prowling based on the evidence and all inferences drawn from the evidence that the defendant was found outside the victim's apartment door at 6:45 A.M., in the dark, with items in the defendant's pocket that could be used for a burglary and fled when

confronted; the fact that the defendant identified oneself to the police officer did not mean the evidence was insufficient. St. Louis v. State, 328 Ga. App. 837, 763 S.E.2d 126 (2014).

Evidence that the defendant appeared to be peering into cars in an area the officer knew had been experiencing break-ins, giving the officer concern for the safety of property in the parking lot, and that the defendant fled when an officer smelled marijuana, saw a bulge in a pocket, and wanted to pat the defendant down was sufficient to permit a reasonable trier of fact to find the defendant guilty of loitering. Newman v. State, 336 Ga. App. 760, 786 S.E.2d 688 (2016).

Evidence supports conviction. — Given the evidence that the defendant was standing outside a residential building before dawn, wearing a bulletproof vest and armed with a handgun, a large knife, and two long swords, one of which was drawn, the jury was authorized to find that the defendant's manner and the circumstances justified an objectively reasonable immediate concern for the safety of persons or property in the vicinity for purposes of the loitering statute, O.C.G.A. § 16-11-36. El-Fatin v. State, 332 Ga. App. 252, 771 S.E.2d 902 (2015).

Evidence supports revocation of probation. — Trial court was authorized to find, under the preponderance of the evidence standard, that defendant's presence on private property caused a justifiable and reasonable alarm for the safety of the property, and the revocation of the defendant's probation was proper for the offense of criminal trespass and loitering or prowling since the record showed that the defendant climbed through a hole in a fence around private property at a time when the business was closed and the gate shut, a manager called police, and then, when the defendant was told that police had been summoned, defendant left the scene; there was no evidence that defendant's economic status or homelessness factored into the trial court's decision to revoke defendant's probation. Milanovich v. State, 278 Ga. App. 669, 629 S.E.2d 556 (2006).

Cited in Bullock v. City of Dallas, 248 Ga. 164, 281 S.E.2d 613 (1981); Shoemaker v. State, 165 Ga. App. 124, 299 S.E.2d 414 (1983); Price v. State, 175 Ga. App. 780, 334 S.E.2d 711 (1985); Brown v. State, 181 Ga. App. 865, 354 S.E.2d 169 (1987); Castellon v. State, 200 Ga. App. 478, 408 S.E.2d 493 (1991); In the Interest of T. H., 258 Ga. App. 416, 574 S.E.2d 461 (2002); Hall v. State, 322 Ga. App. 313, 744 S.E.2d 833 (2013).

RESEARCH REFERENCES

ALR. — Former jeopardy as ground for prohibition, 94 A.L.R.2d 1048.

Validity, construction, and application of loitering statutes and ordinances, 72 A.L.R.5th 1.

16-11-37. Terroristic threats and acts; penalties.

(a) As used in this Code section, the term "hazardous substance" shall have the same meaning as set forth in Code Section 12-8-92.

(b)(1) A person commits the offense of a terroristic threat when he or she threatens to:

(A) Commit any crime of violence;

(B) Release any hazardous substance; or

(C) Burn or damage property.

(2) Such terroristic threat shall be made:

(A) With the purpose of terrorizing another;

(B) With the purpose of causing the evacuation of a building, place of assembly, or facility of public transportation;

(C) With the purpose of otherwise causing serious public inconvenience; or

(D) In reckless disregard of the risk of causing the terror, evacuation, or inconvenience described in subparagraph (A), (B), or (C) of this paragraph.

(3) No person shall be convicted under this subsection on the uncorroborated testimony of the party to whom the threat is communicated.

(c) A person commits the offense of a terroristic act when:

(1) He or she uses a burning or flaming cross or other burning or flaming symbol or flambeau with the intent to terrorize another or another's household;

(2) While not in the commission of a lawful act, he or she shoots at or throws an object at a conveyance which is being operated or which is occupied by passengers; or

(3) He or she releases any hazardous substance or any simulated hazardous substance under the guise of a hazardous substance:

(A) For the purpose of terrorizing another;

(B) For the purpose of causing the evacuation of a building, place of assembly, or facility of public transportation;

(C) For the purpose of otherwise causing serious public inconvenience; or

(D) In reckless disregard of the risk of causing the terror, evacuation, or inconvenience described in subparagraph (A), (B), or (C) of this paragraph.

(d)(1) A person convicted of the offense of a terroristic threat shall be punished as a misdemeanor; provided, however, that if the threat suggested the death of the threatened individual, the person convicted shall be guilty of a felony and shall be punished by a fine of not more than $1,000.00, imprisonment for not less than one nor more than five years, or both.

(2) A person convicted of the offense of a terroristic act shall be punished by a fine of not more than $5,000.00, imprisonment for not less than one nor more than ten years, or both; provided, however, that if any person suffers a serious physical injury as a direct result of an act giving rise to a conviction under subsection (b) of this Code section, the person so convicted shall be punished by a fine of not

more than $250,000.00, imprisonment for not less than five nor more than 40 years, or both.

(e) A person who commits or attempts to commit a violation of subsection (b) or (c) of this Code section shall, upon conviction thereof, be punished by a fine of not less than $50,000.00, imprisonment for not less than five nor more than 20 years, or both, when such act is done with the intent to retaliate against any person for or intimidate or threaten any person from:

(1) Attending a judicial or administrative proceeding as a witness, attorney, judge, clerk of court, deputy clerk of court, court reporter, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, or party or producing any record, document, or other object in a judicial or official proceeding; or

(2) Providing to a law enforcement officer, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, prosecuting attorney, or judge any information relating to the commission or possible commission of an offense under the laws of this state or of the United States or a violation of conditions of bail, pretrial release, probation, or parole. (Ga. L. 1884-85, p. 131, § 1; Ga. L. 1892, p. 108, § 1; Ga. L. 1893, p. 130, § 1; Penal Code 1895, §§ 511, 512, 730; Ga. L. 1905, p. 86, § 1; Penal Code 1910, §§ 512, 513, 782; Code 1933, §§ 26-1803, 26-7308, 26-7309; Code 1933, § 26-1307, enacted by Ga. L. 1968, p. 1249, § 1; Code 1933, § 26-1307.1, enacted by Ga. L. 1974, p. 1022, § 1; Ga. L. 1998, p. 270, § 6; Ga. L. 2002, p. 1094, § 4; Ga. L. 2010, p. 999, § 3/HB 1002; Ga. L. 2015, p. 422, § 5-26/HB 310; Ga. L. 2016, p. 811, § 2/HB 874.)

The 2016 amendment, effective May 3, 2016, rewrote this Code section.

Cross references. — Constitutional guarantee of free speech and press, Ga. Const. 1983, Art. I, Sec. I, Para. V. Criminal possession of an explosive device, § 16-7-64.

Editor's notes. — Ga. L. 2002, p. 1094, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Transportation Security Act of 2002'."

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For review of 1998 legislation relating to crimes and offenses, see 15 Ga. St. U.L. Rev. 80 (1998). For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

JUDICIAL DECISIONS

Analysis

General Consideration
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APPLICATION

General Consideration

Distinguished from offense of obstruction of officer. — Defendant's convictions and sentence for and obstruction of an officer did not violate the constitutional prohibitions against double jeopardy and cruel and unusual punishment. The crimes are mutually independent and each is aimed at prohibiting specific conduct. Lemarr v. State, 188 Ga. App. 352, 373 S.E.2d 58 (1988).

Crime of terroristic threats focuses solely on conduct of accused. Boone v. State, 155 Ga. App. 937, 274 S.E.2d 49 (1980).

Former Code 1933, § 26-1307 (see now O.C.G.A. § 16-11-37) included threats to individual persons. Echols v. State, 134 Ga. App. 216, 213 S.E.2d 907 (1975).

When crime complete. — Crime of terroristic threats is complete when threat is communicated to victim with intent to terrorize. Lanthrip v. State, 235 Ga. 10, 218 S.E.2d 771 (1975); Boone v. State, 155 Ga. App. 937, 274 S.E.2d 49 (1980); Jordan v. State, 214 Ga. App. 346, 447 S.E.2d 341 (1994).

When communication of threat is done to terrorize another, crime of terroristic threats is complete. Wilson v. State, 151 Ga. App. 501, 260 S.E.2d 527 (1979).

Intent to terrorize may be inferred from circumstances. — When there is no direct evidence that the threats were made for the purpose of terrorizing another, the jury may infer such purpose from circumstances surrounding the threats. Moss v. State, 139 Ga. App. 136, 228 S.E.2d 30 (1976).

Direct evidence that threats were made for purpose of terrorizing another is not necessary if circumstances surrounding threats are sufficient for the jury to find the threats were made for such purpose. Boone v. State, 155 Ga. App. 937, 274 S.E.2d 49 (1980); Jordan v. State, 214 Ga. App. 346, 447 S.E.2d 341 (1994).

Threats against absent third party. — Threat of physical violence against an absent third party is within the conduct prohibited by O.C.G.A. § 16-11-37. Shepherd v. State, 230 Ga. App. 426, 496 S.E.2d 530 (1998).

Conviction reversed due to Sixth Amendment violation. — Although the admission of a victim's statements to a deputy violated defendant's Sixth Amendment rights as defendant was not able to cross-examine the victim, the error was harmless as to defendant's aggravated assault and battery convictions in light of the photographs of the victim's injuries and defendant's admission that defendant grabbed the victim around the neck and that the defendant might have hit the victim in the face; however, as the victim's statements were the only real evidence supporting the terroristic threats and obstructing a person making an emergency call convictions, those convictions were reversed. Miller v. State, 273 Ga. App. 761, 615 S.E.2d 843 (2005).

Cited in Williams v. Caldwell, 229 Ga. 453, 192 S.E.2d 378 (1972); Gibbs v. State, 132 Ga. App. 886, 209 S.E.2d 691 (1974); Hornsby v. State, 139 Ga. App. 254, 228 S.E.2d 152 (1976); Cagle v. State, 141 Ga. App. 392, 233 S.E.2d 485 (1977); Cochran v. State, 151 Ga. App. 478, 260 S.E.2d 391 (1979); Wiggins v. State, 171 Ga. App. 358, 319 S.E.2d 528 (1984); Jones v. State, 253 Ga. 640, 322 S.E.2d 877 (1984); Shepherd v. State, 173 Ga. App. 499, 326 S.E.2d 596 (1985); Hillman v. State, 184 Ga. App. 712, 362 S.E.2d 417 (1987); Carver v. State, 185 Ga. App. 436, 364 S.E.2d 877 (1987); Chapman v. State, 258 Ga. 214, 367 S.E.2d 541 (1988); Wade v. State, 258 Ga. 324, 368 S.E.2d 482 (1988); Steele v. State, 196 Ga. App. 330, 396 S.E.2d 4 (1990); Wilburn v. State, 223 Ga. App. 476, 477 S.E.2d 909 (1996); Scott v. State, 225 Ga. App. 729, 484 S.E.2d 780 (1997); Taylor v. State, 226 Ga. App. 254, 485 S.E.2d 830 (1997); Bielen v. State, 265 Ga. App. 865, 595 S.E.2d 543 (2004); In the Interest of P.R., 282 Ga. App. 480, 638 S.E.2d 898 (2006); In the Interest of B.M., 289 Ga. App. 214, 656 S.E.2d 855 (2008); In the Interest of E.W., 290 Ga. App. 95, 658 S.E.2d 854 (2008); Hyde v. State, 291 Ga. App. 662, 662 S.E.2d 764 (2008); Lemming v. State, 292 Ga. App. 138, 663 S.E.2d 375 (2008); Williams v. State, 293

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Ga. App. 193, 666 S.E.2d 703 (2008); Murray v. State, 297 Ga. App. 571, 677 S.E.2d 745 (2009); Abdul-Malik v. AirTran Airways, Inc., 297 Ga. App. 852, 678 S.E.2d 555 (2009); Mullins v. State, 298 Ga. App. 368, 680 S.E.2d 474 (2009).

Constitutionality

Statute not unconstitutionally vague. — Georgia's Terroristic Threats statute, O.C.G.A. § 16-11-37(a), did not violate the due process clause and was not unconstitutionally vague as a person of ordinary intelligence could clearly understand the meaning of threatening to commit any crime of violence; and both Georgia and federal law plainly defined recklessness as the proper criminal mens rea requirement. Major v. State, 301 Ga. 147, 800 S.E.2d 348 (2017).

Former Code 1933, § 26-1307 (see now O.C.G.A. § 16-11-37) sufficiently meets constitutional test of due process. Lanthrip v. State, 235 Ga. 10, 218 S.E.2d 771 (1975).

Former Code 1933, § 26-1307 (see now O.C.G.A. § 16-11-37) adequately informs persons of conduct prohibited. Masson v. Slaton, 320 F. Supp. 669 (N.D. Ga. 1970).

Former Code 1933, § 26-1307 (see now O.C.G.A. § 16-11-37) is not unconstitutionally vague or indefinite. Masson v. Slaton, 320 F. Supp. 669 (N.D. Ga. 1970).

Terroristic threats are not protected speech under the First Amendment. — Communication of terroristic threats to another person to commit crime of violence upon that person clearly falls outside of those communications and expressions which are protected by U.S. Const., amend. 1. Lanthrip v. State, 235 Ga. 10, 218 S.E.2d 771 (1975).

Scope of section does not include protected speech. — Former Code 1933, § 26-1307 (see now O.C.G.A. § 16-11-37) by its terms did not sweep within its ambit other activities that in ordinary circumstances constitute exercise of freedom of speech or of press. Lanthrip v. State, 235 Ga. 10, 218 S.E.2d 771 (1975).

Georgia's Terroristic Threats statute, O.C.G.A. § 16-11-37(a), did not violate the defendant's First Amendment's right to free speech because the statute's reckless scienter was not overly broad as recklessness clearly required an analysis of the accused's state of mind at the time of the crime; and communicating a threat of violence in a reckless manner did meet the definition of a true threat as recklessness required a knowing act such as conscious disregard of a substantial risk. Major v. State, 301 Ga. 147, 800 S.E.2d 348 (2017).

Corroboration

Crime of terroristic threats requires corroboration of victim's testimony. Moss v. State, 148 Ga. App. 459, 251 S.E.2d 374 (1978).

Corroboration requirement satisfied by another to whom threat was communicated. — Statutory requirement of corroboration does not demand corroboration by some evidence other than another party to whom it was communicated, which would preclude corroboration by covictim. Boone v. State, 155 Ga. App. 937, 274 S.E.2d 49 (1980).

Quantum of corroboration need not in itself be sufficient to convict, but need only be that amount of independent evidence which tends to prove that incident occurred as alleged. Boone v. State, 155 Ga. App. 937, 274 S.E.2d 49 (1980); Ellis v. State, 176 Ga. App. 384, 336 S.E.2d 281 (1985).

Threat to kill sufficiently corroborated. — Defendant's isolated threats to kill officer transporting defendant to jail after arrest for domestic violence incident were sufficiently corroborated by defendant's angry, hostile and verbally abusive behavior to other two officers prior to defendant's arrest. Stone v. State, 210 Ga. App. 198, 435 S.E.2d 527 (1993).

Trial court did not err in revoking two years of a probated sentence because the evidence presented would have been sufficient to convict the probationer of making a terroristic threat pursuant to O.C.G.A. § 16-11-37(a) in violation of probation, and it was more than sufficient to justify the revocation of a portion of the probationer's probated sentence; if properly corroborated, the probationer's statement that the probationer would shoot the

probationer's spouse in the head with the probationer's pistol would be sufficient to show that the probationer threatened the probationer's spouse with a crime of violence with the purpose of terrorizing the spouse, and the spouse's testimony was corroborated despite the fact that the spouse was the only one who heard the threats and despite the fact that the spouse minimized their significance in the spouse's testimony. Geter v. State, 300 Ga. App. 396, 685 S.E.2d 342 (2009).

With regard to the defendant's challenge to the sufficiency of the evidence supporting the defendant's conviction for terroristic threats, evidence of injury to the victim's arm that appeared to be a gunshot, blood on the victim's front porch, and witness testimony that the witness heard a gunshot and a woman say that the victim was shot was sufficient corroboration of the defendant's threat to kill the victim. Lomax v. State, 319 Ga. App. 693, 738 S.E.2d 152 (2013).

Evidence sufficient for corroboration. — See Ellis v. State, 176 Ga. App. 384, 336 S.E.2d 281 (1985); Mitchell v. State, 187 Ga. App. 40, 369 S.E.2d 487, cert. denied, 187 Ga. App. 908, 371 S.E.2d 432 (1988); Warnock v. State, 195 Ga. App. 537, 394 S.E.2d 382 (1990); Baker v. State, 225 Ga. App. 848, 485 S.E.2d 548 (1997); In re C.S.G., 241 Ga. App. 37, 525 S.E.2d 106 (1999); Sprayberry v. State, 241 Ga. App. 501, 527 S.E.2d 224 (1999); Bartlett v. State, 244 Ga. App. 49, 537 S.E.2d 362 (2000); In the Interest of C.A., 249 Ga. App. 280, 548 S.E.2d 37 (2001); Sampson v. State, 271 Ga. App. 206, 609 S.E.2d 110 (2004).

Evidence was sufficient for corroboration where threat to each victim was made in the presence of the other and each testified as to the threat to the other. Hamby v. State, 206 Ga. App. 791, 426 S.E.2d 670 (1992).

Sufficient evidence for corroboration was found in the testimony of one witness who saw the victim's agitated and incoherent state shortly after threat was communicated and also saw defendant standing outside waiting, and by the testimony of another witness who on another occasion saw defendant react to the presence of the victim by pointing defendant's finger aggressively at the victim as if defendant were targeting the victim. Sampson v. State, 209 Ga. App. 213, 433 S.E.2d 136 (1993).

Juvenile defendant provided corroboration to charges under O.C.G.A. § 16-11-37 when responding to questions from director/supervisor of houseparent terrorized. In re J.L.W., 213 Ga. App. 630, 445 S.E.2d 575 (1994).

Defendant's violent behavior toward victim was sufficient corroboration for the police officer's testimony regarding defendant's terroristic threat and met the requirement of O.C.G.A. § 16-11-37(a) even though the victim did not corroborate the officer's testimony that defendant made a threat. Drew v. State, 256 Ga. App. 391, 568 S.E.2d 506 (2002).

Victim of terroristic threat was not required to testify for there to be sufficient evidence to sustain a conviction; testimony from several witnesses who actually heard defendant make the threats to the victim, their identification of defendant's voice, and evidence that defendant showed up outside the apartment where the victim was located, which the jury could construe as additional circumstantial evidence that defendant made the threats with the purpose of terrorizing the victim, was sufficient. Worthington v. State, 257 Ga. App. 10, 750 S.E.2d 85 (2002).

Evidence was sufficient to support the defendant's conviction for terroristic threats as the required corroboration was present after the defendant informed the instructor of a truck-driving school that two other instructors of the school who had failed the defendant previously should watch their mailboxes as the instructors would soon be getting presents; sufficient corroboration existed because a student who was present at the time the statement was made testified as to the threat that was made by the defendant. Denson v. State, 259 Ga. App. 342, 577 S.E.2d 29 (2003).

Evidence was sufficient to support the defendant's terroristic threats convictions where two victims testified that the defendant threatened to kill the victims, and the testimony of each victim adequately corroborated the other. Evans v. State, 266 Ga. App. 405, 597 S.E.2d 505 (2004).

Corroboration (Cont'd)

Given the defendant's violation of a restraining order, it was reasonable to conclude that the defendant intended or expected a threat, which the defendant made in the presence of an officer, to have been communicated to the victim, and the defendant's conviction of terroristic threat was affirmed; also, evidence that defendant was angry with the victim, violated a protective order, and was verbally abusive towards the victim, though slight, constituted sufficient corroborating evidence about the threat. Cobble v. State, 268 Ga. App. 792, 603 S.E.2d 86 (2004).

There was sufficient evidence to support defendant's conviction for terroristic threats under O.C.G.A. § 16-11-37(a) because the evidence showed that defendant threatened to rape and kill a girlfriend's daughter and, although the threat was communicated only to the girlfriend, evidence that defendant had made other verbal threats to the girlfriend and violated a protective order, and that the girlfriend was afraid of defendant, constituted some evidence corroborating the girlfriend's testimony about the threat. Maskivish v. State, 276 Ga. App. 701, 624 S.E.2d 160 (2005).

Evidence sufficiently corroborated the victim's testimony in a case charging the defendant with making a terroristic threat, in violation of O.C.G.A. § 16-11-37, where a classmate overheard the defendant ask the victim to complete the defendant's class project and an assistant principal who interviewed the victim about the threats testified that the victim was scared and cried during the interview. Smith v. State, 273 Ga. App. 843, 616 S.E.2d 183 (2005).

Police officer's testimony that the victim was visibly shaken and which reiterated a threat to kill made by the defendant and others who kidnapped the victim, when coupled with corroboration of the victim's visible fear, was sufficient for a rational trier of fact to find defendant guilty beyond a reasonable doubt of making terroristic threats. Pringle v. State, 281 Ga. App. 235, 635 S.E.2d 839 (2006).

When the victim testified that the defendant pulled out a black and silver handgun and threatened the victim with the gun, an officer's testimony that the officer recovered a loaded silver handgun minutes after the incident in the vehicle in which the defendant was riding sufficiently corroborated the victim's testimony under O.C.G.A. § 16-11-37(a). Because the victim's testimony was sufficiently corroborated, there was no merit to the defendant's argument that there was insufficient evidence to support a conviction for possession of a firearm during the commission of a crime, which was based on the act of making terroristic threats. Wilson v. State, 291 Ga. App. 263, 661 S.E.2d 634 (2008).

Victim's testimony as to a terroristic threats charge was adequately corroborated. Corroboration could consist of the victim's demeanor after the threat was communicated, and police described the victim as "very distraught" and crying from "severe fright" when police arrived on the scene. Jones v. State, 291 Ga. App. 296, 661 S.E.2d 651 (2008).

There was sufficient evidence to support defendant's conviction of making a terroristic threat as the evidence established that defendant told the parent of a child they shared that defendant was going to kill the parent. The appellate court found no merit to defendant's contention that the trial court erred by admitting the testimony of the parent's oldest child that defendant had also threatened to kill that oldest child as the indictment nor the conviction was regarding the threat to the oldest child. Mazza v. State, 292 Ga. App. 168, 664 S.E.2d 548 (2008).

Trial court did not err by denying a defendant's motion for a directed verdict of acquittal on a terroristic threats charge as the victim's testimony was sufficiently corroborated despite the fact that no one other than the victim heard the defendant's threats. Such corroboration included the testimony of the police officer who responded to the victim's 9-1-1 call, who testified that the victim was upset and nervous, that the victim had bruises and scratches on the victim's body, and that the victim's clothes were dirty, and evidence of the fact that the victim called a credit card company to set up the emergency PIN number and that the defendant

made actual withdrawals from that account. Hall v. State, 292 Ga. App. 544, 664 S.E.2d 882 (2008), cert. denied, No. S08C1841, 2008 Ga. LEXIS 926 (Ga. 2008).

Sufficient corroborating evidence was presented to support the jury's verdict on a charge of making a terroristic threat, O.C.G.A. § 16-11-37(d)(2), and the trial court properly denied the defendant's motion for a directed verdict as to this charge under circumstances in which an officer responding to the victim's calls heard the defendant making threats over the telephone; the police officer's testimony regarding the threat against the victim was sufficiently corroborated by the testimony of the victim and the victim's roommate that the defendant threatened the victim repeatedly over the previous three days and by the defendant's attack on the victim three days earlier. It was of no moment that the officer, rather than the victim, heard the specific threat at issue because the victim initially answered the phone before handing the phone to the officer, so it could have been inferred that the defendant intended the threat to be communicated to the victim rather than the officer. Walker v. State, 298 Ga. App. 265, 679 S.E.2d 814 (2009).

There was sufficient evidence to support a defendant's conviction on one count of the offense of terroristic threats as a witness testified that the witness heard the defendant threaten to kill the victim and put the victim in a swamp, and another witness recounted the same statement. Further, an officer also related a witness's initial statement, which was admissible as a prior inconsistent statement, and therefore, contrary to the defendant's argument, there was no requirement that the victim testify for there to be sufficient evidence to sustain the conviction. Mullins v. State, 298 Ga. App. 368, 680 S.E.2d 474 (2009).

Evidence was sufficient to provide the corroboration required under O.C.G.A. § 16-11-37(a) because the defendant's behavior caused family members to become concerned for the victim's safety and to urge the victim to leave, and testimony was presented that the defendant followed the victim, who was the defendant's spouse, as the victim was attempting to leave, that the defendant had a knife, and that the defendant got into a violent struggle with two relatives who tried to keep the defendant away from the victim so that the victim could get away. Vaughn v. State, 301 Ga. App. 55, 686 S.E.2d 847 (2009), overruled on other grounds, State v. Kelly, 290 Ga. 29, 718 S.E.2d 232 (2011).

Any rational trier of fact could have found the defendant guilty of the crime of terroristic threats beyond a reasonable doubt because the victim's testimony was corroborated by independent evidence of the injury to the victim's face and by an officer's testimony that when the officer arrived at the scene the officer saw that the victim was shaking, looked like the victim had been crying, and was scared. Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, No. S12C0473, 2012 Ga. LEXIS 277 (Ga. 2012).

Victim's testimony regarding a defendant's terroristic threat to kill the victim by dropping a hair dryer into a filled bathtub with the victim, then forcing the victim to eat the defendant's feces was sufficiently corroborated by evidence of the events before and after the threat including evidence that police found feces and a hair dryer on the floor in the bathroom. Schneider v. State, 312 Ga. App. 504, 718 S.E.2d 833 (2011).

Evidence was sufficient to support the defendant's conviction for making a terroristic threat, as the recorded conversation between the defendant and the victim, in which the defendant told the victim "You done played with my heart. I'm ready to die tonight. I think you need to be ready too," corroborated the victim's testimony. Crawford v. State, 318 Ga. App. 270, 732 S.E.2d 794 (2012).

In a terroristic threat case, a neighbor's testimony that a vehicle fitting the description of that owned by the defendant was the vehicle driven by the shooter and the defendant's text messages to the complainant after the incident sufficiently corroborated the complainant's testimony that the defendant threatened to kill the complainant. Brown v. State, 325 Ga. App. 237, 750 S.E.2d 453 (2013).

Victim's demeanor, distraught, shaking,

Corroboration (Cont'd)

sobbing, and crying, after the defendant threatened the victim was adequate corroboration to support the defendant's terroristic threat conviction. Long v. State, 324 Ga. App. 882, 752 S.E.2d 54 (2013).

Because the defendant's brother testified about the phone conversation in which the defendant told the brother that the victim was already dead, the state presented evidence that the defendant's sister told a responding officer that the defendant was holding the victim hostage and had threatened to blow the victim's head off, and one of the responding officers testified that the rifle identified by the victim as the one used to hold the victim at gunpoint was found on the floor in the living room upon the defendant being taken into custody, that combined testimony clearly was sufficient to corroborate the victim's testimony regarding the threat made by the defendant and to sustain the defendant's terroristic threats conviction. Lambert v. State, 325 Ga. App. 603, 754 S.E.2d 392 (2014).

Evidence was sufficient for the jury to find the defendant guilty of aggravated assault and terroristic threats based on the trial court properly admitting the victim's testimony identifying the defendant as the person who threatened to shoot the victim early in the morning, and the testimony of the victim's friend, who also identified defendant as the person who threatened to shoot the victim. Johnson v. State, 326 Ga. App. 220, 756 S.E.2d 303 (2014).

Evidence insufficient for corroboration. — Where the victim's testimony is uncorroborated, defendant's conviction for the offense of a terroristic threat was not authorized and the trial court erred in denying defendant's motion for directed verdict of acquittal as to the offense of a terroristic threat. Hanvey v. State, 186 Ga. App. 690, 368 S.E.2d 357, cert. denied, 186 Ga. App. 918, 368 S.E.2d 357 (1988).

Evidence was not sufficient to support the charge of terroristic threats because the victim's testimony was completely uncorroborated. Murrell v. State, 317 Ga. App. 310, 730 S.E.2d 675 (2012).

State need not prove beyond reasonable doubt corroboration of victim in trial for terroristic threats. Wilson v. State, 151 Ga. App. 501, 260 S.E.2d 527 (1979).

Slight circumstances may be sufficient for corroboration, which is a question solely for jury. Boone v. State, 155 Ga. App. 937, 274 S.E.2d 49 (1980).

Application

Threats made as part of kidnapping did not merge with kidnapping. — Evidence was sufficient to convict defendant on a charge of making terroristic threats and the conviction was not improper on the ground that the acts comprising the terroristic threats were included in the charge of kidnapping with bodily harm on which defendant was also convicted; the fact that defendant threatened the victim with violence during the kidnapping did not change the fact that the two crimes did not share the same essential elements. Fulcher v. State, 259 Ga. App. 648, 578 S.E.2d 264 (2003).

Threats made as part of rape did not merge with rape. — Charge of issuing a terroristic threat did not merge into a charge of attempt to commit rape because the state used evidence other than defendant's statement, "shut up or I'll kill you," to prove that defendant attempted to commit rape, but evidence that two witnesses heard defendant say "shut up or I'll kill you" to defendant's victim was sufficient to sustain defendant's conviction for issuing a terroristic threat. Brewster v. State, 261 Ga. App. 795, 584 S.E.2d 66 (2003).

Court need not define murder, although it was crime threatened, absent request to do so. Lanthrip v. State, 235 Ga. 10, 218 S.E.2d 771 (1975).

Arrest for violating O.C.G.A. § 16-11-37 justified by probable cause. — See McQurter v. City of Atlanta, 572 F. Supp. 1401 (N.D. Ga. 1983), appeal dismissed, 724 F.2d 881 (11th Cir. 1984).

Attorney had to disclose information when client communicating threats. — There was sufficient evidence that the defendant, who was convicted of making terroristic threats, expected or intended that the threats would be communicated to the victims, who were the defendant's spouse and the spouse's par-

ent. From the defendant's knowledge of the attorney-client privilege and the defendant's letters and increasingly bizarre conduct and statements, the fact finder could conclude that the defendant intended the defendant's attorney to believe that the defendant was determined to carry out the threats and that the attorney had to report the threats to prevent the defendant from carrying the threats out. Brown v. State, 298 Ga. App. 545, 680 S.E.2d 579 (2009).

Evidence of prior possession of guns. — Since a deliberate intent to terrorize is an integral part of this crime, evidence showing terroristic intent is not only relevant, but necessary, to proving such a case. Therefore, evidence of the prior possession of guns and earlier arrests are properly admitted to show terroristic intent. Carver v. State, 258 Ga. 385, 369 S.E.2d 471 (1988).

Evidence of gun used in commission of crime. — When the defendants were convicted of terroristic threats, the trial court did not err by admitting a shotgun used in the crime spree into evidence without establishing an appropriate chain of custody as the state was not required to prove a chain of custody of the exhibit since the gun was a distinct and recognizable physical object which could be identified upon mere observation. Attaway v. State, 259 Ga. App. 822, 578 S.E.2d 529 (2003).

Threats against police officer. — When the deputy sheriff testified that the defendant, at the scene of a fire, turned toward the deputy, kicked the deputy in the shin, and spit in the deputy's face, and two officers who transported the defendant to jail testified that the defendant threatened to "burn and bomb" the officers' homes when the officers and their families were in the homes, the evidence was sufficient to enable any rational trier of facts to find the existence of the offenses of simple battery and terroristic threats, beyond a reasonable doubt. Veit v. State, 182 Ga. App. 753, 357 S.E.2d 113 (1987).

When there was testimony that the defendant behaved in an angry, violent, and hostile manner to the officers, and that the defendant told the police officer several times that the defendant would kill the officer once the officer got off duty, sufficient corroboration was established to convict the defendant upon the uttered threat. Stone v. State, 210 Ga. App. 198, 435 S.E.2d 527 (1993).

Evidence that defendant and the victim had quarreled frequently over money, defendant had previously shot the victim in the shoulder with a shotgun, and that defendant had anonymously mailed a spent shotgun shell to the victim was sufficient to sustain conviction for committing terroristic threats. Hammock v. State, 210 Ga. App. 513, 436 S.E.2d 571 (1993).

Evidence was sufficient to sustain a conviction where the defendant threatened to find the arresting officer and to kill that officer. Moore v. State, 234 Ga. App. 332, 506 S.E.2d 685 (1998).

Corroborating evidence was sufficient to find defendant guilty beyond a reasonable doubt of making a terroristic threat. Carter v. State, 239 Ga. App. 549, 521 S.E.2d 590 (1999).

Evidence was sufficient to support defendants' conviction for terroristic threats where in the commission of a spree of burglaries, defendants held a gun to the victims' head and threatened to kill them. Attaway v. State, 259 Ga. App. 822, 578 S.E.2d 529 (2003).

Because a burglary victim recognized defendant before a photographic lineup was introduced, defendant did not show deficient performance or prejudice based on trial counsel's failure to object to the lineup; in any event, the evidence was sufficient to sustain the convictions for armed robbery, aggravated assault, burglary, making terroristic threats, and possession of a firearm during the commission of the felonies under O.C.G.A. §§ 16-5-21(a)(1), (a)(2), 16-7-1(a), 16-8-41(a), 16-11-37(a), and 16-11-106(b)(1). Williams v. State, 270 Ga. App. 845, 608 S.E.2d 310 (2004).

Defendant's conviction of making a terroristic threat against an officer was supported by sufficient evidence as defendant threatened to kill the officer. Mayfield v. State, 276 Ga. App. 544, 623 S.E.2d 725 (2005).

Evidence was sufficient to convict defendant of terroristic threats, because the

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victim testified that defendant threatened to hurt and kill the victim, and the state presented evidence as corroboration that the victim was injured under the left eye during the incident. Nelson v. State, 277 Ga. App. 92, 625 S.E.2d 465 (2005).

Evidence was sufficient to support convictions for aggravated assault on a peace officer and making a terroristic threat or act, in violation of O.C.G.A. §§ 16-5-21(a)(2) and 16-11-37(a), respectively, since the defendant was agitated when officers came to the residence to investigate complaints of a terroristic threat, the defendant brandished two knives at the officers which caused the officers to retreat outside of the residence, defendant refused to put the knives down despite being instructed to do so at gunpoint by the officers, and when the defendant threatened to stab an officer and raised the knife up, the defendant was shot in the hand. Williams v. State, 277 Ga. App. 884, 627 S.E.2d 897 (2006).

Evidence was sufficient to sustain a defendant's convictions for a total of 20 counts of armed robbery, possessing a firearm during the commission of a crime, terroristic threats and acts, kidnapping, and aggravated assault arising out of four separate robberies because the victims' testimony, the physical evidence, and one victim's identification of the defendant as the robber provided sufficient corroboration of the testimony of the defendant's accomplice. Metoyer v. State, 282 Ga. App. 810, 640 S.E.2d 345 (2006).

Terroristic threats against family members. — Convictions for theft, aggravated assault, and making a terroristic threat was supported by evidence because defendant admitted to taking gas cans, raised a machete to scare or strike the brother, the brother was frightened and ran, and defendant then threatened the brother and sister that if either called the sheriff the defendant would return and kill them. Turner v. State, 273 Ga. App. 535, 615 S.E.2d 603 (2005).

Evidence that the defendant refused to get into a patrol car and struggled with two officers, then told the defendant's spouse, "I will kill you when I get out of jail," supported the defendant's convictions of terroristic threats and obstructing or hindering a law enforcement officer under O.C.G.A. §§ 16-10-24(a) and 16-11-37(a). For there to be a violation of O.C.G.A. § 16-11-37(a), a defendant did not have to have the immediate ability to carry out a threat. Reeves v. State, 288 Ga. App. 544, 654 S.E.2d 449 (2007).

Evidence was sufficient to convict a defendant on a charge of terroristic threats since the defendant failed to carry the initial burden of establishing by a preponderance of the evidence that the defendant was involuntarily intoxicated at the time the threats were made, and there was at least some evidence before the jury of each element of the charge of terroristic threats that the state was required to prove. Stewart v. State, 291 Ga. App. 846, 663 S.E.2d 278 (2008).

There was sufficient evidence to support a defendant's conviction for terroristic threats as, regardless of any unfulfilled threats the defendant may have uttered in the past, the evidence authorized the jury to find that on the night of the incident at issue, the defendant threatened to kill a romantic friend/victim while the defendant pinned the victim down on the ground and raised a cinder block over the victim's head, with the purpose of terrorizing the victim. Moran v. State, 293 Ga. App. 279, 666 S.E.2d 726 (2008).

Evidence that showed that during an argument with the victim, the defendant dragged the victim off a couch by the victim's hair and threw a table at the victim, that the victim fled on foot and attempted to make a 9-1-1 call, that the defendant pursued the victim in the defendant's truck, reached the victim, and held a knife to the victim, retreating only after another vehicle drove up, was sufficient to convict the defendant of terroristic threats. Stone v. State, 296 Ga. App. 305, 674 S.E.2d 31 (2009).

Evidence sufficient to convict juvenile of terroristic threats. — Juvenile court's adjudication entered against a juvenile on charges of aggravated assault and terroristic threats was upheld on appeal, given sufficient evidence that: (1) the state adequately showed venue; and (2) the victim's testimony described the juve-

nile's act of pointing a gun, threatening to use the gun, and that such caused fear that something could happen as a result of those acts. In the Interest of J.A.L., 284 Ga. App. 220, 644 S.E.2d 162 (2007).

Because evidence of the defendant's act of pointing the defendant's finger like a gun and threatening the victim, along with the use of racial slurs and profanity, was sufficient to support a charge of terroristic threats, the defendant's conviction was upheld on appeal, supporting the denial of a motion for a directed verdict of acquittal as to that charge; further, as to the state's evidence as to the charge, given the equivalence between the words "ought" and "should," the trial court did not abuse the court's discretion when the court overruled an objection to the state's assertion during closing argument that the defendant told the victim, "I ought to kill you." Self v. State, 288 Ga. App. 77, 653 S.E.2d 787 (2007).

Terroristic threat to burn down restaurant. — When the facts demonstrated that the defendant threatened to burn down a restaurant and then proceeded to pour gasoline onto the restaurant's tables and carpet in front of numerous eyewitnesses, such was sufficient evidence to allow a rational jury to convict defendant of attempt to commit arson and terroristic threats; moreover, the defendant's act of damaging the tables and carpet by pouring gasoline on them was sufficient to support a conviction of first-degree criminal damage to property. Robinson v. State, 288 Ga. App. 219, 653 S.E.2d 810 (2007).

Terroristic threat against neighbor. — Because defendant threw a leaf-blower into a neighbor, knocking the neighbor off the neighbor's motorcycle before defendant threatened to kill the neighbor, and because defendant then charged and attacked the neighbor with defendant's hands after the threat, there was sufficient circumstantial evidence to convict defendant of making terroristic threats in violation of O.C.G.A. § 16-11-37(a). Hobby v. State, 298 Ga. App. 52, 679 S.E.2d 72 (2009).

Threats against police officer. — Evidence that, after being arrested, the defendant head-butted an officer in the face and yelled death threats at the officer was sufficient to convict the defendant of obstruction of an officer, O.C.G.A. § 16-10-24(a), and terroristic threats, O.C.G.A. § 16-11-37(a). Bradley v. State, 298 Ga. App. 384, 680 S.E.2d 489 (2009).

Evidence was sufficient to prove that defendant intended to terrorize the victim by threatening to kill the victim, in violation of O.C.G.A. § 16-11-37(a), by surrounding circumstances: (1) the defendant's anger at the victim for accusing the defendant of stealing a lawn mower and talking to the defendant's mother about the theft; (2) the defendant's previous threatening behavior; and (3) the defendant's refusal to leave. Martin v. State, 303 Ga. App. 117, 692 S.E.2d 741 (2010).

Terroristic threats against utility worker. — Defendant's specific and repeat threats to shoot any electric company technicians who ventured onto the defendant's property and the defendant's repeated demands that the defendant's threats be noted in the defendant's account records supported the defendant's convictions for terroristic threats in violation of O.C.G.A. § 16-11-37. Nassau v. State, 311 Ga. App. 438, 715 S.E.2d 837 (2011).

Any rational trier of fact could find the defendant guilty beyond a reasonable doubt of terroristic threats, O.C.G.A. § 16-11-37, hoax devices, O.C.G.A. § 16-7-85(a), and armed robbery, O.C.G.A. § 16-8-41(a), because although circumstantial, the evidence authorized the jury to exclude every reasonable hypothesis other than that the defendant engaged in the acts that constituted the crimes; even though the defendant was apprehended while wearing clothing that did not match that described by the victims, an officer familiar with the habits of bank robbers testified that bank robbers like to wear multi-layer clothing and then shed clothes after the crime. Williams v. State, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

Defendant's conviction for making a terroristic threat was affirmed because evidence showed that the defendant, after an enraged and profane confrontation, angrily returned to the scene to tell the victim that he was a "dead man." This authorized the jury to conclude that the

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defendant was threatening to kill the victim, which would meet the definition of a terroristic threat. Enuka v. State, 314 Ga. App. 466, 724 S.E.2d 471 (2012).

Evidence was sufficient to convict the defendant of terroristic threats, six counts of aggravated assault, and possession of a firearm during the commission of a felony because a witness testified that a vehicle fitting the description of the defendant's car was driven by the shooter who shot at the house of the complainant's mother where the complainant was staying; multiple gunshot holes were found in the side of the home; the complainant testified that, earlier that morning, the defendant had threatened to come to the house and kill the complainant; and the complainant received text messages from the defendant later that morning apologizing for what had happened. Brown v. State, 325 Ga. App. 237, 750 S.E.2d 453 (2013).

Trial court properly convicted the defendant of making a terroristic threat based on the evidence adduced at trial that established that the defendant's purpose in returning to a hair salon after a request for check cashing was rebuffed, loudly cursing the victims, and threatening to force the victims to the floor and shoot the victims was to terrorize the victims. Smith v. State, 319 Ga. App. 640, 738 S.E.2d 95 (2013).

Defendant's threats to kill both victims supported the terroristic threats convictions. Petro v. State, 327 Ga. App. 254, 758 S.E.2d 152 (2014).

Defendant's repeated declarations that the defendant wished a detective and the detective's family to suffer, combined with the defendant's statement that the defendant was likely to be released from jail soon, was sufficient for the jury to infer that the defendant intended the defendant's statements to threaten violence against the detective and the detective's family in violation of O.C.G.A. § 16-11-37, although the defendant was presently in custody and unable to deliver on the threats, and although the detective laughed at the defendant. Edwards v. State, 330 Ga. App. 732, 769 S.E.2d 150 (2015).

Evidence was insufficient for conviction. — There was insufficient evidence that defendant wrote the letter for the purpose of terrorizing the female supervisor because defendant put in writing defendant's reasons for wanting a transfer, which included that defendant wanted to take a gun and kill defendant's supervisor, directing the letter to human resources; there was no evidence to support an inference that defendant intended or expected the reason to be communicated to the supervisor; on the contrary, the record reflected that defendant went out of defendant's way to avoid contact or communication with the supervisor in light of defendant's feelings towards the supervisor. Stephens v. State, 271 Ga. App. 509, 610 S.E.2d 143 (2005).

Defendant's convictions for terroristic acts, aggressive driving, and criminal trespass were reversed on appeal since the only evidence identifying the defendant as the perpetrator of a roadway situation wherein the victim was tailgated and an object was thrown at the victim's car, causing a dent, was a police officer's hearsay testimony that the officer spoke to the defendant's mother, who indicated that defendant had not been home, and the hearsay statement of the defendant admitting to the tailgating and honking; this evidence was inadmissible hearsay and therefore, relying on the remaining evidence, insufficient evidence existed to support the defendant's convictions. Patterson v. State, 287 Ga. App. 100, 650 S.E.2d 770 (2007).

In a juvenile delinquency case, after the state conceded that the state failed to establish venue, the state could not retry a defendant juvenile on a terroristic threat allegation because the state offered insufficient evidence that the defendant made a terroristic threat against an attendance officer (AO) in violation of O.C.G.A. § 16-11-37(a); the defendant's statement that the defendant was leaving school to get a gun did not demonstrate that the defendant made the statement to terrorize the AO. In the Interest of M.S., 292 Ga. App. 127, 664 S.E.2d 240 (2008).

Evidence was insufficient to support the defendant's conviction for terroristic threats in violation of O.C.G.A.

§ 16-11-37(a) because there was no evidence in the record to support an inference that the defendant's threats were directed at a 9-1-1 operator or the police, that the defendant had any particular victim in mind when the defendant communicated the defendant's threats to them, or that the defendant intended or expected that the defendant's threat would be conveyed to anyone besides them; the clear and oft-repeated purpose of the defendant's threats was not to terrorize the defendant's neighbors but rather to obtain a police response to disturbances on the defendant's block. Sidner v. State, 304 Ga. App. 373, 696 S.E.2d 398, cert. denied, No. S10C1664, 2010 Ga. LEXIS 904 (Ga. 2010).

Evidence at trial was not sufficient to support the defendant's conviction for terroristic threats because, while the defendant made a threatening statement about the victim, it was made to other people and there was no evidence to support an inference that the defendant intended or expected the statements, made to others who had no connection to the victim, to be conveyed to the victim. Steplight v. State, 301 Ga. 272, 800 S.E.2d 548 (2017).

Threats made for purpose of mental health evaluation insufficient. — During an intake interview at a mental health evaluation facility, a defendant's threats regarding the defendant's sentencing judge were made for the purpose of diagnosis and treatment of mental health issues, not with the purpose of terrorizing the judge or intimidating the judge from attending legal proceedings as required for finding terroristic threats in violation of O.C.G.A. §§ 16-10-32(b) and 16-11-37. Koldewey v. State, 310 Ga. App. 788, 714 S.E.2d 371 (2011), cert. denied, 2012 Ga. LEXIS 239 (Ga. 2012).

Severance of trials. — When the defendants were convicted of terroristic threats, the trial court did not abuse the court's discretion by denying the defendants' motions to sever the defendants' trials as the defendants failed to make a clear showing of prejudice and a denial of due process protection. Attaway v. State, 259 Ga. App. 822, 578 S.E.2d 529 (2003).

Jury instructions. — Even though only "terroristic threats" were charged in the indictment, a jury charge quoting verbatim the statutory language, referring to "terroristic threats and acts," was not shown to have caused confusion among the jurors. Martin v. State, 219 Ga. App. 277, 464 S.E.2d 872 (1995).

When the defendant's defense to the charge of terroristic threats was that the defendant never made any threats or intimidating remarks at all, the trial court did not err in refusing to give the defendant's requested instruction on the offense of harassing telephone calls. Todd v. State, 230 Ga. App. 849, 498 S.E.2d 142 (1998).

Although the trial court erred in instructing the jury on crime of terroristic threats, the error was harmless because there was no reasonable possibility that the defendant was convicted for committing terroristic threats in a manner not averred by the indictment, and the trial court gave complete instructions to the jury during the course of the one-day trial, albeit not in the sequence required by O.C.G.A. § 5-5-24(b); the charge, although not consistent with the indictment, did not reasonably present the jury with an alternate basis for finding the defendant guilty of terroristic threats. Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, No. S12C0473, 2012 Ga. LEXIS 277 (Ga. 2012).

Defendant waived the objection to the trial court's decision to recharge the jury on the elements of terroristic threats because the defendant did not object when the trial court announced the proposed recharge and asked for any objections before instructing the jury. Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, No. S12C0473, 2012 Ga. LEXIS 277 (Ga. 2012).

Trial court's failure to recharge on corroboration was not plain error under O.C.G.A. § 17-8-58(b) or substantial error that was harmful as a matter of law under O.C.G.A. § 5-5-24(c) because in the court's instructions to the jury following closing argument, the trial court properly charged the jury that no person would be convicted of terroristic threats on the unsupported testimony of the party to whom the threat was made. Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert.

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denied, No. S12C0473, 2012 Ga. LEXIS 277 (Ga. 2012).

Improper jury instructions. — Trial court erred in instructing the jury that the jury could convict the defendant of committing terroristic threats, O.C.G.A. § 16-11-37(a), in a manner not alleged in the indictment because the indictment alleged that the defendant threatened to commit murder with the purpose of terrorizing the victim, but the trial court twice instructed the jury that terroristic threats involved any violence or any crime of violence; under the circumstances, without a remedial instruction, it was probable that the jury found the defendant guilty of committing the act of terroristic threats in a manner not charged in the indictment, and defendant's right to due process was violated due to a fatal variance between the proof and the indictment. The jury charge constituted plain error which affected substantial rights of the defendant, and thus the failure to object to the jury instruction did not preclude appellate review of the charge. Milner v. State, 297 Ga. App. 859, 678 S.E.2d 563 (2009).

Defendant held sentenced beyond statutory maximum. — Smith v. State, 186 Ga. App. 303, 367 S.E.2d 573 (1988).

Factual basis for Alford plea. — When the prosecutor stated that the defendant went into the victim's camper, grabbed the victim by the arm, pulled out a knife, and threatened to cut out the victim's eyes, there was a factual basis to satisfy the defendant's Alford plea to terroristic threats under O.C.G.A. § 16-11-37(a). Henry v. State, 284 Ga. App. 439, 644 S.E.2d 191 (2007).

Victim not required to actually hear threat. — Defendant's motion for a directed verdict of acquittal on the charge of terroristic threat was properly denied because the evidence, in the form of testimony by witnesses, was sufficient to support the charge and the victim was not required to have actually heard and understood the threat, as the other witnesses did hear and understand defendant's threat to burn the victim's house down. Armour v. State, 265 Ga. App. 569, 594 S.E.2d 765 (2004).

New trial not warranted when defense counsel failed to object to prosecutor's use of the term "terrorist" to describe defendant. — Trial court did not err when the court denied the defendant's motion for new trial based on the defendant's claim of ineffective assistance of counsel since trial counsel's performance was not deficient for failing to object to the prosecutor's comment during closing argument that the defendant was a terrorist because the comment was not impermissible when the defendant threatened to commit a crime of violence against another and made a terroristic threat in violation of O.C.G.A. § 16-11-37; the defendant brandished a gun at the victim, shot the victim, and pointed the gun at a bystander, threatening to shoot. Nash v. State, 285 Ga. 753, 683 S.E.2d 591 (2009).

Terroristic threats as a lesser included offense of aggravated assault. — Terroristic threats was included in the offense of aggravated assault with a deadly weapon as a matter of fact, and the trial court did not err in instructing the jury accordingly. Messick v. State, 209 Ga. App. 459, 433 S.E.2d 595 (1993).

Because the offense of terroristic threats was included, as a matter of fact, in the charged delinquent act constituting the offense of aggravated assault if committed by an adult, juvenile was therefore properly apprised before the delinquency hearing that the juvenile could be found delinquent based on commission of an act constituting the offense of the lesser included offense of terroristic threats if committed by an adult. In re C.S.G., 241 Ga. App. 37, 525 S.E.2d 106 (1999).

Aggravated stalking charge, an aggravated assault charge, and a terroristic threats charge did not merge because all three crimes required the state to prove at least one fact different from the others; the crime of aggravated stalking required proof of a special bond condition prohibiting the defendant from having violent contact with the victim and that the defendant's conduct violated that condition, while the crime of aggravated assault required the state to prove an assault with a knife against the victim, and the crime of terroristic threats required proof that the defendant threat-

ened to kill the victim. Vaughn v. State, 301 Ga. App. 55, 686 S.E.2d 847 (2009), overruled on other grounds, State v. Kelly, 290 Ga. 29, 718 S.E.2d 232 (2011).

Harassing telephone calls as lesser included offense of terroristic threats. — Depending on the facts, harassing telephone calls may be an included offense of terroristic threats. Todd v. State, 230 Ga. App. 849, 498 S.E.2d 142 (1998).

Simple assault is not a lesser included offense of terroristic threats. McQueen v. State, 184 Ga. App. 630, 362 S.E.2d 436 (1987).

Communication of terroristic threat is not punishable under simple assault statute. Lanthrip v. State, 235 Ga. 10, 218 S.E.2d 771 (1975).

One may be guilty of simple assault without violating terroristic threats statute. Lanthrip v. State, 235 Ga. 10, 218 S.E.2d 771 (1975).

Mere fact that threats were communicated by telephone could not reduce offense to misdemeanor under former Code 1933, § 26-2610 (see now O.C.G.A. § 16-11-39.1). Usher v. State, 143 Ga. App. 843, 240 S.E.2d 214 (1977).

Admissibility of victim's testimony of threatening phone calls. — Victim's testimony of threatening phone calls, without identifying caller, and that the victim's family received numerous telephone calls was admissible to establish fact of telephone harassment, and was not subject to exclusion as hearsay. Wilson v. State, 131 Ga. App. 536, 206 S.E.2d 527 (1979).

Social media posts. — Georgia's Terroristic Threats statute, O.C.G.A. § 16-11-37(a), was not unconstitutional as applied to the defendant because, whether the defendant's post on a social media site met the required criminal intent was a question of fact reserved for the jury, not the appellate court. Major v. State, 301 Ga. 147, 800 S.E.2d 348 (2017).

Sufficient evidence of intent. — Evidence of defendant's intent was sufficient to support a conviction of making a terroristic threat because defendant told a seven-year-old child that defendant was going to kill the child's mother. Williams v. State, 271 Ga. App. 755, 610 S.E.2d 704 (2005).

Defendant was properly convicted of terroristic threats in violation of O.C.G.A. § 16-11-37 because the jury was presented with sufficient evidence by which to find that the defendant intended to terrorize officers by communicating a threat to blow up the defendant's home using propane; although there was testimony that the defendant suffered from a history of mental illness, the defendant did not plead the affirmative defense of insanity, and the issue of the defendant's criminal intent was a question of fact for the jury, which was presented with sufficient evidence to establish the requisite criminal intent. Layne v. State, 313 Ga. App. 608, 722 S.E.2d 351 (2012).

Evidence was sufficient for the jury to find that the defendant intended to terrorize the victims based on the defendant yelling at an officer trying to restrain the defendant that the defendant was going to kill the officer and the officer's family. Harper v. State, 337 Ga. App. 57, 785 S.E.2d 691 (2016).

Threat meant to terrorize, not part of armed robbery. — Trial court did not err in sentencing defendant separately on the separate conviction for terroristic threats and armed robbery since the evidence was sufficient to show the robbery was complete, and since the money from the cash register was in defendant's possession before defendant made the alleged threat to the victim that defendant would kill the victim if the victim moved. Thus, the threat was not part of the armed robbery, but the evidence was sufficient to show that it was made with the purpose of terrorizing the victim. Barnett v. State, 204 Ga. App. 588, 420 S.E.2d 96 (1992).

Terroristic threats conviction did not merge with attempted armed robbery. — Convictions for burglary, kidnapping, terroristic threats, and possession of a firearm during the commission of a felony did not merge with an attempted armed robbery conviction because the attempted armed robbery was complete before the crimes were committed inside the residence; the defendant discussed with the co-worker the idea to dress up as a heating and air technician to perform a robbery, traveled to the residence armed with handguns and a hollow clipboard

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used to conceal the handgun, and pointed the handgun at a victim before entering the house. McKinney v. State, 274 Ga. App. 32, 619 S.E.2d 299 (2005).

Probable cause shown to arrest. — Police officer had both actual and arguable probable cause to arrest a suspect for making terroristic threats under O.C.G.A. § 16-11-37 based upon the suspect's admission to making the statement that the defendant was "going to have his people get" the officer and that the defendant was going or wanted to "clip" the officer; the officer was entitled to qualified immunity on the suspect's related false arrest claim under 42 U.S.C. § 1983. Alfred v. Powell, No. 1:03-CV-2683-RLV, 2005 U.S. Dist. LEXIS 38723 (N.D. Ga. Dec. 12, 2005).

Plaintiff failed to show that it was entirely unreasonable for the sheriff's deputy to believe, under the particular circumstances, that the deputy had probable cause to arrest the plaintiff for making harassing phone calls and terroristic threats. Plaintiff did not contend that the alleged phone calls, assuming the calls were made and without regard to the identity of the caller, do not arguably establish the elements of both statutes: (1) repeated communications for the purpose of harassment; and (2) a threat to burn or damage the victims's house with the intention of terrorizing the victim. Taylor v. Taylor, 649 F.3d 737 (11th Cir. May 3, 2016) (Unpublished).

Sufficient indictment. — Because the defendant could not admit the charges of aggravated assault and terroristic threats in the indictment and still be innocent, the indictment returned was not defective. Dudley v. State, 283 Ga. App. 86, 640 S.E.2d 677 (2006).

Defendant's threat to get a gun and shoot an officer's car, followed by defendant turning back toward defendant's tavern, may have constituted the crime of terroristic threats. Gay v. State, 179 Ga. App. 430, 346 S.E.2d 877 (1986).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising under O.C.G.A. § 16-11-37(d)(1) are designated as offenses for which those charged are to be fingerprinted. 2017 Op. Att'y Gen. No. 17-1.

RESEARCH REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d, Extortion, Blackmail, and Threats, §§ 46 et seq., 53, 61 et seq. 31A Am. Jur. 2d, Explosions and Explosives, § 192.

Am. Jur. Proof of Facts. — Hate Crimes and Liability for Bias-Motivated Acts, 57 POF3d 1.

C.J.S. — 86 C.J.S., Threats and Unlawful Communications, § 1 et seq.

ALR. — Vacancy or nonoccupancy of building as affecting its character as "dwelling" as regards arson, 44 A.L.R.2d 1456.

Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949.

Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like, 22 A.L.R.5th 261.

Imposition of state or local penalties for threatening to use explosive devices at schools or other buildings, 79 A.L.R.5th 1.

Construction and application of § 2A6.1 of United States Sentencing Guidelines (USSG § 2A6.1), pertaining to sentence to be imposed for making threatening communications, 148 A.L.R. Fed. 501.

Validity, construction, and application of 18 USCA § 844(e), prohibiting use of mail, telephone, telegraph, or other instrument of commerce to convey bomb threat, 160 A.L.R. Fed. 625.

16-11-37.1. Dissemination of information relating to terroristic acts.

It shall be unlawful for any person knowingly to furnish or disseminate through a computer or computer network any picture, photograph, drawing, or similar visual representation or verbal description of any information designed to encourage, solicit, or otherwise promote terroristic acts as defined in Code Section 16-11-37. Any person convicted for violation of this Code section shall be guilty of a misdemeanor of a high and aggravated nature; provided, however, that if such act is in violation of paragraph (1) of subsection (e) of Code Section 16-11-37, the person convicted shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than ten years or by a fine not to exceed $100,000.00 or both. (Code 1981, § 16-11-37.1, enacted by Ga. L. 1995, p. 574, § 2; Ga. L. 2010, p. 999, § 4/HB 1002; Ga. L. 2016, p. 811, § 3/HB 874.)

The 2016 amendment, effective May 3, 2016, substituted "paragraph (1) of subsection (e)" for "paragraph (1) of subsection (d)" in the second sentence of this Code section.

16-11-38. Wearing mask, hood, or device which conceals identity of wearer.

(a) A person is guilty of a misdemeanor when he wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public way or public property or upon the private property of another without the written permission of the owner or occupier of the property to do so.

(b) This Code section shall not apply to:

(1) A person wearing a traditional holiday costume on the occasion of the holiday;

(2) A person lawfully engaged in trade and employment or in a sporting activity where a mask is worn for the purpose of ensuring the physical safety of the wearer, or because of the nature of the occupation, trade, or profession, or sporting activity;

(3) A person using a mask in a theatrical production including use in Mardi gras celebrations and masquerade balls; or

(4) A person wearing a gas mask prescribed in emergency management drills and exercises or emergencies. (Ga. L. 1951, p. 9, §§ 3, 7; Code 1933, § 26-2913, enacted by Ga. L. 1968, p. 1249, § 1.)

Law reviews. — For note, "Klan, Cloth and Constitution: Anti-mask Laws and the First Amendment," see 25 Ga. L. Rev. 819 (1991).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 16-11-38 proscribes mask-wearing conduct that is intended to conceal the wearer's identity and that the wearer knows, or reasonably should know, gives rise to a reasonable apprehension of intimidation, threats or impending violence. O.C.G.A. § 16-11-38 passes constitutional muster and does not violate the rights of freedom of speech, freedom of association, and equal protection of the law. State v. Miller, 260 Ga. 669, 398 S.E.2d 547 (1990).

Standard for conviction under the Anti-Mask Act requires that the state must show that the mask-wearer (1) intended to conceal the person's identity, and (2) either intended to threaten, intimidate, or provoke the apprehension of violence, or acted with reckless disregard for the consequences of the wearer's conduct or a heedless indifference to the rights and safety of others with reasonable foresight that injury would probably result. Daniels v. State, 264 Ga. App. 460, 448 S.E.2d 185 (1994).

Evidence sufficient to support conviction. — There was sufficient evidence to permit a rational trier of fact to conclude beyond a reasonable doubt that the defendant juvenile intended to conceal the defendant's identity and to threaten, intimidate, or provoke the apprehension of violence in violation of the Anti-Mask Act, O.C.G.A. § 16-11-38, because the defendant in a mask and a friend in a hooded sweatshirt stood at the door to a stranger's house and frightened the occupants by standing motionless and silent as to their intentions. In the Interest of I.M.W., 313 Ga. App. 624, 722 S.E.2d 586 (2012).

Immunity from liability. — District court erred when the court denied the police officers' motion to dismiss claims a demonstrator filed against the officers pursuant to 42 U.S.C. § 1983 and state law, which alleged that the officers violated the demonstrator's rights under the First and Fourth Amendments to the U.S. Constitution and Georgia law when the officers arrested the defendant for violating Georgia's mask statute, O.C.G.A. § 16-11-38, during a demonstration in Atlanta in 2014; the officers had qualified immunity from liability on the demonstrator's claims under federal law because the officers had probable cause to arrest the demonstrator when the officers saw the demonstrator wearing a "V for Vendetta" mask after the police directed demonstrators to remove masks the demonstrators were wearing, and official immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX. Gates v. Khokhar, 884 F.3d 1290 (11th Cir. 2018).

OPINIONS OF THE ATTORNEY GENERAL

Georgia Crime Information Center is authorized to maintain records identifying persons charged under former Code 1933, § 26-2913 (see now O.C.G.A. § 16-11-38). 1976 Op. Att'y Gen. No. 76-33.

RESEARCH REFERENCES

ALR. — What amounts to disguise within criminal law, 1 A.L.R. 642.

Validity and construction of state statute or ordinance prohibiting picketing, parading, demonstrating, or appearing in public while masked or disguised, 2 A.L.R.4th 1241.

Validity of law criminalizing wearing dress of opposite sex, 12 A.L.R.4th 1249.

16-11-39. Disorderly conduct.

(a) A person commits the offense of disorderly conduct when such person commits any of the following:

(1) Acts in a violent or tumultuous manner toward another person whereby such person is placed in reasonable fear of the safety of such person's life, limb, or health;

(2) Acts in a violent or tumultuous manner toward another person whereby the property of such person is placed in danger of being damaged or destroyed;

(3) Without provocation, uses to or of another person in such other person's presence, opprobrious or abusive words which by their very utterance tend to incite to an immediate breach of the peace, that is to say, words which as a matter of common knowledge and under ordinary circumstances will, when used to or of another person in such other person's presence, naturally tend to provoke violent resentment, that is, words commonly called "fighting words"; or

(4) Without provocation, uses obscene and vulgar or profane language in the presence of or by telephone to a person under the age of 14 years which threatens an immediate breach of the peace.

(b) Any person who commits the offense of disorderly conduct shall be guilty of a misdemeanor.

(c) This Code section shall not be deemed or construed to affect or limit the powers of counties or municipal corporations to adopt ordinances or resolutions prohibiting disorderly conduct within their respective limits. (Code 1863, § 4271; Ga. L. 1865-66, p. 233, § 2; Code 1868, § 4306; Ga. L. 1872, p. 9, § 1; Code 1873, § 4372; Ga. L. 1875, p. 25, § 1; Code 1882, § 4372; Ga. L. 1890-91, p. 83, § 1; Penal Code 1895, § 396; Penal Code 1910, § 387; Ga. L. 1919, p. 103, § 1; Code 1933, § 26-6303; Ga. L. 1963, p. 455, § 1; Code 1933, § 26-2610, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1974, p. 470, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1995, p. 574, § 3.)

Cross references. — Constitutional guarantee of free speech and press, Ga. Const. 1983, Art. I, Sec. I, Para. V. Further provisions regarding unlawful communications by telephone, § 46-5-21. Use of telephone to transmit obscene or lewd communications for commercial purposes, § 46-5-22.

Law reviews. — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001).

For note discussing First Amendment problems in application of this Code section with particular reference to Breaux v. State, 230 Ga. 506, 197 S.E.2d 695 (1973), see 25 Mercer L. Rev. 371 (1974).

For comment discussing the constitutional standard for judging obscenity, in light of Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), see 10 Ga. St. B.J. 327 (1973).

JUDICIAL DECISIONS

Analysis

General Consideration
Constitutionality

General Consideration

Statute not vague. — O.C.G.A. § 16-11-39(a)(1) was not unconstitutionally vague as a person of common intelligence could ascertain from the word "tumultuous" that the person could be found guilty of disorderly conduct when that person acted in a disorderly, turbulent, or uproarious manner towards another person, which placed the other person in reasonable fear for their safety. Freeman v. State, 302 Ga. 181, 805 S.E.2d 845 (2017).

O.C.G.A. § 16-11-39(a)(1) was not unconstitutionally overbroad as the statute only could reach conduct which involved no lawful exercise of a First Amendment right; as applied to expressive conduct, the statute only reached expressive conduct that amounted to "fighting words" or a "true threat". Freeman v. State, 302 Ga. 181, 805 S.E.2d 845 (2017).

Language may be obscene or vulgar without any reference to sexual matters. Holcombe v. State, 5 Ga. App. 47, 62 S.E. 647 (1908).

Abusive and obscene language has been limited to "fighting words," which are words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. Bolden v. State, 148 Ga. App. 315, 251 S.E.2d 165 (1978).

Mere use of obscene and vulgar or profane language is not necessarily a crime unless such language is also "opprobrious or abusive" and therefore constitutes "fighting words." Crolley v. State, 182 Ga. App. 2, 354 S.E.2d 864 (1987).

Opprobrious and abusive "fighting words" need not necessarily be obscene and vulgar or profane to be proscribed. Crolley v. State, 182 Ga. App. 2, 354 S.E.2d 864 (1987).

Employer's use of obscene, vulgar, and profane language in the course of venting the employer's anger at one of the employer's employees for not informing the employer that it was raining while the employer's automobile convertible top was down did not constitute "fighting words." Crolley v. State, 182 Ga. App. 2, 354 S.E.2d 864 (1987).

Examples of "fighting words." — Pointing to a police officer and yelling to a large crowd of people that "this man here is a dog" is the type of language commonly called "fighting words" which naturally tend to provoke violent resentment. Brooks v. State, 166 Ga. App. 704, 305 S.E.2d 436 (1983).

Act of calling sheriff a "no-good son of a bitch" and admonishing that defendant should kick the sheriff's "ass" constituted fighting words. Anderson v. State, 231 Ga. App. 807, 499 S.E.2d 717 (1998).

Language directed at police officer. — Defendant's conviction of disorderly conduct, O.C.G.A. § 16-11-39(a)(3), was reversed; although defendant was angry, defendant's question to a police officer concerning why the officer was blocking a road did not constitute fighting words, as required by the statute. Delaney v. State, 267 Ga. App. 377, 599 S.E.2d 333 (2004).

When an arrestee allegedly called an officer "a fucking asshole" and was arrested, the officer was properly denied summary judgment based on qualified immunity as to the arrestee's claims under the Fourth Amendment because the officer did not have arguable probable cause to arrest the arrestee for disorderly conduct under Georgia law since the arrestee was not shouting and did not appear to be a danger to anyone as the arrestee walked away. Merenda v. Tabor, No. 12-12562, 2013 U.S. App. LEXIS 2351 (11th Cir. Feb. 1, 2013) (Unpublished).

Arresting officer lacked probable cause to arrest the defendant for disorderly conduct when the only evidence cited or set forth in the stipulated facts showed that the defendant yelled, cursed, referenced the defendant's "damn ID," and said "fuck you" once to the officer and there was no indication that the defendant exhibited any non-verbal aggressive behavior. Knowles v. State, 340 Ga. App. 274, 797 S.E.2d 197 (2017).

Section makes no distinction between types of persons to whom words are uttered. — Fact that police officer admits that the officer is accus-

tomed to hearing obscene language during performance of the officer's duties is not a defense available to a defendant under the disorderly conduct statute. The jury is only required to determine that words uttered were those which as a matter of common knowledge and under ordinary circumstances will, when used to or of another person in that person's presence, naturally tend to provoke a violent response. Bolden v. State, 148 Ga. App. 315, 251 S.E.2d 165 (1978); Evans v. State, 188 Ga. App. 347, 373 S.E.2d 52 (1988).

Opprobrious words in remonstrance of illegal arrest, heard only by arresting officer, do not violate former Code 1933, § 26-2610 (see now O.C.G.A. § 16-11-39). Scott v. State, 123 Ga. App. 675, 182 S.E.2d 183 (1971).

Failure to obey deputy. — After an arrestee refused a deputy's order to turn around and pushed away from the deputy, the arrestee's false arrest claim failed because there was probable cause to arrest the arrestee for disorderly conduct since, inter alia, it was not unreasonable for the deputy to be concerned for the deputy's safety. Anthony v. Coffee County, No. 13-15477, 2014 U.S. App. LEXIS 16897 (11th Cir. Sept. 2, 2014) (Unpublished).

Offense not included in offense of cruelty to children. — Offense of use of fighting words is not included in the offense of cruelty to children as a matter of law. Shuler v. State, 195 Ga. App. 849, 395 S.E.2d 26 (1990).

State need not prove effect of words upon a particular individual; that is, whether individual to whom words were addressed was incited to action by their utterance. Bolden v. State, 148 Ga. App. 315, 251 S.E.2d 165 (1978).

In determining if words uttered are such as to incite an immediate breach of the peace, it is not necessary that the state prove the effect of the words upon a particular individual; that is, whether the individual to whom the words were addressed or in whose presence the words were spoken was incited to hostile action. Davenport v. State, 184 Ga. App. 214, 361 S.E.2d 219 (1987).

Acquittal of use of obscene language does not bar prosecution for using abusive language. — Acquittal of offense of using obscene and vulgar language will not bar prosecution for using abusive language to and of another. McIntosh v. State, 116 Ga. 511, 42 S.E. 783 (1902).

Fact that the defendant is ultimately acquitted of the charge of using opprobrious and abusive language does not make the defendant's original arrest illegal thereby entitling the defendant to resist arrest. Brooks v. State, 166 Ga. App. 704, 305 S.E.2d 436 (1983).

State must prove that words were without provocation. Fuller v. State, 72 Ga. 213 (1883); Dowling v. State, 7 Ga. App. 613, 67 S.E. 697 (1910).

Sufficiency of provocation is question for jury under all circumstances of case. Dyer v. State, 99 Ga. 20, 25 S.E. 609, 59 Am. St. R. 228 (1896); Ray v. State, 113 Ga. 1065, 39 S.E. 408 (1901); Wiggins v. State, 17 Ga. App. 748, 88 S.E. 411 (1916); Cleveland v. State, 22 Ga. App. 124, 95 S.E. 540 (1918).

That there was no provocation may be shown by circumstantial as well as direct evidence. Hays v. State, 10 Ga. App. 823, 74 S.E. 314 (1912).

Considerations in determining sufficiency of provocation. — Sufficiency of provocation depends not only upon language employed, but upon relationship of parties, state of feeling existing between them, tone, manner, and spirit in which language is used, and other circumstances from which jury may in some instances determine that words apparently or ordinarily innocent afforded reasonable cause for provocation under the circumstances or in the manner in which they were used. Hamilton v. State, 9 Ga. App. 402, 71 S.E. 593 (1911).

Fact that opprobrious words are true is not a legal provocation for their use. Dyer v. State, 99 Ga. 20, 25 S.E. 609, 59 Am. St. R. 228 (1896).

Banging on windows sufficient to justify brief investigatory stop. — Trial court erred by granting defendant's motion to suppress the evidence of a DUI violation obtained during the traffic stop of the defendant's vehicle by committing clear error in finding that the officer lacked a reasonable, articulable suspicion to stop defendant's car as the officer had

General Consideration (Cont'd)

received a radio dispatch and had obtained information from a fast-food restaurant employee that suspicious persons in a vehicle were banging on the windows and cursing at the fast-food restaurant. Such actions involved engaging in disorderly conduct, which was an allegation of a crime that gave the officer grounds for conducting a brief traffic stop of defendant's vehicle for investigatory purposes. State v. Melanson, 291 Ga. App. 853, 663 S.E.2d 280 (2008).

Middle finger not fighting words or true threat. — Defendant's act of raising the defendant's middle finger as a form of protest, without more, did not rise to the level "fighting words" or a "true threat" and, thus, could not support a disorderly conduct conviction. Freeman v. State, 302 Ga. 181, 805 S.E.2d 845 (2017).

Sufficiency of evidence. — Evidence authorized a jury charge on the offense of "fighting words," where defendant schoolteacher was indicted for battery and cruelty to children, and the proof tracked the indictment which set forth words defendant said to a student which would fall within the parameter of those forbidden. Shuler v. State, 195 Ga. App. 849, 395 S.E.2d 26 (1990).

When the victim testified that defendant made a dozen or more calls for the purpose of annoying and harassing the victim, there was sufficient evidence to find defendant guilty of the offense of harassing phone calls, even though there was evidence of only one call in which defendant threatened the victim. Saldona v. State, 219 Ga. App. 762, 466 S.E.2d 655 (1996).

Evidence that, while seated at a bar, defendant, in a loud and boisterous voice, thrust obscenities upon innocent bystanders was sufficient for conviction. Tucker v. State, 233 Ga. App. 314, 504 S.E.2d 250 (1998).

Evidence that defendant made a statement that was plainly designed to goad or incite a security officer who was trying to handle a difficult situation involving several people at an amusement park supported a conviction for a violation of O.C.G.A. § 16-11-39(a)(3). Evans v. State, 241 Ga. App. 32, 525 S.E.2d 780 (1999).

Trial court properly denied defendant's motion for directed verdict on a charge of disorderly conduct, since the evidence did not demonstrate that defendant's cursing and violent movement of defendant's car door was directed solely at the passenger, as defendant alleged, but was directed at the victim; furthermore, there was evidence that defendant "violently" shook defendant's keys at the victim, and the victim saw defendant actually damaging the victim's vehicle by scratching it with a key. Crutcher v. State, 267 Ga. App. 410, 599 S.E.2d 353 (2004).

Evidence was insufficient to sustain defendant's conviction for disorderly conduct arising out of an incident in which defendant drove by a police officer, yelled "you bastards" out of the window, and continued down the road because the words used by defendant did not constitute fighting words under O.C.G.A. § 16-11-39(a)(3), in that defendant was not engaged in a face-to-face confrontation with the officer tending to incite an immediate breach of the peace when the words were spoken, but instead, defendant continued to travel past the officer in defendant's vehicle. Turner v. State, 274 Ga. App. 731, 618 S.E.2d 607 (2005).

Because defendant, who was angry and upset, approached a former girlfriend's home uninvited when it was late at night, shouted profanities and fighting words to the victim and the victim's husband, and demanded to talk to the victim and called the victim a "bitch," the evidence was sufficient to support defendant's conviction for disorderly conduct, in violation of O.C.G.A. § 16-11-39(a)(3); defendant uttered "fighting words" that were abusive and would have naturally tended to provide a violent resentment, and the words were profane in that they would have clearly offended a reasonable person's sense of decency. Thomas v. State, 276 Ga. App. 79, 622 S.E.2d 421 (2005).

Since the only statements shown in the evidence to have been uttered by the defendant to an officer during an incident at a store were, "Arrest me" and "Damn, I'm calling corporate office" did not rise to the level of required "fighting words," the defendant's conviction of disorderly conduct, O.C.G.A. § 16-11-39(a)(3), was not sup-

ported by sufficient evidence. Sandidge v. State, 279 Ga. App. 86, 630 S.E.2d 585 (2006).

Victim and other witness testified that the defendant followed the victim through a store, "got in the victim's face," pointed a finger at the victim, loudly called the victim a bitch and a whore, and accused the victim of forgery. This evidence was sufficient to allow the jury to conclude that the victim was placed in the requisite fear for the victim's safety to support the defendant's disorderly conduct conviction. Mayhew v. State, 299 Ga. App. 313, 682 S.E.2d 594 (2009), cert. denied, No. S09C2059, 2009 Ga. LEXIS 786 (Ga. 2009).

Trial court did not err in convicting the defendant of driving under the influence of alcohol to the extent it was less safe for the defendant to drive, possession of an open container of alcoholic beverage, and disorderly conduct because the testimony of the driver accosted by the defendant and the arresting officer was sufficient to enable a rational jury to find the defendant guilty beyond a reasonable doubt of the charged crimes. Corbin v. State, 305 Ga. App. 768, 700 S.E.2d 868 (2010).

Evidence was sufficient to convict the defendant of felony obstruction, possession of a knife during the commission of a felony, and disorderly conduct because the defendant slammed the refrigerator door twice, breaking items stored in the door; the victim called 9-1-1 seeking assistance for a domestic dispute in progress; when one of the responding officers told the defendant that the defendant would have to leave the house as the victim did not want the defendant living there, the defendant told the officer that the officer could not make the defendant leave; and, when the officer unsnapped a taser from the taser's holster and approached the defendant, the defendant grabbed a knife with an eight-inch blade and threatened the officers with the knife. Owens v. State, 329 Ga. App. 455, 765 S.E.2d 653 (2014).

Evidence was sufficient to convict the defendant of disorderly conduct because, although there was no first-person testimony regarding whether the defendant's conduct placed the defendant's father and brother in fear for their safety, and the brother later recanted the brother's statements at trial, the appellate court could not say that there was no evidence that the defendant's conduct placed the defendant's father and brother in such fear, given the brother's statement to the 911 dispatcher that the home's residents felt unsafe; the fact that the father told the brother to call the police; the urgency of the brother's request for police assistance; and the other circumstances presented. Haygood v. State, 338 Ga. App. 189, 789 S.E.2d 404 (2016).

Continuance improperly denied after amendment to accusation. — Because the state amended its accusation against the defendant before trial to include additional charges of disorderly conduct, in violation of O.C.G.A. § 16-11-39, O.C.G.A. § 17-7-71(f) required the trial court to grant the defendant's request for a continuance, and erred when it failed to do so; moreover, defendant had no pretrial notice of the need to defend against a tumultuous act that did not physically harm the wife. Martin v. State, 278 Ga. App. 465, 629 S.E.2d 134 (2006).

General and special demurrer to an amended accusation was properly overruled where the accusation followed the language of O.C.G.A. § 16-11-39 and, so, was sufficient in substance, and where the special demurrer did not raise a claim with sufficient specificity. Tucker v. State, 233 Ga. App. 314, 504 S.E.2d 250 (1998).

Court erred in permitting jury to consider verdict of guilty but mentally ill on a misdemeanor count of making harassing telephone calls, as that verdict is available only in felony cases. Converting, on appeal, the verdict to guilty would have constituted an impermissible substantive change in the verdict, violative of O.C.G.A. § 17-9-40, and therefore the verdict had to be reversed. Levin v. State, 222 Ga. App. 123, 473 S.E.2d 582 (1996).

Trial court erred in excluding evidence of provocation. — Because the trial court erroneously excluded evidence relevant to the defendant's claim that there was provocation sufficient to excuse the use of the fighting words the defendant uttered and made the basis of a disorderly conduct charge, the defendant's

General Consideration (Cont'd)

conviction was reversed; moreover, in determining whether or not there was sufficient provocation for the defendant's use of the fighting words uttered, the jury was entitled to consider all the facts and circumstances tending to prove provocation, not just facts and circumstances contemporaneous with the use of the fighting words. Talmadge v. State, 287 Ga. App. 332, 651 S.E.2d 469 (2007).

Conviction of using opprobrious words to police officers was reversed when the trial court instructed the jury that "if, without provocation, he uses to, or of another, or in his presence opprobrious or abusive words" then the defendant could be found guilty because by inserting the disjunctive "or" into the language of the statute, the court thereby instructed the jury that the jury would be authorized to convict for words spoken "of another, or in his presence," which means that opprobrious words, whispered by a person in the solitude of that person's own home, would be a crime. Dinnan v. State, 253 Ga. 334, 320 S.E.2d 180 (1984).

Cited in Lovell v. State, 226 Ga. 880, 178 S.E.2d 174 (1970); Watts v. Six Flags Over Ga., Inc., 140 Ga. App. 106, 230 S.E.2d 34 (1976); Rozier v. State, 140 Ga. App. 356, 231 S.E.2d 131 (1976); D.G.D. v. State, 142 Ga. App. 266, 235 S.E.2d 673 (1977); Baker v. State, 240 Ga. 431, 241 S.E.2d 187 (1978); Deavers v. Standridge, 144 Ga. App. 673, 242 S.E.2d 331 (1978); Davis v. State, 147 Ga. App. 107, 248 S.E.2d 181 (1978); Blanton v. State, 152 Ga. App. 205, 262 S.E.2d 476 (1979); Davis v. State, 153 Ga. App. 528, 265 S.E.2d 857 (1980); Curry v. State, 248 Ga. 183, 281 S.E.2d 604 (1981); Tuggle v. Wilson, 248 Ga. 335, 282 S.E.2d 110 (1981); Dumas v. State, 159 Ga. App. 517, 284 S.E.2d 33 (1981); Williamson v. State, 249 Ga. 851, 295 S.E.2d 305 (1982); Stephenson v. State, 171 Ga. App. 938, 321 S.E.2d 433 (1984); Boyette v. State, 172 Ga. App. 683, 324 S.E.2d 540 (1984); Gay v. State, 179 Ga. App. 430, 346 S.E.2d 877 (1986); Hall v. State, 201 Ga. App. 328, 411 S.E.2d 274 (1991); Person v. State, 206 Ga. App. 324, 425 S.E.2d 371 (1992); Rooks v. State, 217 Ga. App. 643, 458 S.E.2d 667 (1995); State v. Vines, 226 Ga. App. 779, 487 S.E.2d 521 (1997); Vines v. State, 269 Ga. 438, 499 S.E.2d 630 (1998); Johnson v. State, 255 Ga. App. 537, 566 S.E.2d 349 (2002); Helton v. State, 284 Ga. App. 777, 644 S.E.2d 896 (2007); In the Interest of E.W., 290 Ga. App. 95, 658 S.E.2d 854 (2008); In the Matter of Jones, 293 Ga. 264, 744 S.E.2d 6 (2013); Harper v. State, 337 Ga. App. 57, 785 S.E.2d 691 (2016).

Constitutionality

Former Code 1933, § 26-2610 (see now O.C.G.A. § 16-11-39) was not an unconstitutional violation of U.S. Const., amends. 1 and 14. Grantham v. State, 151 Ga. App. 707, 261 S.E.2d 445 (1979).

Former Code 1933, § 26-2610(a) (see now O.C.G.A. § 16-11-39(a)) was not unconstitutional on its face as being vague and overbroad resulting in inconsistent application by state courts. Lamar v. Banks, 684 F.2d 714 (11th Cir. 1982).

Section constitutional. — While it is matter for jury determination in each case whether under all facts and circumstances words used were of such character that their use was calculated to cause breach of peace, as well as to determine whether there was provocation sufficient to excuse their use, this does not render former Code 1933, § 26-6303 (see now O.C.G.A. § 16-11-39) so vague, indefinite, and uncertain as to render it unconstitutional. Wilson v. State, 223 Ga. 531, 156 S.E.2d 446 (1967), cert. denied, 390 U.S. 911, 88 S. Ct. 839, 19 L. Ed. 2d 885 (1968).

State has power constitutionally to punish "fighting" words under carefully drawn statutes not also susceptible of application to protected expression. Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972); Lamar v. Banks, 684 F.2d 714 (11th Cir. 1982).

Unconstitutional application. — Former paragraph (3), relating to engaging in indecent or disorderly conduct in the presence of another in a public place, impermissibly delegated basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Satterfield v. State, 260 Ga. 427, 395 S.E.2d 816 (1990).

Concurrent jurisdiction with federal labor legislation. — Even under situations involving the jurisdiction of the National Labor Relations Act the state has retained concurrent jurisdiction to enforce this section as it directly relates to the prevention of, or incitement to, immediate violence or to the prevention of the threat of immediate violence or violent injury. State v. Klinakis, 206 Ga. App. 318, 425 S.E.2d 665 (1992).

When accusation included only former paragraph (1) of section, conviction under former paragraph (2) violated due process. Sarnie v. State, 247 Ga. 414, 276 S.E.2d 589 (1981).

Former paragraph (3) void for vagueness. — Because former paragraph (3), relating to engaging in indecent or disorderly conduct in the presence of another in a public place, failed to define in any manner what was meant by indecent or disorderly conduct, it did not provide fair warning to persons of ordinary intelligence as to what it prohibited so that they could act accordingly. The paragraph was therefore too vague to justify the imposition of criminal punishment for its violation. Satterfield v. State, 260 Ga. 427, 395 S.E.2d 816 (1990).

Paragraph (2) (now paragraph (a)(4)) was not so vague, indefinite, and overbroad as to violate due process and equal protection clauses of state and federal Constitutions. Breaux v. State, 230 Ga. 506, 197 S.E.2d 695 (1973).

Language not protected by First Amendment. — Language such as calling a police officer a "[goddamn] liar" and telling the officer to "[fuck off]" is not protected by the First Amendment. Evans v. State, 188 Ga. App. 347, 373 S.E.2d 52 (1988).

Obscene, Vulgar, or Profane Language

Nature of language proscribed. — Former Code 1933, § 26-2610 (see now O.C.G.A. § 16-11-39) refers to utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Breaux v. State, 230 Ga. 506, 197 S.E.2d 695 (1973).

When language is obscene, vulgar, or profane. — Language is obscene, vulgar, or profane when, under circumstances and manner in which such utterance was made, it would clearly offend a reasonable person's sense of decency. Breaux v. State, 230 Ga. 506, 197 S.E.2d 695 (1973); Grantham v. State, 151 Ga. App. 707, 261 S.E.2d 445 (1979).

Evidence was sufficient to sustain "fighting words" conviction of schoolteacher who told student "go to the bathroom and beat off." Shuler v. State, 195 Ga. App. 849, 395 S.E.2d 26 (1990).

Officer's testimony that defendant used disgustingly profane words which disparaged the dignity of motherhood, childhood, and the intellect of police officers while defendant was being served with a traffic citation was sufficient to authorize finding defendant guilty of using fighting words. Nunn v. State, 224 Ga. App. 312, 480 S.E.2d 614 (1997).

Defendant's comment to a female during an interview that, "You have nice tits" did not constitute language so opprobrious or inherently abusive as to be "fighting words" within the meaning of the law. Lundgren v. State, 238 Ga. App. 425, 518 S.E.2d 908 (1999).

Sufficient evidence—swear words yelled and screamed. — Evidence of explicit swear words that defendant screamed and cursed at a victim was sufficient to support defendant's misdemeanor disorderly conduct under O.C.G.A. § 16-11-39. McCarty v. State, 269 Ga. App. 299, 603 S.E.2d 666 (2004).

For the use of obscene words to constitute a disturbance of the peace, it must be made in the presence of a member of the "public" and not merely a police officer. Woodward v. Gray, 241 Ga. App. 847, 527 S.E.2d 595 (2000), overruled on other grounds, Stryker v. State, 297 Ga. App. 493, 677 S.E.2d 680 (2009).

In an action alleging, inter alia, assault and false arrest, three police officers were entitled to official immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) because the officers' conduct in arresting plaintiff arrestee for disorderly conduct

Obscene, Vulgar, or Profane Language (Cont'd)

was based on a discretionary act and was not shown to be based on actual malice; the arrestee used expletives in telling the officers to leave the arrestee's home after the officers executed an arrest warrant for the arrestee's fiancé, and there were children who heard the offensive language outside the arrestee's home. Selvy v. Morrison, 292 Ga. App. 702, 665 S.E.2d 401 (2008).

Directing obscene language at officer. — Officer had probable cause to arrest the defendant for disorderly conduct based on the defendant's yelling obscenities at the officer. Therefore, the defendant's claim that the defendant was entitled to a directed verdict on charges of misdemeanor obstruction of an officer, O.C.G.A. § 16-10-24(a), because the defendant was resisting an unlawful arrest was without merit. Steillman v. State, 295 Ga. App. 778, 673 S.E.2d 286 (2009).

Defendant was not lawfully arrested for disorderly conduct because Georgia law did not criminalize obscene language; therefore, because the defendant was not in lawful custody, the defendant could not be charged with escape in violation of O.C.G.A. § 16-10-52(a)(2) when the defendant elbowed the chief of police during a pat down and ran from the scene. Meadows v. State, 303 Ga. App. 40, 692 S.E.2d 708 (2010).

Defendant officer was not entitled to qualified immunity on plaintiff's Fourth Amendment claim because the officer had no arguable probable cause to arrest the plaintiff for misdemeanor obstruction under O.C.G.A. § 16-10-24(a) or disorderly conduct under O.C.G.A. § 16-11-39(a)(3) as it was undisputed that the plaintiff uttered an epithet as the plaintiff was walking away, thus ending any face-to-face confrontation, and that the officer was the only one to hear the phrase. Further, there was no arguable probable cause to arrest the plaintiff. Merenda v. Tabor, No. 5:10-CV-493 (MTT), 2012 U.S. Dist. LEXIS 63782 (M.D. Ga. May 7, 2012), aff'd in part, appeal dismissed in part, No. 12-12562, 2013 U.S. App. LEXIS 2351 (11th Cir. Ga. 2013).

Juvenile's statement insufficient to sustain delinquency adjudication. — Delinquency adjudication based on an allegation of disorderly conduct, O.C.G.A. § 16-11-39, was improper because the mere fact that the juvenile used a curse word to emphasize the juvenile's statement did not support the disorderly conduct charge; the statement was not sufficiently threatening, belligerent, profane, or abusive enough to constitute "fighting words", and Georgia law no longer criminalized the use of unprovoked language threatening an immediate breach of peace, which was obscene, vulgar, or profane, that was directed to a person older than 14 years of age, unless such language also constituted "fighting words." Moreover, the surrounding circumstances, including the juvenile's behavior and other statements, did not transform the words into fighting words. In re L. E. N., 299 Ga. App. 133, 682 S.E.2d 156 (2009).

Defendant with another who was using profane language. — Defendant's arrest outside the defendant's home for disorderly conduct was not supported by probable cause because there was no evidence that the defendant used fighting words, although a woman with the defendant was cursing police officers, or that the defendant placed officers in fear for their safety. Williams v. State, 305 Ga. App. 657, 700 S.E.2d 653 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct, § 8. 16A Am. Jur. 2d, Constitutional Law, §§ 522, 523.

C.J.S. — 11 C.J.S., Breach of the Peace, § 2 et seq. 67 C.J.S., Obscenity, §§ 12, 13. 86 C.J.S., Telecommunications, § 173.

ALR. — Abusive language addressed to trespasser as breach of peace, 34 A.L.R. 575.

Abusive or insulting language addressed to group as breach of peace, 34 A.L.R. 580.

Participation of student in demonstra-

tion on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 A.L.R.3d 551.

Validity, construction, and application of state criminal statute forbidding use of telephone to annoy or harass, 95 A.L.R.3d 411.

Gesture as punishable obscenity, 99 A.L.R.3d 762.

Validity and construction of statute or ordinance prohibiting use of "obscene" language in public, 2 A.L.R.4th 1331.

Validity and construction of statutes or ordinances prohibiting profanity or profane swearing or cursing, 5 A.L.R.4th 956.

Insulting words addressed directly to peace officer as breach of peace or disorderly conduct, 14 A.L.R.4th 1252.

Telephone calls as nuisance, 53 A.L.R.4th 1153.

Validity, construction, and application of state statutes and municipal ordinances proscribing failure or refusal to obey police officer's order to move on, or disperse, on street, as disorderly conduct, 52 A.L.R.6th 125.

Validity, construction, and operation of federal disorderly conduct regulation (36 C.F.R. § 2.34), 180 A.L.R. Fed. 637.

16-11-39.1. Harassing communications; venue; separate offenses; impact on free speech.

(a) A person commits the offense of harassing communications if such person:

(1) Contacts another person repeatedly via telecommunication, e-mail, text messaging, or any other form of electronic communication for the purpose of harassing, molesting, threatening, or intimidating such person or the family of such person;

(2) Threatens bodily harm via telecommunication, e-mail, text messaging, or any other form of electronic communication;

(3) Telephones another person and intentionally fails to hang up or disengage the connection; or

(4) Knowingly permits any device used for telecommunication, e-mail, text messaging, or any other form of electronic communication under such person's control to be used for any purpose prohibited by this subsection.

(b) Any person who commits the offense of harassing communications shall be guilty of a misdemeanor.

(c) The offense of harassing communications shall be considered to have been committed in the county where:

(1) The defendant was located when he or she placed the telephone call or transmitted, sent, or posted an electronic communication; or

(2) The telephone call or electronic communication was received.

(d) Any violation of this Code section shall constitute a separate offense and shall not merge with any other crimes set forth in this title.

(e) This Code section shall not apply to constitutionally protected speech. (Code 1981, § 16-11-39.1, enacted by Ga. L. 1995, p. 574, § 3; Ga. L. 2015, p. 203, § 2-1/SB 72.)

Cross references. — Free speech, U.S. Const., amend I.

Law reviews. — For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001). For annual survey on criminal law, see 68 Mercer L. Rev. 93 (2016).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Code Section 16-11-39, as it read prior to the 1995 amendment, are included in the annotations for this Code section.

Constitutionality. — O.C.G.A. §§ 16-11-39.1 and 46-5-21 which prohibit telephone calls for purpose of harassing are clear and can be readily understood by people of ordinary intelligence seeking to avoid their violation, and therefore these sections are not unconstitutionally vague or broad and do not violate due process. Constantino v. State, 243 Ga. 595, 255 S.E.2d 710, cert. denied, 444 U.S. 940, 100 S. Ct. 293, 62 L. Ed. 2d 306 (1979) (decided under § 16-11-39, prior to 1995 amendment).

Statute does not provide private remedy. — In a case in which a car buyer appealed a district court's entry of summary judgment in favor of a lender, O.C.G.A. § 16-11-39.1, Georgia's criminal harassment statute addressing harassing telephone calls did not provide for a private remedy. Goia v. Citifinancial Auto, 499 Fed. Appx. 930 (11th Cir. Dec. 3, 2012) (Unpublished).

Accusation not defective. — When the accusation mistakenly cited the statute dealing with disorderly conduct, instead of the harassing phone call statute, it was not fatally defective because the accusation properly described the elements of the crime charged. Corsini v. State, 238 Ga. App. 383, 519 S.E.2d 39 (1999).

Lesser included offense of terroristic threats. — Depending on the facts, harassing telephone calls may be an included offense of terroristic threats. Todd v. State, 230 Ga. App. 849, 498 S.E.2d 142 (1998).

Alternative ways of telephone harassment. — Former paragraph (4) demonstrated that a person may commit the offense of "harassing phone calls" in separate and alternative ways. Hazelton v. State, 200 Ga. App. 61, 406 S.E.2d 569 (1991) (decided under former § 16-11-39).

Allowing use of phone under defendant's control. — Defendant, who was charged with committing the offense of harassing phone calls by repeatedly telephoning the victims personally, could not be convicted of the offense of harassing phone calls on the theory that the defendant knowingly permitted a telephone under the defendant's control to be used for the purpose of harassing one of the victims. Hazelton v. State, 200 Ga. App. 61, 406 S.E.2d 569 (1991) (decided under § 16-11-39, prior to 1995 amendment).

Communication of threats by telephone. — Felonious threats under O.C.G.A. § 16-11-37(a) are not reduced to misdemeanor because those threats are communicated by telephone. Usher v. State, 143 Ga. App. 843, 240 S.E.2d 214 (1977) (decided under § 16-11-39, prior to 1995 amendment).

Plaintiff failed to show that it was entirely unreasonable for the sheriff's deputy to believe, under the particular circumstances, that the deputy had probable cause to arrest the plaintiff for making harassing phone calls and terroristic threats. Plaintiff did not contend that the alleged phone calls, assuming the calls were made and without regard to the identity of the caller, do not arguably establish the elements of both statutes: (1) repeated communications for the purpose of harassment, and (2) a threat to burn or damage the victims's house with the intention of terrorizing the victim. Taylor v.

Taylor, 649 F.3d 737 (11th Cir. May 3, 2016) (Unpublished).

Evidence of previous conflict admissible to show intent. — Trial court did not abuse the court's discretion in allowing evidence of the previous conflict between the defendant and the condominium association because the testimony was relevant to whether the defendant made telephone calls with the intent of harassing the victim in violation of O.C.G.A. § 16-11-39.1(a) and only incidentally reflected on the defendant's character.

Crime is committed whenever one repeatedly places telephone calls to another person with the specific intent described, regardless of whether the caller speaks to the victim. Harris v. State, 190 Ga. App. 805, 380 S.E.2d 345 (1989) (decided under § 16-11-39, prior to 1995 amendment).

Sexual propositions by unidentified caller as offensive to reasonable person's sense of decency. — In prosecution for obscene phone calls, jury could properly find that statements over telephone — that "I want to get between your legs," and "I want to get in bed with you" — which were made unidentified and unprovoked on two occasions, would clearly offend a reasonable person's sense of decency. Grantham v. State, 151 Ga. App. 707, 261 S.E.2d 445 (1979) (decided under § 16-11-39, prior to 1995 amendment).

Single telephone call insufficient. — When the prosecution alleged that a certain date was a material element of the charge, evidence of only one telephone call on that date was insufficient to convict for repeated telephoning under the harassing phone call statute. Sarver v. State, 206 Ga. App. 459, 426 S.E.2d 48 (1992), overruled on other grounds, Whittle v. State, 210 Ga. App. 841, 437 S.E.2d 842 (1993) (decided under § 16-11-39, prior to 1995 amendment).

Single telephone call sufficient. — Language of the statute shows that a person can be charged with committing the offense by conduct constituting either a single telephone call that threatens bodily harm or repeated calls for the purpose of annoying, harassing, or molesting another. State v. Mack, 231 Ga. App. 499, 499 S.E.2d 355 (1998).

Evidence sufficient to support conviction. — See Boyd v. State, 200 Ga. App. 591, 409 S.E.2d 44, cert. denied, 1991 Ga. LEXIS 584 (Ga. Sept. 6, 1991). (decided under § 16-11-39, prior to 1995 amendment); Hall v. State, 226 Ga. App. 380, 487 S.E.2d 41 (1997); Corsini v. State, 238 Ga. App. 383, 519 S.E.2d 39 (1999); Moss v. State, 245 Ga. App. 811, 538 S.E.2d 876 (2000).

Evidence was sufficient to support defendant's conviction for making harassing telephone calls regarding the five calls defendant made to the victim seeking payments on a loan that defendant's finance company had made to the victim, as the evidence showed defendant called the victim repeatedly for the purpose of threatening the victim, that defendant did threaten the victim with bodily harm, and that the victim was frightened by the threatening nature of the calls. Sams v. State, 271 Ga. App. 617, 610 S.E.2d 592 (2005).

Evidence supported the defendant's conviction under O.C.G.A. § 16-11-39.1(a) because the state presented sufficient evidence that the defendant repeatedly called the victim despite the victim's insistence not to do so, during which calls the defendant placed fear in the victim by being verbally abusive through the use of profanity and threats of bodily harm. Kilby v. State, 289 Ga. App. 457, 657 S.E.2d 567 (2008).

Sufficient evidence supported a defendant's conviction under O.C.G.A. § 16-11-39.1(a) for harassing phone calls because only a single telephone call was necessary as the call threatened the victim with language that implied bodily harm; the defendant's message stated that the defendant wanted the victim to die and that there would be a car accident. Williams v. State, 296 Ga. App. 707, 675 S.E.2d 596 (2009).

Defendant's conviction was affirmed because there was sufficient evidence for the trial judge to have found beyond a reasonable doubt that the defendant placed telephone calls to the girlfriend for the purpose of harassing her in violation of O.C.G.A. § 16-11-39.1. Turnbull v. State, 317 Ga. App. 719, 732 S.E.2d 786 (2012).

Jury instructions. — When the defendant's defense to the charge of terroristic

threats was that the defendant never made any threats or intimidating remarks at all, the trial court did not err in refusing to give the defendant's request for an instruction on the offense of harassing telephone calls. Todd v. State, 230 Ga. App. 849, 498 S.E.2d 142 (1998).

Trial court did not err in the court's charge to the jury on the insignificance of the word "solely" as used in the accusation against defendant charging defendant with harassment, because the state, pursuant to O.C.G.A. § 16-11-39.1(a), was only required to prove that defendant made repeated calls for the purpose of harassing the victim, not solely for the purpose of harassing the victim. Roseberry v. State, 251 Ga. App. 856, 554 S.E.2d 816 (2001).

Sentence not excessive. — While a defendant provided no statutory or legal authority for a claim that the sentence for the defendant's conviction for harassing phone calls under O.C.G.A. § 16-11-39.1(a) was excessive and thus abandoned the claim under Ga. Ct. App. R. 25(c)(2), the defendant's sentence of 12 months probated, 240 hours of community service, completion of an anger management counseling program, no contact with the victim, and a $500 fine was within the range provided in O.C.G.A. § 17-10-3(a)(1). Williams v. State, 296 Ga. App. 707, 675 S.E.2d 596 (2009).

Cited in Northington v. State, 287 Ga. App. 96, 650 S.E.2d 760 (2007).

RESEARCH REFERENCES

ALR. — Validity, construction and application of Telephone Consumer Protection Act (47 USCS § 227), 132 A.L.R. Fed. 625.

Validity, construction and application of Telephone Consumer Protection Act (47 U.S.C.A. § 227) — state cases, 77 A.L.R.6th 1.

16-11-39.2. Unlawful conduct during 9-1-1 call.

(a) As used in this Code section, the term:

(1) "Call" shall have the same meaning as set forth in paragraph (2.1) of Code Section 46-5-122.

(2) "False report" means the fabrication of an incident or crime or of material information relating to an incident or crime which the person making the report knows to be false at the time of making the report.

(3) "Harass" means to knowingly and willingly engage in any conduct directed toward a communications officer that is likely to impede or interfere with such communications officer's duties, that threatens such communication officer or any member of his or her family, or that places any member of the public served or to be served by 9-1-1 service in danger of injury or delayed assistance.

(4) "Harassing" means the willful use of opprobrious and abusive language which has no legitimate purpose in relation to imparting information relevant to an emergency call.

(5) "9-1-1" means a public safety answering point as defined in paragraph (15) of Code Section 46-5-122. The term "9-1-1" also means

the digits, address, Internet Protocol address, or other information used to access or initiate a call to a public safety answering point.

(b) A person commits the offense of unlawful conduct during a 9-1-1 telephone call if he or she:

(1) Without provocation, uses obscene, vulgar, or profane language with the intent to intimidate or harass a 9-1-1 communications officer;

(2) Calls or otherwise contacts 9-1-1, whether or not conversation ensues, for the purpose of annoying, harassing, or molesting a 9-1-1 communications officer or for the purpose of interfering with or disrupting emergency telephone service;

(3) Calls or otherwise contacts 9-1-1 and fails to hang up or disengage the connection for the intended purpose of interfering with or disrupting emergency service;

(4) Calls or otherwise contacts 9-1-1 with the intention to harass a communications officer; or

(5) Calls or otherwise contacts 9-1-1 and makes a false report.

(c) Any person who violates subsection (b) of this Code section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $500.00 or 12 months in jail, or both.

(d) Any violation of subsection (b) of this Code section shall be considered to have been committed in any county where such call to or contact with 9-1-1 originated or in any county where the call to or contact with 9-1-1 was received. (Code 1981, § 16-11-39.2, enacted by Ga. L. 2007, p. 318, § 1/HB 394.)

Cross references. — Emergency telephone 9-1-1 system, § 46-5-120 et seq.

Law reviews. — For survey article on local government law, see 59 Mercer L. Rev. 285 (2007).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting. — Any misdemeanor offenses arising under O.C.G.A. § 16-11-39.2(b) are designated as offenses for which those charged are to be fingerprinted. 2010 Op. Att'y Gen. No. 2010-2.

16-11-40. Unlawful use of emergency exit door; penalty.

It shall be unlawful to use an emergency exit door after having violated Code Section 16-8-14. Any person convicted of violating this Code section shall be guilty of and punished as for a misdemeanor. (Code 1981, § 16-11-40, enacted by Ga. L. 2018, p. 342, § 1/HB 890.)

Effective date. — This Code section became effective July 1, 2018.

Editor's notes. — This Code section formerly pertained to criminal defamation. The former Code section was based on Laws 1833, Cobb's 1851 Digest, p. 812; Code 1863, § 4407; Code 1868, § 4448; Code 1873, § 4521; Code 1882, § 4521; Penal Code 1895, § 335; Penal Code 1910, § 340; Code 1933, § 26-2101; Code 1933, § 26-2804, enacted by Ga. L. 1968, p. 1249, § 1 and was repealed by Ga. L. 2015, p. 385, § 3-1/HB 252, effective July 1, 2015.

16-11-40.1. Definitions; identification of minors; criminal offense.

(a) As used in this Code section, the term:

(1) "Minor" means an individual who is under the age of 18 years.

(2) "Nudity" shall have the same meaning as set forth in Code Section 16-11-90.

(3) "Obscene depiction" means a visual depiction of an individual displaying nudity or sexually explicit conduct.

(4) "Sexually explicit conduct" shall have the same meaning as set forth in Code Section 16-12-100.

(b) No person shall intentionally cause a minor to be identified as the individual in an obscene depiction in such a manner that a reasonable person would conclude that the image depicted was that of such minor. Such identification shall include, without limitation, the minor's name, address, telephone number, e-mail address, username, or other electronic identification. Such identification shall also include the electronic imposing of the facial image of a minor onto an obscene depiction.

(c) Any person convicted of violating this Code section shall be guilty of a misdemeanor; provided, however, that upon a second or subsequent violation of this Code section, he or she shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one nor more than five years, a fine of not more than $100,000.00, or both.

(d) A person shall be subject to prosecution in this state pursuant to Code Section 17-2-1 for any conduct made unlawful by this Code section in which such person engages while:

(1) Either within or outside of this state if, by such conduct, the person commits a violation of this Code section which involves an individual who resides in this state; or

(2) Within this state if, by such conduct, the person commits a violation of this Code section which involves an individual who resides within or outside this state.

(e) The provisions of subsection (b) of this Code section shall not apply to:

(1) The activities of law enforcement and prosecution agencies in the investigation and prosecution of criminal offenses; or

(2) An image and identification made pursuant to or in anticipation of a civil action.

(f) Any violation of this Code section shall constitute a separate offense and shall not merge with any other crimes set forth in this title. (Code 1981, § 16-11-40.1, enacted by Ga. L. 2015, p. 1212, § 1A/SB 160.)

Cross references. — Internet safety policies in public schools, § 20-2-324. Internet safety policies in public libraries, § 20-5-5.

16-11-41. Public drunkenness.

(a) A person who shall be and appear in an intoxicated condition in any public place or within the curtilage of any private residence not his own other than by invitation of the owner or lawful occupant, which condition is made manifest by boisterousness, by indecent condition or act, or by vulgar, profane, loud, or unbecoming language, is guilty of a misdemeanor.

(b) This Code section shall not be construed to affect the powers delegated to counties or to municipal corporations to pass laws to punish drunkenness or disorderly conduct within their respective limits. (Code 1933, § 26-2607, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Intoxication as relieving person from criminal responsibility for actions, § 16-3-4. Driving under influence of alcohol, § 40-6-391.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Penal Code 1910, § 442 are included in the annotations for this Code section.

Constitutionality. — O.C.G.A. § 16-11-41 is not vague and overbroad either on its face or as applied. Welch v. State, 251 Ga. 197, 304 S.E.2d 391 (1983).

Purpose of former Penal Code 1910, § 442 was to protect public streets, highways, and private residences not so much from presence of drunkards as from conduct of drunkards as described in that section; in other words, a person while intoxicated can be on the public streets or highways, or within the curtilage of private residences, without violating the law, provided the person does not then and there make manifest the person's drunken condition by some disorderly conduct as set out in the section. Ramey v. State, 40 Ga. App. 658, 151 S.E. 55 (1929) (decided under former Penal Code 1910, § 442).

Former Code 1933, § 26-2607 (see now O.C.G.A. § 16-11-41) was designed as protection against a drunkard's conduct and not the drunkard's mere presence. Scarborough v. State, 231 Ga. 7, 200 S.E.2d 115 (1973).

Probable cause to arrest. — Police officer had probable cause to arrest the defendant for public drunkenness after the officer testified that the defendant was intoxicated, was visible from the public street, was acting loudly and boisterously, and was so loud that people leaving a nearby church could have heard defen-

dant. United States v. Floyd, 281 F.3d 1346 (11th Cir. 2002).

Public place. — "Public place" element of the statute is broadly interpreted to include any place where the defendant's conduct may reasonably be viewed by people other than members of the defendant's family or household; thus, a defendant who is on private property by invitation of the property owner can be found to be in a public place. United States v. Floyd, 281 F.3d 1346 (11th Cir. 2002).

Outward manifestation must be shown. — Supreme Court has construed O.C.G.A. § 16-11-41 to require that the accused not only be or appear intoxicated, but that the accused manifest this condition by boisterous, vulgar, loud, profane, or unbecoming language. The Court of Appeals has further held that unless one of these outward manifestations or acts is present, no violation of the law has occurred. Welch v. State, 251 Ga. 197, 304 S.E.2d 391 (1983).

To effectuate a valid arrest, arrestee's drunken condition must be manifested by boisterousness, or by indecent condition or act, or by vulgar, profane, loud, or unbecoming language. Adams v. State, 153 Ga. App. 41, 264 S.E.2d 532 (1980), overruled on other grounds by State v. Thackston, 289 Ga. 412, 716 S.E.2d 517 (2011).

Merely being intoxicated is not sufficient to satisfy requirements of public drunkenness statute, for condition must be manifested by "boisterousness, or by indecent condition or act, or by vulgar, profane, loud, or unbecoming language." Peoples v. State, 134 Ga. App. 820, 216 S.E.2d 604 (1975).

It is no crime merely to be intoxicated. Ferguson v. City of Doraville, 186 Ga. App. 430, 367 S.E.2d 551 (1988).

Mere drunkenness in public place was not enough for conviction under former Code 1933, § 26-2607 (see now O.C.G.A. § 16-11-41); to complete the offense, drunkenness must be made manifest by at least one of the ways specified in that section. Scarborough v. State, 231 Ga. 7, 200 S.E.2d 115 (1973).

Offense of public drunkenness can be manifested only in manner designated by former Code 1933, § 26-2607 (see now O.C.G.A. § 16-11-41). Young v. State, 155 Ga. App. 598, 271 S.E.2d 731 (1980).

Mere drunkenness, manifested by extreme stupor or deep sleep, does not violate law, for state penalizes only that drunkenness which is manifested in manner specifically pointed out by former Penal Code 1910, § 442. Ramey v. State, 40 Ga. App. 658, 151 S.E. 55 (1929) (decided under former Penal Code 1910, § 442).

Drunkenness manifested by extreme stupor or deep sleep is not violation of state law. Peoples v. State, 134 Ga. App. 820, 216 S.E.2d 604 (1975); Moore v. State, 155 Ga. App. 299, 270 S.E.2d 713 (1980).

Merely staggering is not sufficient manifestation to justify arrest under former Code 1933, § 26-2607 (see now O.C.G.A. § 16-11-41). Young v. State, 155 Ga. App. 598, 271 S.E.2d 731 (1980).

Staggering, accompanied by loud and boisterous conduct. — Where unimpeached testimony of officer was that defendant, in addition to staggering, was loud and boisterous prior to defendant's arrest, there was sufficient probable cause for defendant's warrantless arrest. Young v. State, 155 Ga. App. 598, 271 S.E.2d 731 (1980).

Defendant's loud and boisterous actions in defendant's backyard and driveway were sufficiently "public" to support a charge of public drunkenness. Ridley v. State, 176 Ga. App. 669, 337 S.E.2d 382 (1985).

Indecency of condition or act is question of fact. Scarborough v. State, 231 Ga. 7, 200 S.E.2d 115 (1973).

"Indecent condition or act" does not include concept of recklessness, nor necessarily that of impropriety, unless the impropriety is such as to offend sentiments of delicacy and modesty universally recognized in civilized communities. Scarborough v. State, 231 Ga. 7, 200 S.E.2d 115 (1973).

Indecency of condition or act involves notions of public decency. — When conviction rests on "indecent condition or act", the question comes down to whether the defendant's condition was such as to offend public decency. Scarborough v. State, 231 Ga. 7, 200 S.E.2d 115 (1973).

Public drunkness not included in crime of public indecency. — With regard to the defendant's conviction for felony public indecency for urinating in public, the trial court's refusal to charge the jury on public drunkenness as a lesser included offense of public indecency was not error because the crime of public drunkenness requires proof that the defendant was intoxicated, which the crime of public indecency does not; the crime of public drunkenness does not require a lewd exposure of sexual organs, which is required by the crime of public indecency; and, the crime of public indecency requires proof of exposure of sexual organs, which the crime of public drunkenness does not; therefore, the offense of public drunkeness was not included in the crime of public indecency. Loya v. State, 321 Ga. App. 430, 740 S.E.2d 382 (2013).

There was sufficient evidence to sustain defendant's conviction of public drunkenness, where defendant was exiting a private club with defendant's spouse when defendant threw a beer cooler which struck the spouse, defendant smelled of alcohol, and defendant was "cussing," "talking pretty loud," or was "irate and acting unreasonably." Patterson v. State, 181 Ga. App. 68, 351 S.E.2d 503 (1986).

Officer had probable cause to arrest a defendant for public drunkenness and for obstruction of a police officer. Loudly playing a car radio in the early morning hours and quarreling with police officers was sufficient to constitute boisterousness for purposes of O.C.G.A. § 16-11-41, and once the defendant refused to exit the defendant's vehicle and physically and verbally threatened an officer, officers had probable cause to arrest the defendant for obstructing a police officer under O.C.G.A. § 16-10-24. Martin v. State, 291 Ga. App. 363, 662 S.E.2d 185 (2008).

Not a lesser included offense of DUI. — Public drunkenness is not, as a matter of fact or law, a lesser included offense of driving under the influence of alcohol to the extent it is less safe to drive. State v. Tweedell, 209 Ga. App. 13, 432 S.E.2d 619 (1993).

Conviction of obstruction despite acquittal of public drunkenness. — Because the police officer had grounds to arrest defendant for public drunkenness and was in the process of making the arrest when defendant shouted at the officer and attempted to walk away, conviction of defendant for misdemeanor obstruction was proper even though defendant was acquitted on the charge of public drunkenness. Williams v. State, 228 Ga. App. 698, 492 S.E.2d 708 (1997).

Cited in Moore v. State, 133 Ga. App. 28, 209 S.E.2d 662 (1974); LaRue v. State, 137 Ga. App. 762, 224 S.E.2d 837 (1976); Evans v. City of Tifton, 138 Ga. App. 374, 226 S.E.2d 471 (1976); Goldstein v. City of Atlanta, 141 Ga. App. 701, 234 S.E.2d 344 (1977); Davis v. State, 147 Ga. App. 107, 248 S.E.2d 181 (1978); Latty v. State, 154 Ga. App. 751, 270 S.E.2d 38 (1980); Johnson v. State, 201 Ga. App. 88, 410 S.E.2d 189 (1991); Simmons v. State, 281 Ga. App. 654, 637 S.E.2d 70 (2006); Tomsic v. Marriott Int'l, Inc., 321 Ga. App. 374, 739 S.E.2d 521 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Probate courts are without jurisdiction to try cases or to accept cash bonds for the offense of public drunkenness. 1984 Op. Att'y Gen. No. U84-13.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct, § 9.

ALR. — Location of offense as "public" within requirement of enactments against drunkenness, 8 A.L.R.3d 930.

Validity, construction, and effect of Uniform Alcoholism and Intoxication Treatment Act, 85 A.L.R.3d 701.

16-11-42. Refusal to relinquish telephone party line in case of emergency; false request on party line as to emergency; warning printed in telephone books.

(a) A person is guilty of a misdemeanor when he fails to relinquish a telephone party line consisting of subscriber line telephone circuit with two or more main telephone stations connected therewith, each having a distinctive ring or telephone number, after he has been requested to do so to permit another to place a call in an emergency, in which property or human life is in jeopardy and the prompt summoning of aid is essential, to a fire or police department or for medical aid or ambulance service, if the party line at the time of the request is not being used for any such other emergency call. Any person who shall request the use of the party line by falsely stating that the same is needed for any of such purposes, knowing the statement to be false, is guilty of a misdemeanor.

(b) In every telephone directory distributed to the general public in this state, in which is listed the call numbers of any telephones located within this state, except such as are distributed solely for business advertising purposes, commonly known as classified telephone directories, there shall be printed in type not smaller than the smallest type appearing on the same page, a notice setting forth the substance of subsection (a) of this Code section preceded by the word "warning" printed in boldface type. (Ga. L. 1960, p. 915, §§ 1, 2; Code 1933, § 26-2912, enacted by Ga. L. 1968, p. 1249, § 1.)

RESEARCH REFERENCES

ALR. — Liability of otherwise uninvolved person for harm resulting from refusal to telephone, or to allow another to telephone, for emergency or police help, 37 A.L.R.4th 1196.

16-11-43. Obstructing highways, streets, sidewalks, or other public passages.

A person who, without authority of law, purposely or recklessly obstructs any highway, street, sidewalk, or other public passage in such a way as to render it impassable without unreasonable inconvenience or hazard and fails or refuses to remove the obstruction after receiving a reasonable official request or the order of a peace officer that he do so, is guilty of a misdemeanor. (Laws 1818, Cobb's 1851 Digest, p. 949; Ga. L. 1859, p. 65, § 1; Code 1863, § 4481; Ga. L. 1865-66, p. 233, § 2; Code 1868, § 4527; Code 1873, § 4617; Code 1882, § 4617; Penal Code 1895, § 715; Penal Code 1910, § 766; Code 1933, § 26-8106; Code 1933, § 26-2611, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Further provisions regarding obstruction of public roads, § 32-6-1. Authorization of security personnel to deny entrance and remove persons from state property, § 50-16-14.

Administrative rules and regulations. — Powers and procedures for enforcement of highway obstruction laws, Official Compilation of the Rules and Regulations of the State of Georgia, State Department of Transportation, § 672-4-.06.

JUDICIAL DECISIONS

"Public passage" construed. — Establishment of temporary barricades along or around a public passage during the legitimate exercise of police power does not, by confining an area for certain purpose, render such passage nonpublic or "private," such that a person unlawfully crossing the barricade and obstructing the confined area could quixotically claim to have committed no crime. McMonagle v. State, 196 Ga. App. 300, 395 S.E.2d 821 (1990).

Sufficient evidence that road was public passage. — There was sufficient evidence that the road the defendant obstructed was a public passage when there was testimony that the road was used by not only residents, but by the traveling public, that the county maintained the road, that the road was on an official county map, and that the road was assigned a county road number. The offense did not require government ownership of the area blocked. Davis v. State, 288 Ga. App. 66, 653 S.E.2d 358 (2007).

Questions of fact remained as to abandonment. — In a dispute over access to a roadway, the trial court erred in granting the plaintiff summary judgment enjoining the defendant from obstructing the road because questions of fact remained as to abandonment of the roadway leading to the plaintiff's property, which were not properly resolved by the trial court. Pass v. Forestar GA Real Estate Group, Inc., 337 Ga. App. 244, 787 S.E.2d 250 (2016), cert. denied, No. S16C1689, 2016 Ga. LEXIS 830 (Ga. 2016).

Protesters as obstruction. — Refusal of abortion protesters to remove themselves after warning, and their going "limp" and playing "dead," constituted "obstruction" within the meaning of O.C.G.A. § 16-11-43. McMonagle v. State, 196 Ga. App. 300, 395 S.E.2d 821 (1990).

Evidence showing that abortion protesters purposely or recklessly obstructed a public passage in such a way as to render the passage impassable without unreasonable inconvenience or hazard, and then failed to remove the obstacle after receiving a reasonable official request or order of a peace officer to do so, authorized the protestors' convictions for obstructing the public passage in violation of O.C.G.A. § 16-11-43. Hoover v. State, 198 Ga. App. 481, 402 S.E.2d 92 (1991).

No merger with obstructing law enforcement officer conviction. — It was not error to refuse to merge the defendant's convictions of obstructing a public passage and obstructing a law enforcement officer under O.C.G.A. §§ 16-10-24 and 16-11-43 when the defendant placed a barricade across a roadway, refused to move the barricade when ordered to do so, and then, after the officer moved the barricade, replaced the barricade after being told by the officer not to do so. The evidence required to prove the obstruction of a law enforcement officer was not "used up" in proving the obstruction of a public passage. Davis v. State, 288 Ga. App. 66, 653 S.E.2d 358 (2007).

Cited in Cearley v. State, 193 Ga. App. 652, 388 S.E.2d 751 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 40 Am. Jur. 2d, Highways, Streets, and Bridges, §§ 594, 595.

C.J.S. — 40 C.J.S., Highways, §§ 355, 356.

ALR. — Right of abutting owner to use street including sidewalk, for the deposit, exhibition, or sale of goods, 6 A.L.R. 1314.

Liability of one maintaining a tempo-

rary obstruction upon sidewalk while loading or unloading vehicle, 61 A.L.R. 1054.

Right of abutting owner to change grade of sidewalk, 62 A.L.R. 401.

Public speaking in street, 62 A.L.R. 404.

Liability of owner or occupant for condition of covering over opening or vault in sidewalk, 62 A.L.R. 1067; 31 A.L.R.2d 1334.

Liability of public contractor to property owner for obstructing street, 68 A.L.R. 1510.

Emission of smoke or steam from private premises, or existence of other conditions thereon, as ground of liability of owner or occupant for results of an automobile accident on the highway, 150 A.L.R. 371.

Duty of highway construction contractor to provide temporary way or detour around obstruction, 29 A.L.R.2d 876.

Owner's liability, under legislation forbidding domestic animals to run at large on highways, as dependent on negligence, 34 A.L.R.2d 1285.

Liability of motor vehicle owner or operator to one on sidewalk struck by overhang of vehicle, 34 A.L.R.3d 425.

Governmental liability for failure to reduce vegetation obscuring view at railroad crossing or at street or highway intersection, 22 A.L.R.4th 624.

Liability of private landowner for vegetation obscuring view at highway or street intersection, 69 A.L.R.4th 1092.

16-11-44. Maintaining a disorderly house.

A person who keeps and maintains, either by himself or others, a common, ill-governed, and disorderly house, to the encouragement of gaming, drinking, or other misbehavior, or to the common disturbance of the neighborhood or orderly citizens, is guilty of a misdemeanor. (Laws 1833, Cobb's 1851 Digest, p. 815; Code 1863, § 4422; Ga. L. 1865-66, p. 233, § 2; Code 1868, § 4463; Code 1873, § 4537; Code 1882, § 4537; Penal Code 1895, § 392; Penal Code 1910, § 383; Code 1933, § 26-6103; Code 1933, § 26-2614, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Right of civil action for public nuisance generally, § 41-1-3.

JUDICIAL DECISIONS

Constitutionality. — So far as O.C.G.A. § 16-11-44 proscribes the maintenance of a house to the encouragement of gambling on a general, customary, or habitual basis, one of ordinary intelligence is given fair notice of what conduct is prohibited and arbitrary, and erratic arrests and convictions are not encouraged. The same view of the statute applies to its proscription of the maintenance of a "drinking" house, and it will not be struck down as facially unconstitutional where there are a substantial number of situations to which it may constitutionally be applied, despite the phrase "other misbehavior." Hubbard v. State, 256 Ga. 637, 352 S.E.2d 383 (1987).

Disorderly house defined. — Disorderly house is a house in which people abide or to which people resort to the disturbance of the neighborhood or for purposes which are injurious to public morals, health, convenience, or safety. Fanning v. State, 17 Ga. App. 316, 86 S.E. 731 (1915); Martin v. State, 62 Ga. App. 902, 10 S.E.2d 254 (1940).

Section refers to general, customary, common habits of a house. — Noise must qualify as loud noises, cursing, swearing, etc., that are ordinary and

usual, or common occurrences; not casual and at long intervals, but rather the general, customary, common habits of the house. Brewer v. State, 129 Ga. App. 118, 199 S.E.2d 109 (1973), overruled on other grounds, State v. Folk, 238 Ga. App. 206, 521 S.E.2d 194 (1999).

Noises and misbehavior must be ordinary and usual or common, and disturbance must be general. — To constitute a disorderly house, noises, etc., must be ordinary and usual, or common, and disturbance must be general, and not of only one person in a thickly settled neighborhood. Heard v. State, 113 Ga. 444, 39 S.E. 118 (1901).

Noise must exist for sufficient length of time to render it "common"; and noises made and improper acts committed therein must disturb peace and comfort of quite a number of orderly citizens in neighborhood. Brewer v. State, 129 Ga. App. 118, 199 S.E.2d 109 (1973), overruled on other grounds, State v. Folk, 238 Ga. App. 206, 521 S.E.2d 194 (1999).

Defendants must be occupants of or must maintain house in question. — In order for defendants to be charged for this offense, they must be occupants of the house or keep and maintain the house in some manner. Being visitors only is not sufficient. Brewer v. State, 129 Ga. App. 118, 199 S.E.2d 109 (1973), overruled on other grounds, State v. Folk, 238 Ga. App. 206, 521 S.E.2d 194 (1999).

Playing stereo so as to disturb one person for less than an hour. — When only person shown to be disturbed by defendant's stereo was complainant, who informed officer that noise had been maintained for a period of less than one hour, circumstances are insufficient to warrant arrest. Clare v. State, 135 Ga. App. 281, 217 S.E.2d 638 (1975).

Disorderly house may be gaming house, tippling shop, or bawdy house. Martin v. State, 62 Ga. App. 902, 10 S.E.2d 254 (1940).

Accusation against maintaining a disorderly house may include acts of lewdness as one of the other acts of misbehavior as stated in former Code 1933, § 26-6103 (see now O.C.G.A. § 16-11-44), and should acts of lewdness alone be relied upon for conviction, acts which constitute encouragement of lewdness must be openly and notoriously carried on, at least to extent of disturbing others. Cason v. State, 60 Ga. App. 626, 4 S.E.2d 713 (1939).

Repeated acts of fornication and adultery committed with defendant's knowledge and approval as establishing violation. Birdwell v. State, 112 Ga. App. 836, 146 S.E.2d 374 (1965).

Possession of prohibited liquors without revenue stamps. — To maintain a disorderly house requires more than control and possession of intoxicating and prohibited liquors on which revenue stamps have not been affixed. McBrayer v. State, 79 Ga. App. 132, 53 S.E.2d 216 (1949).

Offenses of furnishing alcohol to minors and maintaining a disorderly house did not merge, because each of the offenses had elements not required by the other and each prohibited a distinct type of criminal conduct. Tate v. State, 198 Ga. App. 276, 401 S.E.2d 549 (1991).

Indictment need not definitely set out acts constituting misbehavior. — Count in indictment charging that defendants "did keep and maintain a common, ill-governed, and disorderly house to the encouragement of idleness, drinking, and other misbehavior," is sufficiently specific, and is not subject to demurrer because it does not definitely set out acts constituting misbehavior. Jones v. State, 2 Ga. App. 433, 58 S.E. 559 (1907).

Court did not err in admitting evidence of general reputation of defendant's place of business charged as being operated as a disorderly house. Martin v. State, 62 Ga. App. 902, 10 S.E.2d 254 (1940).

Admissibility of evidence of previous gambling charges. — On trial of defendant for keeping and maintaining a disorderly house, it is not error to permit state to prove that, previous to indictment and during time in question, gambling devices had been found on defendant's premises, and that defendant had pleaded guilty to charges based thereon. Ballenger v. State, 60 Ga. App. 344, 4 S.E.2d 58 (1939).

Presumption that husband is head of house. — Wife can be convicted of

maintaining ill-governed house where at time of offense her husband is serving sentence in work camp, because presumption that husband is head of house is not applicable during protracted absence of husband. Kinney v. State, 80 Ga. App. 754, 57 S.E.2d 359 (1950).

Evidence sufficient for conviction. — Evidence showing that defendant had encouraged at least four different minors to drink alcoholic beverages in defendant's home on at least three different occasions was sufficient to sustain defendant's conviction for maintaining a disorderly house. Tate v. State, 198 Ga. App. 276, 401 S.E.2d 549 (1991).

Evidence insufficient for conviction. — Sufficient evidence did not support the defendant's conviction of keeping a disorderly house as a conviction required that there be evidence of customary habits of the house; here, although there was evidence of underage drinking at the party in question, there was no evidence that there had been underage drinking at previous parties held at the defendant's house. Beckom v. State, 286 Ga. App. 38, 648 S.E.2d 656 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Disorderly Houses, § 1 et seq.

16-11-45. Use of laser against aircraft.

(a) As used in this Code section, the term:

(1) "Laser" means any device that projects a beam or point of light by means of light amplification by stimulated emission of radiation or a device that emits light which simulates the appearance of a laser.

(2) "Laser pointer" means any device designed or used to amplify electromagnetic radiation by stimulated emission that emits a beam designed to be used by the operator as a pointer or highlighter to indicate, mark, or identify a specific position, place, item, or object.

(b) Except as otherwise provided in subsection (c) of this Code section, whoever knowingly and intentionally aims the beam of a laser pointer, or projects a laser, at an aircraft or at the flight path of an aircraft shall be guilty of a misdemeanor.

(c) Laser or laser pointer airspace uses that have been reviewed and approved by the Federal Aviation Administration are exempt from the provisions of this Code section. (Code 1981, § 16-11-45, enacted by Ga. L. 2012, p. 1142, § 2/SB 441.)

Editor's notes. — Ga. L. 2012, p. 1142, § 3/SB 441, not codified by the General Assembly, provides that this Code section applies to offenses committed on or after July 1, 2012.

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A. § 16-11-45 are offenses for which those charged are to be fingerprinted. 2012 Op.

Att'y Gen. No. 12-6.

ARTICLE 3

INVASIONS OF PRIVACY

Law reviews. — For article, "Defense Against Outrage and the Perils of Parasitic Torts," see 45 Ga. L. Rev. 107 (2010).

For notes on 1995 amendments and enactments of Code sections in this article, see 12 Ga. St. U.L. Rev. 128 and 138 (1995). For note, "Just You and Me and Netflix Makes Three: Implications for Allowing 'Frictionless Sharing' of Personally Identifiable Information under the Video Privacy Protection Act," see 20 J. Intell. Prop. L. 413 (2013).

PART 1

WIRETAPPING, EAVESDROPPING, SURVEILLANCE, AND RELATED OFFENSES

Law reviews. — For note, "The Online Zoom Lens: Why Internet Street-Level Mapping Technologies Demand Reconsideration of the Modern-Day Tort Notion of 'Public Privacy'," see 43 Ga. L. Rev. 575 (2009).

For comment on Bodrey v. Cape, 120 Ga. App. 859, 172 S.E.2d 643 (1969), see 7 Ga. St. B.J. 256 (1970).

JUDICIAL DECISIONS

Ga. L. 1968, p. 1249 generally defines and proscribes invasions of privacy. Bilbo v. State, 142 Ga. App. 716, 236 S.E.2d 847 (1977), rev'd on other grounds, 240 Ga. 601, 242 S.E.2d 21 (1978).

Various sections of Ga. L. 1968, p. 1249 must be construed together in order to determine legislative intent. Birge v. State, 142 Ga. App. 735, 236 S.E.2d 906 (1977), rev'd on other grounds, 240 Ga. 501, 241 S.E.2d 213, cert. denied, 436 U.S. 945, 98 S. Ct. 2847, 56 L. Ed. 2d 786 (1978).

Part not preempted by federal law. — O.C.G.A. P. 1, Art. 3, Ch. 11, T. 16 provides greater protection to individual privacy rights than the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. § 2510 et seq., and, accordingly, was not preempted thereby. Bishop v. State, 241 Ga. App. 517, 526 S.E.2d 917 (1999).

Cause of action for invasion of privacy through wiretapping not dependent on disclosure. — Georgia recognizes a cause of action for invasion of privacy through wiretapping irrespective of whether information obtained is published or disclosed. Awbrey v. Great Atl. & Pac. Tea Co., 505 F. Supp. 604 (N.D. Ga. 1980).

Cited in Satterfield v. State, 127 Ga. App. 528, 194 S.E.2d 295 (1972); Ansley v. Stynchcombe, 480 F.2d 437 (5th Cir. 1973); Cross v. Georgia, 581 F.2d 102 (5th Cir. 1978).

OPINIONS OF THE ATTORNEY GENERAL

Applicability to federal agencies. — O.C.G.A. P. 1, Art. 3, Ch. 11, T. 16, governing use of telephone service observing equipment, is inapplicable to agencies of United States. 1974 Op. Att'y Gen. No. 74-36.

RESEARCH REFERENCES

ALR. — Validity of statute or ordinance interfering with privacy in restaurants, 5 A.L.R. 965.

Bank's duty to customer or depositor not to disclose information as to his financial condition, 92 A.L.R.2d 900.

Investigations and surveillance, shadowing and trailing, as violation of right of privacy, 13 A.L.R.3d 1025.

Censorship and evidentiary use of unconvicted prisoners' mail, 52 A.L.R.3d 548.

Uninvited entry into another's living quarters as invasion of privacy, 56 A.L.R.3d 434.

Waiver or loss of right of privacy, 57 A.L.R.3d 16.

Taking unauthorized photographs as invasion of privacy, 86 A.L.R.3d 374.

Exchange among insurers of medical information concerning insured or applicant for insurance as invasion of privacy, 98 A.L.R.3d 561.

Permissible warrantless surveillance, under state communications interception statute, by state or local law enforcement officer or one acting in concert with officer, 27 A.L.R.4th 449.

Eavesdropping on extension telephone as invasion of privacy, 49 A.L.R.4th 430.

Intrusion by news-gathering entity as invasion of right of privacy, 69 A.L.R.4th 1059.

Bank's liability, under state law, for disclosing financial information concerning depositor or customer, 81 A.L.R.4th 377.

16-11-60. Definitions.

As used within this part, the term:

(1) "Device" means an instrument or apparatus used for overhearing, recording, intercepting, or transmitting sounds or for observing, photographing, videotaping, recording, or transmitting visual images and which involves in its operation electricity, electronics, or infrared, laser, or similar beams. Without limiting the generality of the foregoing, the term "device" shall specifically include any camera, photographic equipment, video equipment, or other similar equipment or any electronic, mechanical, or other apparatus which can be used to intercept a wire, oral, or electronic communication other than:

(A) Any telephone or telegraph instrument, equipment, or facility or any component thereof:

(i) Furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or

(ii) Being used by a provider of wire or electronic communication service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of his or her duties; or

(B) A hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(C) Focusing, lighting, or illuminating equipment, optical magnifying equipment; and

(D) A "pen register" or "trap and trace device" as defined in this Code section.

(2) "Pen register" means a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted; provided, however, that such information shall not include the contents of any communication; but such term does not include any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course its business.

(3) "Private place" means a place where there is a reasonable expectation of privacy.

(4) "Trap and trace device" means a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication; provided, however, that such information shall not include the contents of any communication. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3009, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1995, p. 1051, § 2; Ga. L. 2000, p. 875, § 1; Ga. L. 2002, p. 1432, § 2; Ga. L. 2015, p. 1046, § 1/SB 94.)

Editor's notes. — Ga. L. 2000, p. 875, § 3, not codified by the General Assembly, provides that: "This Act shall become effective July 1, 2000, and shall apply with respect to offenses committed on or after that effective date. This Act shall not affect or abate the status as a crime of any offense committed prior to that effective date, nor shall the prosecution of such crime be abated as a result of this Act."

Ga. L. 2002, p. 1432, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'Georgia's Support of the War on Terrorism Act of 2002'."

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 79 (2015). For annual survey on criminal law, see 68 Mercer L. Rev. 93 (2016).

For note on 2000 amendment of this Code section, see 17 Ga. St. U.L. Rev. 102 (2000). For note, "Location, Location, Location: A 'Private' Place and Other Ailments of Georgia Surveillance Law Curable Through Alignment with the Federal System," 46 Ga. L. Rev. 1089 (2012).

JUDICIAL DECISIONS

Word "intercepting" is to be interpreted as "aural acquisition," consistent with the definition in 18 U.S.C. § 2510(4). Evans v. State, 252 Ga. 312, 314 S.E.2d

421, cert. denied, 469 U.S. 826, 105 S. Ct. 106, 83 L. Ed. 2d 50 (1984).

Word "transmitting" was included to cover such instruments and apparatus as miniature transmitters and microphones used to overhear private conversations other than those conducted by telephone. Evans v. State, 252 Ga. 312, 314 S.E.2d 421, cert. denied, 469 U.S. 826, 105 S. Ct. 106, 83 L. Ed. 2d 50 (1984).

Pen register is a "device" whose use requires a warrant under state law. Ellis v. State, 256 Ga. 751, 353 S.E.2d 19 (1987); Duncan v. State, 259 Ga. 278, 379 S.E.2d 507 (1989).

Inductor coil in junction box not "device." — An inductor coil which is placed in the junction box servicing each phone to be tapped is not a device used to overhear, record, or intercept defendant's conversation within the meaning of O.C.G.A. §§ 16-11-60 and 16-11-64. Evans v. State, 252 Ga. 312, 314 S.E.2d 421, cert. denied, 469 U.S. 826, 105 S. Ct. 106, 83 L. Ed. 2d 50 (1984).

Reasonable expectation of privacy. — Subjective belief, without more, does not constitute reasonable expectation of privacy necessary to invoke protection of this chapter. Meyer v. State, 150 Ga. App. 613, 258 S.E.2d 217 (1979).

A 16-year-old girl had a reasonable expectation of privacy in her bedroom, even from her father. Snider v. State, 238 Ga. App. 55, 516 S.E.2d 569 (1999).

Police station is not a "private place" within the meaning of O.C.G.A. § 16-11-60. Thompson v. State, 191 Ga. App. 906, 383 S.E.2d 339, cert. denied, 191 Ga. App. 923, 383 S.E.2d 339 (1989).

Cited in Satterfield v. State, 127 Ga. App. 528, 194 S.E.2d 295 (1972); State v. Birge, 240 Ga. 501, 241 S.E.2d 213 (1978); Green v. State, 250 Ga. 610, 299 S.E.2d 544 (1983); Quintrell v. State, 231 Ga. App. 268, 499 S.E.2d 117 (1998); Gavin v. State, 292 Ga. App. 402, 664 S.E.2d 797 (2008).

RESEARCH REFERENCES

ALR. — Observation through binoculars as constituting unreasonable search, 48 A.L.R.3d 1178; 59 A.L.R.5th 615.

Construction and application of 18 USCS § 2511(1)(a) and (b), providing criminal penalty for intercepting, endeavoring to intercept, or procuring another to intercept wire, oral, or electronic communication, 122 A.L.R. Fed. 597.

What constitutes "device which is primarily useful for the surreptitious interception of wire, oral, or electronic communication," under 18 USCS § 2512(1)(B), prohibiting manufacture, possession, assembly, sale of such device, 129 A.L.R. Fed. 549.

Applicability, in civil action, of provisions of Omnibus Crime Control and Safe Streets Act of 1968, prohibiting interception of communications (18 USCS § 2511 (1)), to interception by spouse, or spouse's agent, of conversations of other spouse, 139 A.L.R. Fed 517.

Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. § 2520) authorizing civil cause of action by person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of Act, 164 A.L.R. Fed. 139.

16-11-61. Peeping Toms.

(a) It shall be unlawful for any person to be a "peeping Tom" on or about the premises of another or to go about or upon the premises of another for the purpose of becoming a "peeping Tom."

(b) As used in this Code section, the term "peeping Tom" means a person who peeps through windows or doors, or other like places, on or about the premises of another for the purpose of spying upon or

invading the privacy of the persons spied upon and the doing of any other acts of a similar nature which invade the privacy of such persons. (Ga. L. 1919, p. 386, §§ 1, 2; Code 1933, §§ 26-2001, 26-2002; Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3002, enacted by Ga. L. 1968, p. 1249, § 1.)

Law reviews. — For note, "Pedophilia, Exhibitionism, and Voyeurism: Legal Problems in the Deviant Society," see 4 Ga. L. Rev. 149 (1969).

For comment on Ellenberg v. Pinkerton's, Inc., 125 Ga. App. 648, 188 S.E.2d 911 (1972), holding employer defendant may not use independent contractor defense to invasion of privacy suit resulting from actions of investigator working in his behalf, see 9 Ga. St. B.J. 519 (1973).

JUDICIAL DECISIONS

Specific intent is an essential element of "Peeping Tom" offense, in that it must appear that accused was on or about premises of another for purpose, i.e., intention, of spying upon or invading privacy of another, or of doing acts which tend to invade privacy of another. Davis v. State, 115 Ga. App. 338, 154 S.E.2d 462 (1967).

Gravamen of the offense of Peeping Tom is being on the premises of another for the purpose of spying or invading privacy. Longenbach v. State, 202 Ga. App. 863, 415 S.E.2d 546 (1992).

Prohibited act is "peeping" with requisite wrongful purpose or intent. — If act and intent are in concurrence, the crime is complete regardless of what or who may or may not be subject to perpetrator's unlawful gaze. Chance v. State, 154 Ga. App. 543, 268 S.E.2d 737 (1980).

Whether intended victims within view. — Guilt or innocence not dependent on whether persons defendant sought to spy upon were actually in defendant's view. Butts v. State, 97 Ga. App. 465, 103 S.E.2d 450 (1958).

State is not required to show that a person is actually spied upon, the gravamen of the offense being that the spying took place regardless of whether the attempt to invade the privacy of another was successful. McBride v. State, 196 Ga. App. 398, 396 S.E.2d 78 (1990).

Peeping Tom Statute is sufficiently definite to apprise one of ordinary intelligence of conduct which statute forbids. Lemon v. State, 235 Ga. 74, 218 S.E.2d 818 (1975), cert. denied, 425 U.S. 906, 96 S. Ct. 1499, 47 L. Ed. 2d 757 (1976).

Publication or commercialization of information obtained. — In offense of invasion of privacy of another, the gravamen or essence of the action is not publication or commercialization of the information obtained. There is nothing in the decided cases of this state which indicates any such limitation or qualification of the right, and a person's privacy is invaded even though the information obtained is restricted to immediate transgressor. Publication or commercialization may aggravate, but individual's right to privacy is invaded and violated nevertheless by original act of intrusion. McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939).

Introduction of similar transactions. — In a trial for rape, burglary, assault and sodomy, where the evidence was such as to authorize the inference that the perpetrator had most likely been a "peeping Tom" before the perpetrator committed the instant burglaries and sexual offenses against the victims, the trial court did not err in allowing the state to introduce, as sufficiently similar transactions, evidence that, on two other occasions, defendant had been a "peeping Tom" without having committed the additional offenses of burglary and sexual assault. Muckle v. State, 202 Ga. App. 733, 415 S.E.2d 299, cert. denied, 202 Ga. App. 907, 415 S.E.2d 299 (1992).

Trial court did not abuse its discretion in admitting similar transaction evidence of defendant's involvement in a Peeping Tom incident where defendant was arrested for entering a women's restroom at

another college and peering into an occupied stall with a hand mirror in defendant's trial for Peeping Tom and burglary with intent to commit rape as: (1) the state offered the testimony of the alleged victim in that Peeping Tom incident, a young, black, female student, as well as the testimony of the arresting police officer, for the appropriate purpose of showing defendant's bent of mind, course of conduct, and identity; (2) the alleged victim's testimony provided sufficient evidence that defendant peered into the bathroom stall while she was in it; and (3) the acts were sufficiently similar. Howard v. State, 266 Ga. App. 281, 596 S.E.2d 627 (2004).

Relevant evidence. — Testimony of a person arrested for allegedly staring into the complainant's windows from the next-door driveway, explaining that the person went there to take an employee with the person on the person's daily visits to the person's institutionalized retarded child, was relevant. Rosenthal v. Hudson, 183 Ga. App. 712, 360 S.E.2d 15 (1987) (action for malicious prosecution).

Impact of multiple sclerosis on ability to commit offense should be investigated. — Defendant, who was convicted of violating Georgia's Peeping Tom Statute, O.C.G.A. § 16-11-61, was entitled to a new trial since defendant's counsel failed to investigate the impact of defendant's multiple sclerosis, which might have been sufficient to create a reasonable doubt as to whether defendant acted with the purpose of spying on the victim. Fedak v. State, 304 Ga. App. 580, 696 S.E.2d 421 (2010).

When proof at variance with indictment. — Allegation in the indictment as to the identity of the victim was mere surplusage, and the failure to prove the allegation was not a fatal variance requiring reversal of defendant's conviction. McBride v. State, 196 Ga. App. 398, 396 S.E.2d 78 (1990).

Evidence sufficient for conviction. — See Banks v. State, 178 Ga. App. 54, 341 S.E.2d 859 (1986); In re J.G., 188 Ga. App. 856, 374 S.E.2d 796 (1988); Emerson v. State, 217 Ga. App. 284, 458 S.E.2d 657 (1995); Smith v. State, 238 Ga. App. 605, 520 S.E.2d 13 (1999); Brown v. State, 242 Ga. App. 858, 531 S.E.2d 409 (2000).

Cited in Terrell v. State, 124 Ga. App. 117, 183 S.E.2d 24 (1971); State v. Birge, 240 Ga. 501, 241 S.E.2d 213 (1978); Drake v. State, 245 Ga. 798, 267 S.E.2d 237 (1980); Barron v. State, 158 Ga. App. 172, 279 S.E.2d 299 (1981); Lemon v. State, 161 Ga. App. 692, 289 S.E.2d 789 (1982); Elmore v. Atlantic Zayre, Inc., 178 Ga. App. 25, 341 S.E.2d 905 (1986); English v. State, 282 Ga. App. 552, 639 S.E.2d 551 (2006).

RESEARCH REFERENCES

ALR. — Investigations and surveillance, shadowing and trailing, as violation of right of privacy, 13 A.L.R.3d 1025.

Criminal prosecution of video or photographic voyeurism, 120 A.L.R.5th 337.

16-11-62. Eavesdropping, surveillance, or intercepting communication which invades privacy of another; divulging private message.

It shall be unlawful for:

(1) Any person in a clandestine manner intentionally to overhear, transmit, or record or attempt to overhear, transmit, or record the private conversation of another which shall originate in any private place;

(2) Any person, through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activi-

ties of another which occur in any private place and out of public view; provided, however, that it shall not be unlawful:

(A) To use any device to observe, photograph, or record the activities of persons incarcerated in any jail, correctional institution, or other facility in which persons who are charged with or who have been convicted of the commission of a crime are incarcerated, provided that such equipment shall not be used while the prisoner is discussing his or her case with his or her attorney;

(B) For an owner or occupier of real property to use for security purposes, crime prevention, or crime detection any device to observe, photograph, or record the activities of persons who are on the property or an approach thereto in areas where there is no reasonable expectation of privacy;

(C) To use for security purposes, crime prevention, or crime detection any device to observe, photograph, or record the activities of persons who are within the curtilage of the residence of the person using such device. A photograph, videotape, or record made in accordance with this subparagraph, or a copy thereof, may be disclosed by such resident to the district attorney or a law enforcement officer and shall be admissible in a judicial proceeding, without the consent of any person observed, photographed, or recorded; or

(D) For a law enforcement officer or his or her agent to use a device in the lawful performance of his or her official duties to observe, photograph, videotape, or record the activities of persons that occur in the presence of such officer or his or her agent;

(3) Any person to go on or about the premises of another or any private place, except as otherwise provided by law, for the purpose of invading the privacy of others by eavesdropping upon their conversations or secretly observing their activities;

(4) Any person intentionally and secretly to intercept by the use of any device, instrument, or apparatus the contents of a message sent by telephone, telegraph, letter, or by any other means of private communication;

(5) Any person to divulge to any unauthorized person or authority the content or substance of any private message intercepted lawfully in the manner provided for in Code Section 16-11-65;

(6) Any person to sell, give, or distribute, without legal authority, to any person or entity any photograph, videotape, or record, or copies thereof, of the activities of another which occur in any private place and out of public view without the consent of all persons observed; or

(7) Any person to commit any other acts of a nature similar to those set out in paragraphs (1) through (6) of this Code section which invade the privacy of another. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3001, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 1100, § 1; Ga. L. 1985, p. 149, § 16; Ga. L. 2000, p. 491, § 1; Ga. L. 2000, p. 875, § 2; Ga. L. 2015, p. 1046, § 2/SB 94.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2000, a comma was deleted following "detection" in subparagraphs (2)(B) and (2)(C), respectively.

Editor's notes. — Ga. L. 2000, p. 875, § 3, not codified by the General Assembly, provides that: "This Act shall become effective July 1, 2000, and shall apply with respect to offenses committed on or after that effective date. This Act shall not affect or abate the status as a crime of any offense committed prior to that effective date, nor shall the prosecution of such crime be abated as a result of this Act."

Law reviews. — For annual survey on domestic relations, see 65 Mercer L. Rev. 107 (2013). For article on domestic relations, see 66 Mercer L. Rev. 65 (2014). For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 79 (2015).

For note on 2000 amendment of this Code section, see 17 Ga. St. U.L. Rev. 102 (2000). For note, "Location, Location, Location: A 'Private' Place and Other Ailments of Georgia Surveillance Law Curable Through Alignment with the Federal System," see 46 Ga. L. Rev. 1089 (2012).

For comment on Ellenberg v. Pinkerton's, Inc., 125 Ga. App. 648, 188 S.E.2d 911 (1972), holding employer defendant may not use independent contractor defense to invasion of privacy suit resulting from actions of investigator working in his behalf, see 9 Ga. St. B.J. 519 (1973). For comment on Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509 (1977), see 29 Mercer L. Rev. 351 (1977). For comment, "Lawful or Unlawful: Tape-recording Phone Calls?," see 10 Ga. St. B.J. 44 (No. 4, 2004).

JUDICIAL DECISIONS

Analysis

General Consideration
Waiver of Right to Privacy

General Consideration

Right of privacy is not absolute. — Right of privacy must be kept within its proper limits, and in its exercise must be made to accord with rights of those who have other liberties, as well as rights of any person who may be properly interested in matters which are claimed to be of purely private concern. Bodrey v. Cape, 120 Ga. App. 859, 172 S.E.2d 643 (1969).

Former Code 1933, § 26-3001 (see now O.C.G.A. § 16-11-62) did not violate right of privacy when interpreted to refer only to third parties. Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509, on remand, 142 Ga. App. 802, 237 S.E.2d 243 (1977).

Subparagraph (2)(C) held irreconcilable. — Under Ga. Laws 2000, p. 491, § 1, one who surreptitiously records the activities of another within the curtilage of his or her home has done nothing unlawful because O.C.G.A. § 16-11-62(2)(C) creates an exception to the general prohibition set forth in § 16-11-62 but under Ga. Law 2000, p. 875, § 2, the same conduct is deemed unlawful; thus, the two statutes pertaining to the same conduct are irreconcilably inconsistent, therefore, subparagraph (2)(C) does not survive. Rutter v. Rutter, 294 Ga. 1, 749 S.E.2d 657 (2013) (decided prior to the amendment to Code Section 28-9-5 enacted by Ga. L. 2014, p. 866, § 28/SB 340). (The version of Code Section 16-11-62 that was in effect on the date of this decision was subsequently reenacted and adopted by the General Assembly in 2014, by Ga. L. 2014,

p. 866, § 54/SB 340.).

Manifest intent of legislature in enacting former Code 1933, § 26-3001 (see now O.C.G.A. § 16-11-62) was revealed by its plain and unambiguous language in paragraph (1) that "any person" was prohibited from intentionally transmitting or recording in a clandestine manner the private conversation of another person which originates in a private place unless one of the statutory exceptions is met. Mitchell v. State, 142 Ga. App. 802, 237 S.E.2d 243 (1977).

O.C.G.A. § 16-11-62 protects all persons from invasions upon their privacy, including interspousal invasions. Ransom v. Ransom, 253 Ga. 656, 324 S.E.2d 437 (1985).

Both federal and Georgia law prohibit only clandestine taping by persons not parties to the conversations. Parrott v. Wilson, 707 F.2d 1262 (11th Cir.), cert. denied, 464 U.S. 936, 104 S. Ct. 344, 78 L. Ed. 2d 311 (1983).

Former Code 1933, § 26-3001 (see now O.C.G.A. § 16-11-62) implicitly refers to persons who are not parties to conversation. Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509, on remand, 142 Ga. App. 802, 237 S.E.2d 243 (1977).

Most reasonable interpretation of statute and of the intention of the legislature in adopting the statute is that the statute should not apply to one who is a party to the conversation. State v. Birge, 240 Ga. 501, 241 S.E.2d 213, cert. denied, 436 U.S. 945, 98 S. Ct. 2847, 56 L. Ed. 2d 786 (1978); Fetty v. State, 268 Ga. 365, 489 S.E.2d 813 (1997).

Former Code 1933, § 26-3001 (see now O.C.G.A. § 16-11-62) was inapposite when related to one who was a party to the conversation itself. One does not intercept or overhear a conversation that was made directly to that person. The person was not an eavesdropper nor does the person have the conversation under surveillance. Cross v. State, 128 Ga. App. 837, 198 S.E.2d 338 (1973).

Former Code 1933, § 26-3001 (see now O.C.G.A. § 16-11-62) did not prohibit actual parties to conversation from recording or divulging the conversation. Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509, on remand, 142 Ga. App. 802, 237 S.E.2d 243 (1977).

It is not a crime for a party to a conversation to record the conversation. McCallum v. Hinson, 489 F. Supp. 627 (M.D. Ga. 1980).

O.C.G.A. § 16-11-62 does not prohibit the recording of a conversation by one of the actual parties thereto. Sheppard v. Reid, 198 Ga. App. 703, 402 S.E.2d 793 (1991).

Vagueness not shown. — Trial court erred in concluding that O.C.G.A. §§ 16-11-62(2) and 16-11-66(a) were unconstitutionally vague as people of ordinary intelligence could understand that people could be found guilty if they used a device to secretly photograph or video record others in private places. State v. Cohen, 302 Ga. 616, 807 S.E.2d 861 (2017).

Secretly recording conversation without consent of other party. — Former Code 1933, § 26-3001 (see now O.C.G.A. § 16-11-62) did not prohibit one party to a conversation from secretly recording or transmitting it without knowledge or consent of other party. State v. Birge, 240 Ga. 501, 241 S.E.2d 213, cert. denied, 436 U.S. 945, 98 S. Ct. 2847, 56 L. Ed. 2d 786 (1978); Hall v. State, 155 Ga. App. 724, 272 S.E.2d 578 (1980); Thompson v. State, 191 Ga. App. 906, 383 S.E.2d 339, cert. denied, 191 Ga. App. 923, 383 S.E.2d 339 (1989).

Former Code 1933, § 26-3001 (see now O.C.G.A. § 16-11-62(1)) prohibited clandestine interception of private conversations except under conditions of former Code 1933, § 26-3006 (see now O.C.G.A. § 16-11-66). Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509, on remand, 142 Ga. App. 802, 237 S.E.2d 243 (1977).

Cordless telephone conversations are protected from interception by O.C.G.A. § 16-11-62. Barlow v. Barlow, 272 Ga. 102, 526 S.E.2d 857 (2000).

Intent of paragraph (5) of section. — Former Code 1933, §§ 26-3001 and 26-3004 (see now O.C.G.A. §§ 16-11-62(5) and 16-11-64) were not intended to apply to a sovereign absent appropriate naming of sovereign, but, rather, were intended merely to state rules relating to admissibility of evidence in courts in this state and not to prohibit admissibility in courts

General Consideration (Cont'd)

of other jurisdictions, particularly not in courts of the United States. United States v. Hayes, 445 F. Supp. 455 (M.D. Ga. 1977).

Construction of "record" as used in paragraph (1). — Word "record" used in former Code 1933, § 26-3001(1) (see now O.C.G.A. § 16-11-62(1)) must be construed with reference to words "overhear" and "attempt to overhear," and overall intent of section to make eavesdropping and surveillance of a conversation a criminal act, i.e., interception of conversation by third party. Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509, on remand, 142 Ga. App. 802, 237 S.E.2d 243 (1977).

Construction of "without the consent of all persons observed." — O.C.G.A. § 16-11-62(2) contains the language, "without the consent of all persons observed," which the legislature has not included in § 16-11-62(1); the plain import of these words illustrates the legislative intent that the consent required under § 16-11-62(2) is that of each individual observed. It follows then that "any person" as used in that subsection was not intended to exclude one who records an activity in which the person willingly participates. Gavin v. State, 292 Ga. App. 402, 664 S.E.2d 797 (2008), cert. denied, 2008 Ga. LEXIS 937 (Ga. 2008).

Evidence obtained in violation of state law, but without violating federal law is admissible in federal court. United States v. Hayes, 445 F. Supp. 455 (M.D. Ga. 1977).

Recorded telephone conversation properly admitted. — With regard to a defendant's convictions for malice murder and kidnapping with bodily injury as a result of the defendant killing a former girlfriend who was also the mother of the defendant's two children, the trial court did not err by admitting an audiotape of a telephone conversation between the victim and the defendant since the state laid a proper foundation for the admission of the audiotape by adequately demonstrating that the victim was the person who made the tape, the victim was a party to the conversation, and the tape was not inadmissible under O.C.G.A. § 16-11-62. Griffin v. State, 282 Ga. 215, 647 S.E.2d 36 (2007), overruled on other grounds, Garza v. State, 284 Ga. 696, 670 S.E.2d 73 (2008).

Exception to "fruit of poisonous tree" doctrine. — In a prosecution of defendant wife for solicitation of murder, where there was no state participation in an illegal tapping of initial phone conversation by her husband, the "fruit of the poisonous tree" doctrine did not require suppression of an undercover agent's subsequent surreptitiously taped conversations with defendant. Jordan v. State, 211 Ga. App. 86, 438 S.E.2d 371 (1993).

Store was not a private place. — Defendant's act of using a cell-phone camera to take video recordings underneath the victim's skirt as the victim walked through the store where the defendant was employed did not violate the criminal invasion of privacy statute because the store was a public area, not a private place, and the statute criminalized conduct as to an individual who was in a private place. Gary v. State, 338 Ga. App. 403, 790 S.E.2d 150 (2016).

Private places. — A 16-year old girl has an expectation of privacy, even from her parents or guardians, while in the bathroom of the family home. Kelley v. State, 233 Ga. App. 244, 503 S.E.2d 881 (1998).

Defendant's conviction for invasion of privacy was affirmed because the evidence showed that the stepdaughter did not give her consent to be recorded while taking a shower; thus, the defendant clearly did not have the consent of all persons. Price v. State, 320 Ga. App. 85, 738 S.E.2d 289 (2013).

A 16-year-old girl had a reasonable expectation of privacy in her bedroom, even from her father. Snider v. State, 238 Ga. App. 55, 516 S.E.2d 569 (1999).

Both the victim and the other person who was secretly video recorded in the residence would have had a reasonable expectation to be safe from hostile intrusion or surveillance in the places they were video recorded as the recorded activities all took place in spaces within the residence that were outside of the public view. State v. Cohen, 302 Ga. 616, 807 S.E.2d 861 (2017).

Wiretapping without proper warrants constitutes unlawful search and seizure. — Although a wiretap may not have been unlawful and not subject to prosecution under former Code 1933, § 26-3001 (see now O.C.G.A. § 16-11-62), this cannot alter the mandate of U.S. Const., amend. 4, which makes a wiretap an unlawful search and seizure without proper warrants. Farmer v. State, 228 Ga. 225, 184 S.E.2d 647 (1971).

Intercepting telephone conversations without following procedures. — When investigator listening in on defendant's telephone conversations had not previously made written application under oath to district attorney or Attorney General, showing probable cause, and then obtained an investigation warrant from judge of superior court, the investigator was clearly within prohibition of former Code 1933, § 26-3001 (see now O.C.G.A. § 16-11-62). State v. Toomey, 134 Ga. App. 343, 214 S.E.2d 421 (1975).

When investigating officer answered the telephone during a legal search of the absent defendant's apartment stating that the officer was the defendant, testimony of the officer's conversation with the third party was substantial evidence which was properly used against the defendant for illegal possession of drugs. Teems v. State, 161 Ga. App. 339, 287 S.E.2d 774 (1982).

Police officer placing ear next to door does not convert otherwise permissible surveillance into illegal search. Cox v. State, 160 Ga. App. 199, 286 S.E.2d 482 (1981).

Telephone calls from jail. — Trial counsel was not ineffective for failing to file a motion to suppress recordings of an appellant's telephone calls while the appellant was in jail because while O.C.G.A. § 16-11-62(4) prohibited any person from intentionally and secretly intercepting a telephone call by use of any device, instrument, or apparatus, O.C.G.A. § 16-11-66(a) provided an exception to this rule when one of the parties to the communication had given prior consent and that consent was implied based on the statements during the recording that all jail phone calls were recorded or monitored. Boykins-White v. State, 305 Ga. App. 827, 701 S.E.2d 221 (2010).

Defendant's conversation with the defendant's attorney, made through a three-way call by the defendant's girlfriend and recorded at the jail, were admissible and not privileged under former O.C.G.A. § 24-9-24 (see now O.C.G.A. § 24-5-501) because the defendant's girlfriend remained on the call and the telephone had signs and a message indicating that calls could be recorded. Such a recording did not violate O.C.G.A. § 16-11-62 because that statute contained an express exception for recording jail calls. Rogers v. State, 290 Ga. 18, 717 S.E.2d 629 (2011).

Interception of a conversation between arrestees in the back seat of a patrol car did not offend wiretapping statutes. Burgeson v. State, 267 Ga. 102, 475 S.E.2d 580 (1996).

Counsel's recording of conversations of witnesses without consent. — When counsel for a party clandestinely recorded conversations with witnesses, this practice violated no law; but the Code of Professional Conduct imposes a higher standard than mere legality. The American Bar Association's Committee on Ethics and Professional Responsibility has ruled that the recording of conversations of witnesses without their consent is unethical. Parrott v. Wilson, 707 F.2d 1262 (11th Cir.), cert. denied, 464 U.S. 936, 104 S. Ct. 344, 78 L. Ed. 2d 311 (1983).

Disclosure of numbers dialed from particular phone not prohibited. — Disclosure of the contents of telephonic or radio communications is prohibited by O.C.G.A. § 16-11-62. The disclosure of information concerning what numbers were dialed from a particular phone is not prohibited. Szczuka v. Bellsouth Mobility, Inc., 189 Ga. App. 370, 375 S.E.2d 667 (1988).

Eavesdropping on cordless telephone conversations by use of an open air scanner constituted a violation of O.C.G.A. § 16-11-62. Tapley v. Collins, 41 F. Supp. 2d 1366 (S.D. Ga. 1999).

Inapplicable to cellular telephone conversations. — O.C.G.A. § 16-11-62 does not prohibit the interception of a cellular telephone conversation given that the public accessibility of "FM" radio waves waives any justifiable expectation

General Consideration (Cont'd)

of privacy. Salmon v. State, 206 Ga. App. 469, 426 S.E.2d 160 (1992).

Officer's text messaging from another's cell phone did not violate statute. — Sheriff's officer did not violate O.C.G.A. § 16-11-62 by communicating with a defendant via text messages on a cell phone that belonged to another, leading the defendant to believe that the defendant was communicating with the owner of the cell phone when the defendant agreed to buy drugs from the officer. Hawkins v. State, 307 Ga. App. 253, 704 S.E.2d 886 (2010), aff'd, 290 Ga. 785, 723 S.E.2d 924, (2012).

Officer's recording of crime scene on cell phone. — When an ambulance was called to the scene of a child's injury, and a police officer recorded the defendant acting out the events on the officer's cell phone, allegedly contrary to O.C.G.A. § 16-11-62(2), any error in admitting the video was harmless because the evidence of guilt was overwhelming, and the recording was cumulative of other evidence. Sims v. State, 297 Ga. 401, 774 S.E.2d 620 (2015).

Private land under surveillance for illegal hunting was not a "private place" within the meaning of O.C.G.A. § 16-11-62; thus, in a prosecution for hunting over bait, a videotape of defendant showing defendant in possession of a bow and arrows on a hunting stand in that area was admissible. Quintrell v. State, 231 Ga. App. 268, 499 S.E.2d 117 (1998).

Development of film or showing photographs to others was not required for the offense of invasion of privacy. Kelley v. State, 233 Ga. App. 244, 503 S.E.2d 881 (1998).

Municipalities are entitled to sovereign immunity from liability under O.C.G.A. § 16-11-62(1) for unlawful eavesdropping or surveillance. Anderson v. City of Columbus, 374 F. Supp. 2d 1240 (M.D. Ga. 2005).

Recording of act by willing participant. — When the defendant was accused of unlawful eavesdropping and surveillance under O.C.G.A. § 16-11-62(2) based on allegations that the defendant had taped the defendant having sex with a neighbor, the defendant's general demurrer was properly denied. The provision was not intended to exclude one who recorded an activity in which the person doing the recording willingly participated. Gavin v. State, 292 Ga. App. 402, 664 S.E.2d 797 (2008), cert. denied, 2008 Ga. LEXIS 937 (Ga. 2008).

Admission of audio only from videotape. — Trial court did not err in denying the defendant's motion for new trial because the defendant failed to show that a reasonable probability existed that the outcome of the case would have been different but for trial counsel's failure to file a motion to suppress videotaped evidence showing the drug sales transactions in the defendant's residence on the ground that the videotaping was done in violation of O.C.G.A. § 16-11-62; the defendant acknowledged that the audio recording of what transpired inside the home was admissible, even if the video portion of the tape inside the home had been excluded, and in addition to the audio tape of the transaction, an informant testified in detail about the events during the two buys and identified the defendant as the person who was present and participated in both buys. Durham v. State, 309 Ga. App. 444, 710 S.E.2d 644 (2011).

Because none of the types of communication encompassed by O.C.G.A. § 16-11-66(a) were at issue, because the parties stipulated that the video recordings the victim made between the victim and defendant without defendant's consent were in a private place, and because the participant's exception in § 16-11-66(a) applied to O.C.G.A. § 16-11-62 in its entirety, pursuant to O.C.G.A. § 16-11-67, the trial court properly excluded the recordings. State v. Madison, 311 Ga. App. 31, 714 S.E.2d 714 (2011).

Attorneys with knowledge of recording were disqualified. — In a suit between an employer against the employer's former housekeeper, who video recorded a sexual encounter between the two, the court held that the trial court did not abuse the court's discretion in disqualifying two of the former housekeeper's lawyers from further representation because the lawyers were necessary wit-

nesses since the lawyers' testimony was relevant to where and from whom the recording device used to record the sexual encounter was obtained. Cohen v. Rogers, 338 Ga. App. 156, 789 S.E.2d 352 (2016).

Evidence sufficient for conviction. — Evidence was sufficient for a rational finder of fact to find the defendant guilty beyond a reasonable doubt of unlawful eavesdropping and surveillance because the defendant peered through the first-floor bedroom window of an apartment and saw a teenage girl, who was working on a computer in another room, and defendant climbed through the window, picked up the cell phone that was on the girl's bed, and recorded her phone number; although the defendant initially told a police officer that the defendant had entered the apartment because the defendant needed money, the defendant later admitted that defendant wanted to get the girl's phone number so the defendant could call her. Hawkins v. State, 302 Ga. App. 84, 690 S.E.2d 440 (2010).

Cited in Pruitt v. State, 227 Ga. 188, 179 S.E.2d 339 (1971); Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525 (1971); Satterfield v. State, 127 Ga. App. 528, 194 S.E.2d 295 (1972); Cross v. State, 233 Ga. 960, 214 S.E.2d 374 (1975); Orkin v. State, 236 Ga. 176, 223 S.E.2d 61 (1976); Brooks v. State, 141 Ga. App. 725, 234 S.E.2d 541 (1977); Carter v. State, 239 Ga. 509, 238 S.E.2d 57 (1977); Meyer v. State, 150 Ga. App. 613, 258 S.E.2d 217 (1979); O'Dillon v. State, 245 Ga. 342, 265 S.E.2d 18 (1980); Drake v. State, 245 Ga. 798, 267 S.E.2d 237 (1980); Goodwin v. State, 154 Ga. App. 46, 267 S.E.2d 488 (1980); Ballweg v. State, 158 Ga. App. 576, 281 S.E.2d 319 (1981); Gaither v. State, 160 Ga. App. 705, 288 S.E.2d 18 (1981); Kesler v. State, 249 Ga. 462, 291 S.E.2d 497 (1982); Evans v. State, 252 Ga. 312, 314 S.E.2d 421 (1984); Elmore v. Atlantic Zayre, Inc., 178 Ga. App. 25, 341 S.E.2d 905 (1986); Tarrant v. City of Douglas, 190 Bankr. 704 (Bankr. S.D. Ga. 1995); Ewing v. Ewing, 333 Ga. App. 766, 777 S.E.2d 56 (2015); Prophitt v. State, 336 Ga. App. 262, 784 S.E.2d 103 (2016).

Waiver of Right to Privacy

Right of privacy may be waived either expressly or by implication. Bodrey v. Cape, 120 Ga. App. 859, 172 S.E.2d 643 (1969); Ellenberg v. Pinkerton's, Inc., 125 Ga. App. 648, 188 S.E.2d 911 (1972), later appeal, 130 Ga. App. 254, 202 S.E.2d 701 (1973).

Implicit waiver may be found in such matters which law or public policy demands shall be kept private. Ellenberg v. Pinkerton's, Inc., 125 Ga. App. 648, 188 S.E.2d 911 (1972), later appeal, 130 Ga. App. 254, 202 S.E.2d 701 (1973).

Extent of invasion authorized by waiver. — Waiver authorizes invasion of right only to such extent as is necessary to be inferred from purpose for which waiver is made. A waiver for one purpose and in favor of one person or class does not authorize an invasion for all purposes or by all persons and classes. Ellenberg v. Pinkerton's, Inc., 125 Ga. App. 648, 188 S.E.2d 911 (1972), later appeal, 130 Ga. App. 254, 202 S.E.2d 701 (1973).

Implied waiver by filing tort claim to extent of defendant's right to investigate. — Right of privacy may be implicitly waived by one who files an action for damages resulting from a tort to the extent of defendant's intervening right to investigate and ascertain for oneself the true state of injury. Reasonableness of investigation under circumstances is a question for the jury. Ellenberg v. Pinkerton's, Inc., 125 Ga. App. 648, 188 S.E.2d 911 (1972), later appeal, 130 Ga. App. 254, 202 S.E.2d 701 (1973).

Extent of tort defendant's investigative right. — Defendant-employer has right to invade injured plaintiff's-employee's privacy, but only in a reasonable and proper manner and only in furtherance of its interest with regard to suit for personal injuries against it. It cannot delegate its duty of conducting a proper investigation to a third party so as to insulate itself from suit if third party fails to conduct a reasonable surveillance. Consequently, independent contractor rationale is not applicable in a case of this kind. Ellenberg v. Pinkerton's, Inc., 125 Ga. App. 648, 188 S.E.2d 911 (1972), later appeal, 130 Ga. App. 254, 202 S.E.2d 701 (1973).

Implied waiver of right to privacy between former spouses. — Since the father of a child has a vital and continuing

Waiver of Right to Privacy (Cont'd)

interest and right in the welfare of his child, he does not as a matter of law incur liability for invasion of privacy for making observations and investigation into affairs and conduct of his former wife who at time had custody of his child. Under such circumstances there is an implied waiver of her right of privacy as to ex-husband and those acting as his agents. Bodrey v. Cape, 120 Ga. App. 859, 172 S.E.2d 643 (1969).

Wife did not waive her right of privacy by engaging in lascivious conversations over the family telephone, which had been tapped by her husband. Middleton v. Middleton, 259 Ga. 41, 376 S.E.2d 368 (1989).

Consent to record telephone calls is not implied consent to record private conversations. — Because a city employee was allegedly unaware that a system for recording telephone calls to the city continued to record statements through the employee's headset after calls were terminated, the employee's consent to the recordation of telephone calls did not constitute implied consent to the interception and recordation of the employee's private conversation with co-workers. Anderson v. City of Columbus, 374 F. Supp. 2d 1240 (M.D. Ga. 2005).

Emails of employees. — Trial court did not err in admitting into evidence an email because O.C.G.A. § 16-11-62 was not applicable; a former employer's president went into a former employee's office, which was owned by the business of which the president was the chief executive officer and was used by the employee, who was under the president's authority, and there was no evidence that the president eavesdropped on the employee's conversations or secretly observed the employee's activities. Sitton v. Print Direction, Inc., 312 Ga. App. 365, 718 S.E.2d 532 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct, § 30.

C.J.S. — 86 C.J.S., Telecommunications, §§ 177, 195 et seq.

ALR. — Mode of establishing that information obtained by illegal wiretapping has not led to evidence introduced by prosecution, 28 A.L.R.2d 1055.

Validity, construction, and effect of state legislation making wiretapping a criminal offense, 74 A.L.R.2d 855.

What constitutes an "interception" of a telephone or similar communication forbidden by the Federal Communications Act (47 U.S.C. § 605) or similar state statutes, 9 A.L.R.3d 423.

Eavesdropping as violating right of privacy, 11 A.L.R.3d 1296.

Investigations and surveillance, shadowing and trailing, as violation of right of privacy, 13 A.L.R.3d 1025.

Observation through binoculars as constituting unreasonable search, 48 A.L.R.3d 1178; 59 A.L.R.5th 615.

Admissibility, in criminal prosecution, of evidence obtained by electronic surveillance of prisoner, 57 A.L.R.3d 172.

State or municipal liability for invasion of privacy, 87 A.L.R.3d 145.

Permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer, 24 A.L.R.4th 1208.

Construction and application of state statutes authorizing civil cause of action by person whose wire or oral communication is intercepted, disclosed, or used in violation of statutes, 33 A.L.R.4th 506.

"Caller ID" system, allowing telephone call recipient to ascertain number of telephone from which call originated, as violation of right to privacy, wiretapping statute, or similar protections, 9 A.L.R.5th 553.

Criminal prosecution of video or photographic voyeurism, 120 A.L.R.5th 337.

Applicability, in civil action, of provisions of Omnibus Crime Control and Safe Streets Act of 1968, prohibiting interception of communications (18 USCS § 2511 (1)), to interception by spouse, or spouse's agent, of conversations of other spouse, 139 A.L.R. Fed 517.

16-11-63. Possession, sale, or distribution of eavesdropping devices.

(a) Other than law enforcement officers permitted by this part to employ such devices, it shall be unlawful for any person to possess, sell, offer for sale, or distribute any eavesdropping device.

(b) An "eavesdropping device" shall mean any instrument or apparatus which by virtue of its size, design, and method of operation has no normal or customary function or purpose other than to permit the user thereof secretly to intercept, transmit, listen to, or record private conversations of others. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3003, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1982, p. 3, § 16.)

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Ga. L. 1967, p. 844, § 1 is not violative of U.S. Const., amend. 14. Nixdorf v. State, 226 Ga. 615, 176 S.E.2d 701 (1970).

Cited in State v. Birge, 240 Ga. 501, 241 S.E.2d 213 (1978); Drake v. State, 245 Ga. 798, 267 S.E.2d 237 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Use of two-way communication system, known to prisoners, to monitor jail activity. — Use of two-way communication system for monitoring all activity in a jail, operation of such system being known to each prisoner, would not necessarily deprive a prisoner of constitutional rights, provided there is no interception of conversations between attorney and client. 1970 Op. Att'y Gen. No. U70-84.

"Psychological stress evaluator" does not constitute an "eavesdropping device". 1972 Op. Att'y Gen. No. 72-163.

RESEARCH REFERENCES

ALR. — What constitutes an "interception" of a telephone or similar communication forbidden by the Federal Communications Act (47 U.S.C. § 605) or similar state statutes, 9 A.L.R.3d 423.

16-11-64. Interception of wire or oral transmissions by law enforcement officers.

(a) **Application of part to law enforcement officers.** Except only as provided in subsection (b) of this Code section, nothing in this part shall apply to a duly constituted law enforcement officer in the performance of his official duties in ferreting out offenders or suspected offenders of the law or in secretly watching a person suspected of violating the laws of the United States or of this state, or any subdivision thereof, for the purpose of apprehending such suspected violator.

(b) When in the course of his or her official duties, a law enforcement officer desiring to make use of any device, but only as such term is

defined in Code Section 16-11-60, and such use would otherwise constitute a violation of Code Section 16-11-62, the law enforcement official shall act in compliance with the provisions provided for in this part.

(c) Upon written application, under oath, of the district attorney having jurisdiction over prosecution of the crime under investigation or the Attorney General made before a judge of superior court having jurisdiction over the crime under investigation, such court may issue an investigation warrant permitting the use of a device for the surveillance of a person or place to the extent the same is consistent with and subject to the terms, conditions, and procedures provided for by 18 U.S.C. Chapter 119. Such warrant shall have state-wide application and interception of communications shall be permitted in any location in this state.

(d) Evidence obtained in conformity with this part shall be admissible only in the courts of this state having felony and misdemeanor jurisdiction.

(e) **Defenses.** A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this part or under any other law. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3004, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1972, p. 615, § 1; Ga. L. 1972, p. 952, § 1; Ga. L. 1979, p. 824, § 1; Ga. L. 1980, p. 326, § 1; Ga. L. 1982, p. 1385, § 7; Ga. L. 1982, p. 2319, § 1; Ga. L. 1983, p. 3, § 13; Ga. L. 1984, p. 22, § 16; Ga. L. 1985, p. 149, § 16; Ga. L. 1992, p. 6, § 16; Ga. L. 2000, p. 491, § 2; Ga. L. 2002, p. 1432, § 3; Ga. L. 2013, p. 4, § 1/HB 55.)

Cross references. — Searches and seizures generally, T. 17, C. 5.

Editor's notes. — Ga. L. 2002, p. 1432, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'Georgia's Support of the War on Terrorism Act of 2002'."

Law reviews. — For survey of 1986 Eleventh Circuit cases on constitutional criminal procedure, see 38 Mercer L. Rev. 1141 (1987). For article on the 2013 amendment of this Code section, see 30 Ga. St. U.L. Rev. 109 (2013).

For note discussing organized crime in Georgia with respect to the application of state gambling laws, and suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970).

For comment advocating certain revisions to former eavesdropping statute, in light of constitutional requirements as articulated in Berger v. New York, 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967), see 2 Ga. L. Rev. 595 (1968).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Legislative intent. — General Assembly's intent is to foster cooperation between law enforcement agencies as necessary to the prosecution of organized crime. Waller v. State, 251 Ga. 124, 303 S.E.2d 437 (1983), rev'd on other grounds, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

Scope of section. — Former Code 1933, § 26-3004 (see now O.C.G.A. § 16-11-64) provided permission for third-party interception by law enforcement officers under specified circumstances and procedures. Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509, on remand, 142 Ga. App. 802, 237 S.E.2d 243 (1977).

Former Code 1933, § 26-3004 (see now O.C.G.A. § 16-11-64) permitted enforcement agents to use electronic eavesdropping devices under appropriate circumstances and control. Birge v. State, 142 Ga. App. 735, 236 S.E.2d 906 (1977), rev'd on other grounds, 240 Ga. 501, 241 S.E.2d 213, cert. denied, 436 U.S. 945, 98 S. Ct. 2847, 56 L. Ed. 2d 786 (1978).

No prohibition against evidence gathered as part of federal investigation. — O.C.G.A. § 16-11-64(c) merely provides authority to Georgia superior court judges to issue wiretap warrants upon proper application by the prosecuting attorney, and the statute contains no prohibition against evidence gathered as part of a federal investigation in compliance with the federal warrant process. State v. Harrell, 323 Ga. App. 56, 744 S.E.2d 867 (2013).

Jurisdiction of warrant issuing court. — Appellate court erred in affirming a trial court's denial of the appellants' motion to suppress because the warrants were invalid since the Gwinnett County Superior Court lacked the authority to issue the wiretap warrants for the interceptions in the case which took place exclusively in Fulton County. In conclusion, the Supreme Court of Georgia concludes that Georgia superior courts do not currently possess the authority to issue wiretap warrants for interceptions conducted outside the boundaries of their respective judicial circuits. Luangkhot v. State, 292 Ga. 423, 736 S.E.2d 397 (2013).

Warrant not issued by superior court judge. — Trial court erred by granting the defendant's motion to suppress because the fact that the warrant was not initially issued by a Georgia superior court judge did not violate the requirements for obtaining a warrant codified in O.C.G.A. § 16-11-64(c) and that fact did not require suppression of evidence gathered pursuant to the warrant. State v. Harrell, 323 Ga. App. 56, 744 S.E.2d 867 (2013).

Section permits entry upon premises of another by police officer. — Police officer in performance of the officer's official duties in ferreting out offenders of the law was authorized by former Code 1933, § 26-3004 (see now O.C.G.A. § 16-11-64) to go upon premises of another or any private place and eavesdrop upon conversations of others. Rautenstrauch v. State, 129 Ga. App. 381, 199 S.E.2d 613 (1973).

Nothing in former Code 1933, § 26-3004 (see now O.C.G.A. § 16-11-64) allowed private individuals to monitor intercepted communications. Bilbo v. State, 142 Ga. App. 716, 236 S.E.2d 847 (1977), rev'd on other grounds, 240 Ga. 601, 242 S.E.2d 21 (1978).

Exception stated in former Code 1933, § 26-3006 (see now O.C.G.A. § 16-11-66) was not limited to law enforcement officers as they were dealt with and excepted in former Code 1933, § 26-3004 (see now O.C.G.A. § 16-11-64). Quaid v. State, 132 Ga. App. 478, 208 S.E.2d 336 (1974).

Intercepting telephone conversations without following procedure. — When investigator listening in on the defendant's telephone conversations had not previously made written application under oath to the district attorney or Attorney General, showing probable cause, and then obtained an investigation warrant from a judge of superior court, the investigator was clearly within the prohibition of former Code 1933, § 26-3001 (see now O.C.G.A. § 16-11-62). State v. Toomey, 134 Ga. App. 343, 214 S.E.2d 421 (1975).

Obtaining an investigation warrant. — An investigation warrant must be obtained before recording a telephone conversation between the alleged child victim

General Consideration (Cont'd)

and the defendant, even though the District Attorney obtained the consent of the child's father. Dobbins v. State, 262 Ga. 161, 415 S.E.2d 168 (1992).

Superior court judge may grant application for telephonic surveillance. — Superior court judge, in granting application for telephonic surveillance, is not presiding as judge for particular county of the judicial circuit in which the judge is physically present when application is presented to the judge, but is acting as judge of superior court of circuit authorized to grant such applications. The application, therefore, may be granted in any county of the judge's judicial circuit. Granese v. State, 232 Ga. 193, 206 S.E.2d 26 (1974).

Disclosure under former O.C.G.A. § 16-11-64(b)(7) was not required when consent of one party was received under O.C.G.A. § 16-11-66. Luck v. State, 163 Ga. App. 657, 295 S.E.2d 584 (1982).

Former O.C.G.A. § 16-11-64(b)(8) was intended to strictly limit publication and use of evidence obtained through electronic surveillance. Orkin v. State, 236 Ga. 176, 223 S.E.2d 61 (1976).

Former O.C.G.A. § 16-11-64(b)(8) did not prohibit the use of information obtained to broaden the scope of the pending investigation and give probable cause to seek additional wiretaps and to intercept the conversations of additional parties. Van Nice v. State, 180 Ga. App. 112, 348 S.E.2d 515 (1986), cert. denied, 480 U.S. 931, 107 S. Ct. 1568, 94 L. Ed. 2d 760 (1987).

Trial court's suppression of wiretap evidence was proper where the state made no evidentiary showing that the disclosure of intercepted telephone conversations to an IRS agent was necessary and essential for purposes of prosecuting defendant for commercial gambling; moreover, there was no basis for finding that disclosure to the agent was authorized under O.C.G.A. § 16-11-64 as a matter of law. Anderson v. State, 267 Ga. 116, 475 S.E.2d 629 (1996), reversing State v. Anderson, 218 Ga. App. 643, 463 S.E.2d 34 (1995).

O.C.G.A. § 16-11-64(b) does not prohibit making duplicate recordings. Van Nice v. State, 180 Ga. App. 112, 348 S.E.2d 515 (1986), cert. denied, 480 U.S. 931, 107 S. Ct. 1568, 94 L. Ed. 2d 760 (1987).

Limitation on use of evidence derived from interception of wire or oral communications. — O.C.G.A. § 16-11-64 permits use of evidence derived from interception of wire or oral communications relating to offense, but limits use of evidence of offenses other than those specified in the order of authorization to offense for which investigative warrant may issue. Little v. State, 157 Ga. App. 462, 278 S.E.2d 17 (1981).

Evidence disclosable to other law enforcement agencies. — Assuming the information obtained during electronic surveillance by police officers was shared with other law enforcement agencies, such disclosure does not cause the information and evidence to be inadmissible at trial. Uhler v. State, 180 Ga. App. 767, 350 S.E.2d 281 (1986), cert. dismissed, 257 Ga. 324, 359 S.E.2d 14 (1987).

Intent. — Former Code 1933, §§ 26-3001 and 26-3004(c) (see now O.C.G.A. §§ 16-11-62 and 16-11-64(c)) were not intended to apply to a sovereign absent an appropriate naming of the sovereign, but, rather, were intended merely to state rules relating to admissibility of evidence in courts in this state and not to prohibit admissibility in courts of other jurisdictions, particularly not in courts of the United States. United States v. Hayes, 445 F. Supp. 455 (M.D. Ga. 1977).

Civil actions for wiretapping tort. — Legislature contemplated bringing of civil actions for wiretapping tort. Awbrey v. Great Atl. & Pac. Tea Co., 505 F. Supp. 604 (N.D. Ga. 1980).

When the record showed that the discs of the wiretap recordings were created June 24, 2015, the issuing judge signed an order sealing the discs on July 2, 2015, and the authorizing order expired around July 6, 2015, pursuant to O.C.G.A. § 16-11-64 and 18 U.S.C. § 2518(8)(a), the state did not need to provide an explanation of the delay between the sealing and the date the authorizing order expired as the evidence showed that the recordings were sealed before the expiration of the authorizing order; thus, the

defendants' motion to suppress was properly denied. Booth v. State, 344 Ga. App. 661, No. A18A0735, 2018 Ga. App. LEXIS 110 (2018).

O.C.G.A. § 16-11-67 applies to violations of the administrative requirements of O.C.G.A. § 16-11-64 since, to protect against tampering, alteration, or destruction of evidence, and against allegations thereof, "obtained" necessarily includes both the gathering and safeguarding of evidence. Williams v. State, 265 Ga. 471, 457 S.E.2d 665 (1995).

Noncompliance with the administrative requirements of O.C.G.A. § 16-11-64 did not call for suppression of evidence developed from information gathered with a pen register where there was no showing of any prejudice to defendant's privacy interest resulting from such noncompliance. Williams v. State, 265 Ga. 471, 457 S.E.2d 665 (1995).

Standing to complain of illegality. — Alleged noncompliance with procedural safeguards in connection with a wiretap on the telephone of defendant's mother did not provide a basis for suppressing intercepted communications from defendant's telephone; defendant had no standing to complain of the noncompliance. Williams v. State, 211 Ga. App. 8, 438 S.E.2d 126 (1993).

No standing to assert that illegality was due to illegal obtaining of records by telephone company. — Although the defendants had general standing to attack the illegality of a wiretap on their telephone, the defendants lacked the standing to assert that the illegality was due to the fact that the defendants' telephone toll records were illegally obtained because telephone toll and billing records are not owned or possessed by the telephone customer but are business records belonging to the telephone company. Van Nice v. State, 180 Ga. App. 112, 348 S.E.2d 515 (1986), cert. denied, 480 U.S. 931, 107 S. Ct. 1568, 94 L. Ed. 2d 760 (1987).

Cited in Pruitt v. State, 227 Ga. 188, 179 S.E.2d 339 (1971); Satterfield v. State, 127 Ga. App. 528, 194 S.E.2d 295 (1972); Cauley v. State, 130 Ga. App. 278, 203 S.E.2d 239 (1973); Orkin v. State, 239 Ga. 334, 236 S.E.2d 576 (1977); State v. Birge, 240 Ga. 501, 241 S.E.2d 213 (1978); State v. Bilbo, 240 Ga. 601, 242 S.E.2d 21 (1978); Dismuke v. State, 152 Ga. App. 188, 262 S.E.2d 490 (1979); Drake v. State, 245 Ga. 798, 267 S.E.2d 237 (1980); Caudill v. State, 157 Ga. App. 415, 277 S.E.2d 773 (1981); Ford v. State, 160 Ga. App. 707, 288 S.E.2d 39 (1981); Bilbo v. United States, 633 F.2d 1137 (5th Cir. 1981); Gilstrap v. State, 162 Ga. App. 841, 292 S.E.2d 495 (1982); Romano v. State, 162 Ga. App. 816, 292 S.E.2d 533 (1982); Gonzalez v. State, 175 Ga. App. 217, 333 S.E.2d 132 (1985); Napper v. Georgia Television Co., 257 Ga. 156, 356 S.E.2d 640 (1987); Quintrell v. State, 231 Ga. App. 268, 499 S.E.2d 117 (1998); Tapley v. Collins, 41 F. Supp. 2d 1366 (S.D. Ga. 1999); Santibanez v. State, 301 Ga. App. 121, 686 S.E.2d 884 (2009).

Constitutionality

Former Code 1933, § 26-3004 (see now O.C.G.A. § 16-11-64) was not violative of U.S. Const., amends. 1, 4, 5, 6, and 14. Granese v. State, 232 Ga. 193, 206 S.E.2d 26 (1974).

Former O.C.G.A. § 16-11-64(b)(8), limiting publication, does not automatically override the Sixth Amendment's openness principle or the First Amendment and turn criminal proceedings into closed events. Ayers v. State, 181 Ga. App. 244, 351 S.E.2d 692 (1986).

No violation of Fifth Amendment protection against self-incrimination. — Electronic surveillance of suspect not in custody does not violate right under U.S. Const., amend. 5 not to be compelled in any criminal case to be a witness against oneself. Granese v. State, 232 Ga. 193, 206 S.E.2d 26 (1974).

Rights to remain silent and to counsel inapplicable to electronic surveillance of suspect not in custody. Granese v. State, 232 Ga. 193, 206 S.E.2d 26 (1974).

Fact that 28 U.S.C. § 2518(6) is not included in former Code 1933, § 26-3004 (see now O.C.G.A. § 16-11-64) did not render the state statute unconstitutional or in conflict with federal provision. Lawson v. State, 236 Ga. 770, 225 S.E.2d 258, cert. denied, 429 U.S. 857, 97 S. Ct. 156, 50 L. Ed. 2d 134, cert. denied, 429 U.S. 859, 97 S. Ct. 159, 50 L. Ed. 2d 136 (1976).

Relationship Between State and Federal Law

Both state and federal law must be complied with. — Wiretapping and surveillance are subjects of federal and state law and both must be complied with where applicable. Cox v. State, 152 Ga. App. 453, 263 S.E.2d 238 (1979); Evans v. State, 252 Ga. 312, 314 S.E.2d 421, cert. denied, 469 U.S. 826, 105 S. Ct. 106, 83 L. Ed. 2d 50 (1984).

Although an investigation warrant could be obtained under provisions of former Code 1933, § 26-3004 (see now O.C.G.A. § 16-11-64), it was settled that a wiretap must also be measured against standards set out in 18 U.S.C. §§ 2510-2520, which are part of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. Bilbo v. State, 142 Ga. App. 716, 236 S.E.2d 847 (1977), rev'd on other grounds, 240 Ga. 601, 242 S.E.2d 21 (1978).

Evidence must be excluded if obtained in manner inconsistent with either federal or state law. Cox v. State, 152 Ga. App. 453, 263 S.E.2d 238 (1979).

State wiretap statutes need only be in conformity with federal law. — Eighteen U.S.C. § 2516(2) does not require that state wiretap statutes be carbon copies of federal enactment; they must merely be in conformity with federal law. Cox v. State, 152 Ga. App. 453, 263 S.E.2d 238 (1979).

Former Code 1933, § 26-3004 (see now O.C.G.A. § 16-11-64) was supplementary of the federal statute. Granese v. State, 232 Ga. 193, 206 S.E.2d 26 (1974).

Applicable federal standards set minimum requirements for surveillance in analysis of state-authorized wiretap; if these minimum requirements are not met, analysis need proceed no further and wiretap must be held to be unlawful. Cox v. State, 152 Ga. App. 453, 263 S.E.2d 238 (1979).

When federal standards are met, analysis must proceed under applicable state law to determine if state standards, which may be more stringent, are met. Cox v. State, 152 Ga. App. 453, 263 S.E.2d 238 (1979).

Applicable standard under both federal statute and former Code 1933, § 26-3004 (see now O.C.G.A. § 16-11-64) was probable cause for issuance of order to tap. Cox v. State, 152 Ga. App. 453, 263 S.E.2d 238 (1979).

"Good cause shown" under former paragraph (b)(3) of former Code 1933, § 26-3004 (see now O.C.G.A. § 16-11-64) was equivalent of "probable cause" under federal statute. Granese v. State, 232 Ga. 193, 206 S.E.2d 26 (1974).

Evidence obtained without violating federal law, although violating state law, is admissible in federal criminal trial. United States v. Hayes, 445 F. Supp. 455 (M.D. Ga. 1977).

Application

Pen registers. — Under former O.C.G.A. § 16-11-60, the definition of the term "device" expressly excluded pen registers; thus, defendant's contention that a pen register order violated former O.C.G.A. § 16-11-64(b)'s 20-day time limitation for investigative warrants failed. Barnett v. State, 259 Ga. App. 465, 576 S.E.2d 923 (2003).

Standard of probable cause required for invasion of citizen's privacy by authority of wiretap warrant is same as standard for regular search warrant. Tookes v. State, 159 Ga. App. 423, 283 S.E.2d 642 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1443, 71 L. Ed. 2d 658 (1982).

Investigation warrants authorizing tapping of telephone lines must state: (1) that interception will terminate when described communication is first obtained; (2) that authorization to intercept will be executed as soon as practicable; (3) that interceptions will be conducted so as to minimize interception of communications not otherwise subject to interception; and (4) that interception will terminate upon attainment of authorized objective. Johnson v. State, 226 Ga. 805, 177 S.E.2d 699 (1970).

Time necessary to accomplish objective of wiretap is within discretion of judge issuing warrant, thus, "execution" of a wiretap is not rendered illegal for reason that surveillance was not terminated immediately upon realization of objectives

sought in petition for investigation warrant which initially authorized wiretap. Dowdy v. State, 148 Ga. App. 498, 251 S.E.2d 571 (1978).

Length of time to continue a wiretap addresses sound discretion of trial court and absent abuse of that discretion an appellate court will not interfere. Morrow v. State, 147 Ga. App. 395, 249 S.E.2d 110 (1978), cert. denied, 440 U.S. 917, 99 S. Ct. 1235, 59 L. Ed. 2d 467 (1979).

Georgia Bureau of Investigation agent's failure to follow the mandated procedure for obtaining a warrant for installation of a pen register negated the legal effect of the authorization order the agent obtained from a judge and caused the pen register to be illegal. Duncan v. State, 259 Ga. 278, 379 S.E.2d 507 (1989).

Judicial supervision of wiretaps. — There is no requirement that court exercise personal supervision over execution of wiretap. Morrow v. State, 147 Ga. App. 395, 249 S.E.2d 110 (1978), cert. denied, 440 U.S. 917, 99 S. Ct. 1235, 59 L. Ed. 2d 467 (1979).

Neither personal judicial supervision nor progress reports, absent judicial request, are required by either state or federal law. Dowdy v. State, 148 Ga. App. 498, 251 S.E.2d 571 (1978).

When trial judge need not make express written findings under former paragraph (b)(2). — Failure of trial judge to expressly make written findings under former Code 1933, § 26-3004 (see now O.C.G.A. § 16-11-64) would not be cause for invalidating warrant where it appeared from record that affidavit or other evidence submitted to issuing judge by applicant would clearly have authorized such findings. Under these circumstances it will be presumed that judge issuing warrant made necessary findings before issuing it. Cross v. State, 225 Ga. 760, 171 S.E.2d 507 (1969).

Conspiracy to commit murder may justify issuance of investigation warrant. — Conspiracy to commit murder, although subsequently enacted, is a felony involving bodily harm within meaning of former (b)(1) for which an investigation warrant may issue. Orkin v. State, 236 Ga. 176, 223 S.E.2d 61 (1976).

Former Code 1933, § 26-2304 (see O.C.G.A. § 16-10-4(b)) was an offense within scope of 18 U.S.C. § 2516(2) and former paragraph (b)(1) of former Code 1933, § 26-3004 (see now O.C.G.A. § 16-11-64). Ansley v. State, 124 Ga. App. 670, 185 S.E.2d 562 (1971), cert. denied, 408 U.S. 929, 92 S. Ct. 2503, 33 L. Ed. 2d 341 (1972).

Police officer placing ear next to door does not convert otherwise permissible surveillance into illegal search. Cox v. State, 160 Ga. App. 199, 286 S.E.2d 482 (1981).

An inductor coil which is placed in the junction box servicing each phone to be tapped is not a device used to overhear, record, or intercept defendant's conversation within the meaning of O.C.G.A. §§ 16-11-60 and 16-11-64. Evans v. State, 252 Ga. 312, 314 S.E.2d 421, cert. denied, 469 U.S. 826, 105 S. Ct. 106, 83 L. Ed. 2d 50 (1984).

District attorney possesses discretion regarding what is reasonably necessary. — Construction to be given to former (b)(8) was what was reasonably necessary and essential to preparation of and actual prosecution for a crime; what is reasonable will depend upon facts of a given case and must necessarily rest with controlled discretion of district attorney, subject to review by trial court. Orkin v. State, 236 Ga. 176, 223 S.E.2d 61 (1976); Cox v. State, 152 Ga. App. 453, 263 S.E.2d 238 (1979).

At hearing on motion to suppress, state must prove probable cause basis of warrant. — At hearing on a motion to suppress, burden of proof is upon state to show what facts constituting probable cause existed and were presented to magistrate before warrant was issued. Cox v. State, 152 Ga. App. 453, 263 S.E.2d 238 (1979).

Playing recorded conversations to victim or victim's attorney for voice identification. — Playing tape recordings of telephone conversations between conspirators to intended victim for purposes of voice identification, does not taint evidence, nor does allowing victim's counsel to hear tapes. Orkin v. State, 140 Ga. App. 651, 231 S.E.2d 481 (1976).

Application (Cont'd)

Procedural violation did not warrant suppression of evidence. — See Williams v. State, 214 Ga. App. 280, 447 S.E.2d 676 (1994), aff'd, 265 Ga. 471, 457 S.E.2d 665 (1995).

Officer's recording of crime scene on cell phone. — When an ambulance was called to the scene of a child's injury, and a police officer recorded the defendant acting out the events on the officer's cell phone, allegedly contrary to O.C.G.A. § 16-11-62(2), any error in admitting the video was harmless because the evidence of guilt was overwhelming, and the recording was cumulative of other evidence. Sims v. State, 297 Ga. 401, 774 S.E.2d 620 (2015).

OPINIONS OF THE ATTORNEY GENERAL

Use of two-way communication system, known to prisoners. — Use of two-way communication system for monitoring all activity in jail, operation of such system being known to each prisoner, would not necessarily deprive a prisoner of constitutional rights, provided there is no interception of conversations between attorney and client. 1970 Op. Att'y Gen. No. U70-84.

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 620. 68 Am. Jur. 2d, Search and Seizure, §§ 176 et seq., 338.

C.J.S. — 79 C.J.S., Searches and Seizures, §§ 30, 31, 144 et seq. 86 C.J.S., Telecommunications, § 177.

ALR. — Admissibility of evidence obtained by government or other public officer by intercepting letter or telegraph or telephone message, 66 A.L.R. 397; 134 A.L.R. 614.

Admissibility of telephone conversations in evidence, 71 A.L.R. 5; 105 A.L.R. 326.

Mode of establishing that information obtained by illegal wiretapping has or has not led to evidence introduced by prosecution, 28 A.L.R.2d 1055.

What constitutes an "interception" of a telephone or similar communication forbidden by the Federal Communications Act (47 U.S.C. § 605) or similar state statutes, 9 A.L.R.3d 423.

Right or duty to refuse telephone, telegraph, or other wire service in aid of illegal gambling operations, 30 A.L.R.3d 1143.

Uninvited entry into another's living quarters as invasion of privacy, 56 A.L.R.3d 434.

Omission or inaudibility of portions of sound recording as affecting its admissibility in evidence, 57 A.L.R.3d 746.

Sufficiency of identification of participants as prerequisite to admissibility of telephone conversation in evidence, 79 A.L.R.3d 79.

State or municipal liability for invasion of privacy, 87 A.L.R.3d 145.

Propriety of governmental eavesdropping on communications between accused and his attorney, 44 A.L.R.4th 841.

16-11-64.1. Application and issuance of order authorizing installation and use of pen register or trap and trace device.

Any district attorney having jurisdiction over the prosecution of the crime under investigation or the Attorney General is authorized to make application for an order or an extension of an order authorizing or approving the installation and use of a pen register or a trap and trace device to a judge of the superior court of the same judicial circuit as the district attorney, or, in the case of the Attorney General, in any judicial

circuit; and such court shall be authorized to enter an order authorizing the use of a pen register or a trap and trace device, to the extent the same is consistent with and permitted by the laws of the United States. Such order shall have state-wide application and the interception by use of a pen register or trap and trace device shall be permitted in any location in this state. (Code 1981, § 16-11-64.1, enacted by Ga. L. 1995, p. 1051, § 3; Ga. L. 2005, p. 635, § 1/SB 269; Ga. L. 2007, p. 47, § 16/SB 103; Ga. L. 2013, p. 4, § 2/HB 55.)

Law reviews. — For article on the 2013 amendment of this Code section, see 30 Ga. St. U.L. Rev. 109 (2013).

JUDICIAL DECISIONS

Time limitations of investigative warrant. — Because pen registers were not among the devices governed by former O.C.G.A. § 16-11-64, the 20-day limit for investigative warrants issued under that section would not have applied to the 60-day pen register order described by defendant; rather, such a pen register order would have been governed by O.C.G.A. § 16-11-64.1, which contained no time limitation, and defendant's motion to suppress was premised on an alleged violation of an inapplicable Code section. Barnett v. State, 259 Ga. App. 465, 576 S.E.2d 923 (2003).

16-11-64.2. Emergency situation and other grounds authorizing installation and use of pen register or trap and trace device prior to order; time for order approving installation or use.

Any investigative or law enforcement officer, specially designated in writing for such purpose by the Attorney General or by a district attorney, who reasonably determines that:

(1) An emergency situation exists that involves:

(A) Immediate danger of death or serious bodily injury to any person; or

(B) Conspiratorial activities characteristic of organized crime

that requires the installation and use of a pen register or a trap and trace device before an order authorizing such installation and use can, with due diligence, be obtained; and

(2) There are grounds upon which an order could be entered under the laws of the United States to authorize such installation and use

may have installed and use a pen register or trap and trace device if, within 48 hours of the time the pen register or trap and trace device is installed, an order approving the installation or use is issued in accordance with Code Section 16-11-64.1. (Code 1981, § 16-11-64.2, enacted by Ga. L. 1995, p. 1051, § 3.)

16-11-64.3. Emergency situation; application for an investigation warrant.

(a) Notwithstanding any other provision of this part, in the event that the Attorney General or a district attorney of the judicial circuit having jurisdiction over the emergency situation described herein or where the observation, monitoring, or recording of the activities of any person may occur as provided in this subsection determines that:

(1) An emergency situation exists involving the immediate danger of death or serious physical injury to any person;

(2) The said emergency situation requires the immediate interception of a wire, oral, or electronic communications or the immediate observation, monitoring, or recording of the activities of any person involved in said emergency situation in violation of the provisions of Code Section 16-11-62 before an order authorizing such interception or surveillance can, with due diligence, be obtained; and

(3) There are grounds upon which an investigation warrant pursuant to Code Section 16-11-64 could be issued,

then any investigative or law enforcement officer specifically designated by the prosecuting official making such determination may utilize any device as defined in Code Section 16-11-60 to intercept the wire, oral, or electronic communications or to observe, monitor, or record the activities of the person or persons involved in said emergency situation, provided that an application for an investigation warrant is made pursuant to Code Section 16-11-64 within 48 hours after said interception or surveillance commences.

(b) In the event that an application for an investigation warrant made pursuant to this Code section is granted, then the interception or surveillance shall be conducted in accordance with the provisions of Code Section 16-11-64, except that said interception or surveillance shall continue only so long as the emergency situation exists.

(c) In the event that an application for an investigation warrant made pursuant to this Code section is denied or in any event where the interception or surveillance is terminated without an investigation warrant having been issued, the contents of any intercepted communications or other surveillance effected pursuant to this Code section shall not be admissible in any court of this state except to prove violations of this part. The contents of any such intercepted communications or other surveillance effected pursuant to this Code section without an investigation warrant having been issued shall be confidential and shall not be disclosed except to prove violations of this part. (Code 1981, § 16-11-64.3, enacted by Ga. L. 2000, p. 491, § 3; Ga. L. 2001, p. 4, § 16.)

Cross references. — Security from unwarrantable search and seizure, U.S. Const., amend. 4. Security from unreasonable search and seizure, Ga. Const. 1983, Art. I, Sec. I, Para. XIII and § 1-2-6. Searches and seizures generally, T. 17, C. 5.

16-11-65. License to intercept telephonic communications for business service improvement; regulatory powers of Georgia Public Service Commission.

(a) Nothing contained within Code Section 16-11-62 shall prohibit the employment and use of any equipment or device which is owned by any person or is furnished by any telephone company authorized to do business in this state under proper tariffs filed with and approved by the Georgia Public Service Commission which may be attached to any telephonic equipment of any user of or subscriber to such equipment which permits the interception of telephonic communications solely for the purposes of business service improvement when the user of or subscriber to such facilities and equipment has duly applied for and obtained from the Georgia Public Service Commission a license for the employment and installation of the equipment. No license shall be issued until the applicant has demonstrated to the commission a clear, apparent, and logically reasonable need for the use of the equipment in connection with a legitimate business activity of the user or subscriber and demonstrated to the satisfaction of the commission that it will be operated by persons of good moral character and that the equipment will be used in a lawful manner and in conformity with the tariffs filed for the equipment. The commission is authorized to establish the necessary procedures to be employed and followed in applying for such permits and to require from the user or subscriber of such equipment the furnishing of any reasonable information required by the commission in regard to the intended and actual use of the equipment.

(b) The Georgia Public Service Commission is authorized to revoke any license and to order any owner of such equipment or any telephone company supplying such equipment to remove from the premises of the licensee the equipment when it is established to the satisfaction of the commission that the equipment is being used in an unlawful manner contrary to the tariff applicable to the equipment or in a manner contrary to the purposes and uses for which the license had been issued. Such licenses may also be revoked by the commission if it is subsequently discovered that a material misrepresentation of fact has been made in applying for the license. The commission is authorized to promulgate such rules and regulations in connection with the licensing and revocation thereof of such users of such equipment as will enable it to carry out the purposes, duties, and responsibilities imposed upon the commission by this Code section. Such rules and regulations shall afford to any aggrieved licensee an opportunity to a full and impartial

hearing before the commission. The commission shall further have the authority to adopt any and all appropriate rules and regulations of any sort to ensure the privacy of telephonic and telegraphic communications. A violation of such rules and regulations shall be a violation of this part.

(c) All telephone companies shall have printed in a conspicuously accessible location within their directories a notice to the public that there is available without cost at the business office of the telephone company served by the directory a list of subscribers of such equipment which will be made available to any member of the general public requesting the same from such companies.

(d) The provisions of this part shall not apply to acts by duly authorized employees of any telephone company regulated by the Georgia Public Service Commission, with regard to the reasonable and limited intercepting of telephone communications under circumstances reasonably calculated to assure the privacy of telephone communications when such interception is accomplished solely for the purpose of maintaining the quality of service furnished to the public or for the purpose of preventing the unlawful use of telephone service. All such telephone companies shall adopt regulations and procedures consistent with the requirements of this Code section governing the use of equipment which permits the interception of telephone messages by their employees and file the same with the commission. After being filed with the commission, such regulations and procedures shall be public records. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3005, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1985, p. 149, § 16; Ga. L. 1991, p. 1040, § 1.)

JUDICIAL DECISIONS

Cited in Drake v. State, 245 Ga. 798, 267 S.E.2d 237 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Use of equipment contrary to purposes for which license issued. — License to use telephone service observing equipment may be revoked upon proof that licensee is recording conversations on grounds that the activity is contrary to purposes and uses for which license was issued. 1976 Op. Att'y Gen. No. 76-103.

Recording of conversations is not authorized by commission's grant of authority to intercept as use of term "recording" is not included within term "interception" by enabling legislation. 1976 Op. Att'y Gen. No. 76-103.

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 21.

ALR. — Mode of establishing that information obtained by illegal wiretapping

has or has not led to evidence introduced by prosecution, 28 A.L.R.2d 1055.

Sufficiency of identification of participants as prerequisite to admissibility of telephone conversation in evidence, 79 A.L.R.3d 79.

State or municipal liability for invasion of privacy, 87 A.L.R.3d 145.

Permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer, 24 A.L.R.4th 1208.

16-11-66. Interception of wire, oral, or electronic communication by party thereto; consent requirements for recording and divulging conversations to which child under 18 years is a party; parental exception.

(a) Nothing in Code Section 16-11-62 shall prohibit a person from intercepting a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(b) After obtaining the consent required by this subsection, the telephonic conversations or electronic communications to which a child under the age of 18 years is a party may be recorded and divulged, and such recording and dissemination may be done by a private citizen, law enforcement agency, or prosecutor's office. Nothing in this subsection shall be construed to require that the recording device be activated by the child. Consent for the recording or divulging of the conversations of a child under the age of 18 years conducted by telephone or electronic communication shall be given only by order of a judge of a superior court upon written application, as provided in subsection (c) of this Code section, or by a parent or guardian of said child as provided in subsection (d) of this Code section. Said recording shall not be used in any prosecution of the child in any delinquency or criminal proceeding. An application to a judge of the superior court made pursuant to this Code section need not comply with the procedures set out in Code Section 16-11-64.

(c) A judge to whom a written application has been made shall issue the order provided by subsection (b) of this Code section only:

(1) Upon finding probable cause that a crime has been committed;

(2) Upon finding that the child understands that the conversation is to be recorded and that such child agrees to participate; and

(3) Upon determining that participation is not harmful to such child.

A true and correct copy of the recording provided for in subsection (b) of this Code section shall be returned to the superior court judge who issued the order and such copy of the recording shall be kept under seal until further order of the court.

(d) The provisions of this article shall not be construed to prohibit a parent or guardian of a child under 18 years of age, with or without the consent of such minor child, from monitoring or intercepting telephonic conversations of such minor child with another person by use of an extension phone located within the family home, or electronic or other communications of such minor child from within the family home, for the purpose of ensuring the welfare of such minor child. If the parent or guardian has a reasonable or good faith belief that such conversation or communication is evidence of criminal conduct involving such child as a victim or an attempt, conspiracy, or solicitation to involve such child in criminal activity affecting the welfare or best interest of such child, the parent or guardian may disclose the content of such telephonic conversation or electronic communication to the district attorney or a law enforcement officer. A recording or other record of any such conversation or communication made by a parent or guardian in accordance with this subsection that contains evidence of criminal conduct involving such child as a victim or an attempt, conspiracy, or solicitation to involve such child in criminal activity shall be admissible in a judicial proceeding except as otherwise provided in subsection (b) of this Code section. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3006, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1993, p. 565, § 1; Ga. L. 1994, p. 97, § 16; Ga. L. 2000, p. 491, § 4.)

Law reviews. — For annual survey on criminal law, see 68 Mercer L. Rev. 93 (2016).

For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 109 (1993). For note, "Location, Location, Location: A 'Private' Place and Other Ailments of Georgia Surveillance Law Curable Through Alignment with the Federal System," 46 Ga. L. Rev. 1089 (2012).

For comment on Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509 (1977), see 29 Mercer L. Rev. 351 (1977). For comment, "Lawful or Unlawful: Tape-recording Phone Calls?," see 10 Ga. St. B.J. 44 (No. 4, 2004).

JUDICIAL DECISIONS

Analysis

General Consideration
Conversations in Furtherance of Crime

General Consideration

When third party may intercept, record, and divulge a conversation. — O.C.G.A. § 16-11-66 allows a third party to intercept, record, and divulge conversation, (1) when parties to conversation consent, or (2) when message is a crime or is directly in furtherance of a crime and one party to conversation consents. Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509, on remand, 142 Ga. App. 802, 237 S.E.2d 243 (1977), for comment, see 29 Mercer L. Rev. 351 (1977).

Disclosure under former paragraph (b)(7) of O.C.G.A. § 16-11-64 was not required where consent of one party is received under O.C.G.A. § 16-11-66. Luck v. State, 163 Ga. App. 657, 295 S.E.2d 584 (1982).

Scope of statute. — Motions for reconsideration were denied because the court did not err in the court's interpretation of O.C.G.A. § 16-11-66 because rather than

functioning as a limitation on some pre-existing parental right to consent on behalf of the child, the statute was more properly read as a narrow grant of authority for parents' consent to the recording of their child's conversations by a specific means (telephonic conversations) and in a specific location (the family home). Atlanta Indep. Sch. Sys. v. S.F., No. 1:09-CV-2166-RWS, 2010 U.S. Dist. LEXIS 124152 (N.D. Ga. Nov. 23, 2010).

Applicability. — Trial court erred in granting the defendants' general demurrer to unlawful surveillance counts, as the indictment did not fail based on O.C.G.A. § 16-11-66(a), as the one-party-consent rule did not apply to the video recording. State v. Cohen, 302 Ga. 616, 807 S.E.2d 861 (2017).

Vagueness not shown. — Trial court erred in concluding that O.C.G.A. §§ 16-11-62(2) and 16-11-66(a) were unconstitutionally vague as people of ordinary intelligence could understand that people could be found guilty if they used a device to secretly photograph or video record others in private places. State v. Cohen, 302 Ga. 616, 807 S.E.2d 861 (2017).

Children's telephone calls. — O.C.G.A. § 16-11-66 does not allow parents to vicariously consent to interceptions of their children's telephone calls. Bishop v. State, 241 Ga. App. 517, 526 S.E.2d 917 (1999).

Child can not give consent to the recording of the child's phone calls either by implication or by subsequent ratification. Bishop v. State, 241 Ga. App. 517, 526 S.E.2d 917 (1999).

Finding of consent not erroneous when there is conflicting evidence. — Denial of defendants' motion to suppress the admission of the two tape recordings of their conversations with an informant made on the ground that the informant did not consent to the conversations being recorded is not clearly erroneous since the evidence on this issue was in conflict with several law officers testifying that the informant was fully aware of what the informant was doing and was not coerced into consenting to the conversations and the recording thereof and the informant's testimony, while somewhat equivocal, indicated the contrary. Ramsey v. State, 165 Ga. App. 854, 303 S.E.2d 32 (1983).

Former Code 1933, § 26-3006 (see now O.C.G.A. § 16-11-66) dealt solely with interception and acts following interception. Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509, on remand, 142 Ga. App. 802, 237 S.E.2d 243 (1977), for comment, see 29 Mercer L. Rev. 351 (1977).

Former Code 1933, § 26-3006 (see now O.C.G.A. § 16-11-66) did not prohibit actual parties to conversation from recording or divulging it. Mitchell v. State, 239 Ga. 3, 235 S.E.2d 509, on remand, 142 Ga. App. 802, 237 S.E.2d 243 (1977), for comment, see 29 Mercer L. Rev. 351 (1977); Fetty v. State, 268 Ga. 365, 489 S.E.2d 813 (1997).

Involvement in divorce action is not equivalent of implied consent to have one's telephone line tapped. Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525 (1971).

Telephone calls from jail. — Trial counsel was not ineffective for failing to file a motion to suppress recordings of an appellant's telephone calls while the appellant was in jail because while O.C.G.A. § 16-11-62(4) prohibited any person from intentionally and secretly intercepting a telephone call by use of any device, instrument, or apparatus, O.C.G.A. § 16-11-66(a) provided an exception to this rule when one of the parties to the communication had given prior consent and that consent was implied based on the statements during the recording that all jail phone calls were recorded or monitored. Boykins-White v. State, 305 Ga. App. 827, 701 S.E.2d 221 (2010).

Because none of the types of communication encompassed by O.C.G.A. § 16-11-66(a) were at issue, because the parties stipulated that the video recordings the victim made between the victim and defendant without defendant's consent were in a private place, and because the participant's exception in § 16-11-66(a) applied to O.C.G.A. § 16-11-62 in its entirety, pursuant to O.C.G.A. § 16-11-67, the trial court properly excluded the recordings. State v. Madison, 311 Ga. App. 31, 714 S.E.2d 714 (2011).

Cited in Farmer v. State, 228 Ga. 225, 184 S.E.2d 647 (1971); Ansley v. State, 124

General Consideration (Cont'd)

Ga. App. 670, 185 S.E.2d 562 (1971); Cauley v. State, 130 Ga. App. 278, 203 S.E.2d 239 (1973); Adams v. State, 130 Ga. App. 362, 203 S.E.2d 314 (1973); Cross v. State, 233 Ga. 960, 214 S.E.2d 374 (1975); Cross v. State, 136 Ga. App. 400, 221 S.E.2d 615 (1975); United States v. Ransom, 515 F.2d 885 (5th Cir. 1975); Connally v. State, 237 Ga. 203, 227 S.E.2d 352 (1976); Williams v. State, 142 Ga. App. 764, 236 S.E.2d 893 (1977); Mitchell v. State, 142 Ga. App. 802, 237 S.E.2d 243 (1977); State v. Birge, 240 Ga. 501, 241 S.E.2d 213 (1978); O'Dillon v. State, 245 Ga. 342, 265 S.E.2d 18 (1980); Drake v. State, 245 Ga. 798, 267 S.E.2d 237 (1980); Ford v. State, 160 Ga. App. 707, 288 S.E.2d 39 (1981); Green v. State, 250 Ga. 610, 299 S.E.2d 544 (1983); Stephenson v. State, 171 Ga. App. 938, 321 S.E.2d 433 (1984); Peugh v. State, 175 Ga. App. 90, 332 S.E.2d 384 (1985); Norris v. State, 176 Ga. App. 164, 335 S.E.2d 611 (1985); Hall v. State, 176 Ga. App. 428, 336 S.E.2d 291 (1985); Duren v. State, 177 Ga. App. 421, 339 S.E.2d 394 (1986); Martin v. State, 179 Ga. App. 551, 347 S.E.2d 247 (1986); Reeves v. State, 192 Ga. App. 12, 383 S.E.2d 613 (1989); Lawrence v. State, 195 Ga. App. 320, 393 S.E.2d 475 (1990); Kemp v. State, 201 Ga. App. 629, 411 S.E.2d 880 (1991); Gavin v. State, 292 Ga. App. 402, 664 S.E.2d 797 (2008).

Conversations in Furtherance of Crime

One-party consent requirement renders exception constitutional. — Requirement of consent of one party ensures that overhearing by third parties is by divulgence of one party to conversation, which is constitutionally permissible, and not by surreptitious interception unbeknownst to any party to conversation, which is constitutionally impermissible. Goodwin v. State, 154 Ga. App. 46, 267 S.E.2d 488 (1980).

Applicability to face-to-face oral communication. — One-party consent provision of former Code 1933, § 26-3006 (see now O.C.G.A. § 16-11-66) was applicable to face-to-face oral communication. Orkin v. State, 236 Ga. 176, 223 S.E.2d 61 (1976); Brooks v. State, 141 Ga. App. 725, 234 S.E.2d 541 (1977).

Face-to-face communications are included in the consent exceptions to the electronic surveillance prohibitions of former Code 1933, § 26-3006 (see now O.C.G.A. § 16-11-66). Thornton v. State, 139 Ga. App. 483, 228 S.E.2d 919 (1976).

Face-to-face conversations were intended by legislature to be included in consent exceptions contained in former Code 1933, § 26-3006 (see now O.C.G.A. § 16-11-66). Humphrey v. State, 231 Ga. 855, 204 S.E.2d 603, cert. denied, 419 U.S. 839, 95 S. Ct. 68, 42 L. Ed. 2d 66 (1974).

Scope of section. — Legislature intended former Code 1933, § 26-3006 (see now O.C.G.A. § 16-11-66) to govern specifically conversations or communications arranged or anticipated by one of the parties for purpose of interception, recording, and divulging. Goodwin v. State, 154 Ga. App. 46, 267 S.E.2d 488 (1980).

One-party consent may be given to law enforcement officers. — Former Code 1933, § 26-3006 (see now O.C.G.A. § 16-11-66) allowed law enforcement officers to intercept, record, and divulge a conversation, where at least one party thereto consents, and where conversation is a crime or is in furtherance of a crime. Goodwin v. State, 154 Ga. App. 46, 267 S.E.2d 488 (1980).

Section applicable where consenting party is a police officer. — Former Code 1933, § 26-3006 (see now O.C.G.A. § 16-11-66) was intended to cover situations in which conversation was between two private parties, one of whom consented to interception by some third party, most likely a law enforcement agency. This does not mean that if one party to conversation was a police officer who had consented that the section cannot apply. Cross v. State, 128 Ga. App. 837, 198 S.E.2d 338 (1973).

Mere fact that one party to conversation records it does not vitiate its evidentiary value. — Anyone who makes a statement to another knows that person to whom it was made may repeat it to others who may use it against the person; mere fact that person to whom statement was directed made a recording without knowledge of person recorded

does not vitiate its evidentiary value. Quaid v. State, 132 Ga. App. 478, 208 S.E.2d 336 (1974).

Divulging conversation by means of radio transmitting equipment. — State agent may divulge contents of conversations with accused by carrying radio equipment which simultaneously transmits conversations to other agents monitoring transmission frequency, and police officers who are simultaneously listening to conversation through electronic amplification of conversation may testify as to what they have heard. Goodwin v. State, 154 Ga. App. 46, 267 S.E.2d 488 (1980).

Taped testimony of incestuous-rape victim's initiated conversation with assailant found admissible. See Legg v. State, 207 Ga. App. 399, 428 S.E.2d 87 (1993); Cofield v. State, 216 Ga. App. 623, 455 S.E.2d 342 (1995), overruled by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006).

RESEARCH REFERENCES

ALR. — Opening, search, and seizure of mail, 61 A.L.R.2d 1282.

What constitutes an "interception" of a telephone or similar communication forbidden by the Federal Communications Act (47 U.S.C. § 605) or similar state statutes, 9 A.L.R.3d 423.

Permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer, 24 A.L.R.4th 1208.

16-11-66.1. Disclosure of stored wire or electronic communications; records; search warrants; issuance of subpoena; violation.

(a) A law enforcement officer, a prosecuting attorney, or the Attorney General may require the disclosure of stored wire or electronic communications, as well as transactional records pertaining thereto, to the extent and under the procedures and conditions provided for by the laws of the United States.

(b) A provider of electronic communication service or remote computing service shall provide the contents of, and transactional records pertaining to, wire and electronic communications in its possession or reasonably accessible thereto when a requesting law enforcement officer, a prosecuting attorney, or the Attorney General complies with the provisions for access thereto set forth by the laws of the United States.

(c) Search warrants for production of stored wire or electronic communications and transactional records pertaining thereto shall have state-wide application or application as provided by the laws of the United States when issued by a judge with jurisdiction over the criminal offense under investigation and to which such records relate.

(d) A subpoena for the production of stored wire or electronic communications and transactional records pertaining thereto may be issued at any time upon a showing by a law enforcement official, a prosecuting attorney, or the Attorney General that the subpoenaed material relates to a pending criminal investigation.

(e) Violation of this Code section shall be punishable as contempt. (Code 1981, § 16-11-66.1, enacted by Ga. L. 1993, p. 299, § 1; Ga. L. 1995, p. 1023, § 1; Ga. L. 2002, p. 1432, § 4; Ga. L. 2003, p. 140, § 16.)

Editor's notes. — Ga. L. 2002, p. 1432, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'Georgia's Support of the War on Terrorism Act of 2002'."

Law reviews. — For annual survey on criminal law, see 65 Mercer L. Rev. 79 (2013).

For note on 1993 enactment of this Code section, see 10 Ga. St. U.L. Rev. 109 (1993).

JUDICIAL DECISIONS

Cited in Tapley v. Collins, 41 F. Supp. 2d 1366 (S.D. Ga. 1999); Barlow v. Barlow, 272 Ga. 102, 526 S.E.2d 857 (2000); Luangkhot v. State, 292 Ga. 423, 736 S.E.2d 397 (2013).

16-11-67. Admissibility of evidence obtained in violation of part.

No evidence obtained in a manner which violates any of the provisions of this part shall be admissible in any court of this state except to prove violations of this part. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3007, enacted by Ga. L. 1968, p. 1249, § 1.)

Law reviews. — For annual survey on criminal law, see 65 Mercer L. Rev. 79 (2013). For article on domestic relations, see 66 Mercer L. Rev. 65 (2014).

JUDICIAL DECISIONS

O.C.G.A. § 16-11-67 applies to violations of the administrative requirements of O.C.G.A. § 16-11-64; to protect against tampering, alteration, or destruction of evidence, and against allegations thereof, "obtained" necessarily includes both the gathering and safeguarding of evidence. Williams v. State, 265 Ga. 471, 457 S.E.2d 665 (1995).

Noncompliance with the administrative requirements of O.C.G.A. § 16-11-64 did not call for suppression of evidence developed from information gathered with a pen register where there was no showing of any prejudice to defendant's privacy interest resulting from such noncompliance. Williams v. State, 265 Ga. 471, 457 S.E.2d 665 (1995).

Construction with O.C.G.A. § 16-11-64. — O.C.G.A. § 16-11-64(c) merely provides authority to Georgia superior court judges to issue wiretap warrants upon proper application by the prosecuting attorney, and the statute contains no prohibition against evidence gathered as part of a federal investigation in compliance with the federal warrant process. Furthermore, the fact that the warrant was not initially issued by a Georgia superior court judge does not violate the requirements for obtaining a warrant codified in O.C.G.A. § 16-11-64(c), and that fact does not require suppression of evidence gathered pursuant to the warrant. State v. Harrell, 323 Ga. App. 56, 744 S.E.2d 867 (2013).

Violation of 18 U.S.C. § 2518 not included in allowable grounds of motion to suppress under former Code 1933, § 26-3007 (see now O.C.G.A. § 16-11-67). Ansley v. State, 124 Ga. App. 670, 185 S.E.2d 562 (1971), cert. denied, 408 U.S. 929, 92 S. Ct. 2503, 33 L. Ed. 2d 341 (1972).

Jurisdiction of warrant issuing court. — Supreme Court of Georgia concludes that Georgia superior courts do not currently possess the authority to issue

wiretap warrants for interceptions conducted outside the boundaries of their respective judicial circuits. Luangkhot v. State, 292 Ga. 423, 736 S.E.2d 397 (2013).

Appellate court erred in affirming a trial court's denial of the appellants' motion to suppress because the warrants were invalid since the Gwinnett County Superior Court lacked the authority to issue the wiretap warrants for the interceptions in the case which took place exclusively in Fulton County. Luangkhot v. State, 292 Ga. 423, 736 S.E.2d 397 (2013).

Issuance of a warrant by superior court judge. — Trial court erred by granting the defendant's motion to suppress because the fact that the warrant was not initially issued by a Georgia superior court judge did not violate the requirements for obtaining a warrant codified in O.C.G.A. § 16-11-64(c) and that fact did not require suppression of evidence gathered pursuant to the warrant. State v. Harrell, 323 Ga. App. 56, 744 S.E.2d 867 (2013).

Section does not include telephone company records. — O.C.G.A. § 16-11-67, while applicable to the content of telephone conversations, does not extend to include telephone company records. Van Nice v. State, 180 Ga. App. 112, 348 S.E.2d 515 (1986), cert. denied, 480 U.S. 931, 107 S. Ct. 1568, 94 L. Ed. 2d 760 (1987).

Evidence obtained surreptitiously by tape recording spouse's private telephone conversation is evidence obtained in violation of O.C.G.A. § 16-11-67 and is inadmissible for impeachment purposes. Ransom v. Ransom, 253 Ga. 656, 324 S.E.2d 437 (1985).

Exception to "fruit of poisonous tree" doctrine. — In a prosecution of defendant wife for solicitation of murder, where there was no state participation in an illegal tapping of initial phone conversation by her husband, the "fruit of the poisonous tree" doctrine did not require suppression of an undercover agent's subsequent surreptitiously taped conversations with defendant. Jordan v. State, 211 Ga. App. 86, 438 S.E.2d 371 (1993).

Evidence properly excluded. — Because none of the types of communication encompassed by O.C.G.A. § 16-11-66(a) were at issue, because the parties stipulated that the video recordings the victim made between the victim and defendant without defendant's consent were in a private place, and because the participant's exception in § 16-11-66(a) applied to O.C.G.A. § 16-11-62 in its entirety, pursuant to O.C.G.A. § 16-11-67, the trial court properly excluded the recordings. State v. Madison, 311 Ga. App. 31, 714 S.E.2d 714 (2011).

Cited in Bilbo v. State, 142 Ga. App. 716, 236 S.E.2d 847 (1977); Carter v. State, 239 Ga. 509, 238 S.E.2d 57 (1977); State v. Birge, 240 Ga. 501, 241 S.E.2d 213 (1978); State v. Bilbo, 240 Ga. 601, 242 S.E.2d 21 (1978); Dunham v. Belinky, 248 Ga. 479, 284 S.E.2d 397 (1981); Quillan v. State, 160 Ga. App. 167, 286 S.E.2d 503 (1981); Kesler v. State, 249 Ga. 462, 291 S.E.2d 497 (1982); Evans v. State, 252 Ga. 312, 314 S.E.2d 421 (1984); Reeves v. State, 192 Ga. App. 12, 383 S.E.2d 613 (1989); Quintrell v. State, 231 Ga. App. 268, 499 S.E.2d 117 (1998); Bishop v. State, 241 Ga. App. 517, 526 S.E.2d 917 (1999); North v. State, 250 Ga. App. 622, 552 S.E.2d 554 (2001); Moss v. State, 298 Ga. 613, 783 S.E.2d 652 (2016).

RESEARCH REFERENCES

ALR. — Admissibility of telephone conversations in evidence, 71 A.L.R. 5; 105 A.L.R. 326.

Admissibility of evidence obtained by government or other public officer by intercepting letter or telegraph or telephone message, 134 A.L.R. 614.

What constitutes an "interception" of a telephone or similar communication forbidden by the Federal Communications Act (47 U.S.C. § 605) or similar state statutes, 9 A.L.R.3d 423.

Censorship and evidentiary use of unconvicted prisoners' mail, 52 A.L.R.3d 548.

Admissibility, in criminal prosecution, of evidence obtained by electronic surveillance of prisoner, 57 A.L.R.3d 172.

Permissible surveillance, under state communications interception statute, by

person other than state or local law enforcement officer or one acting in concert with officer, 24 A.L.R.4th 1208.

State constitutional requirements as to exclusion of evidence unlawfully seized — post-Leon cases, 19 A.L.R.5th 470.

16-11-68. Admissibility of privileged communications.

Nothing contained within this part shall permit the introduction into evidence of any communication which is privileged by the laws of this state or by the decisions of the appellate courts thereof. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3008, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Privileged communications generally, § 24-5-506 et seq.

JUDICIAL DECISIONS

Cited in State v. Birge, 240 Ga. 501, 241 S.E.2d 213 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 273 et seq.

C.J.S. — 98 C.J.S., Witnesses, § 421 et seq.

ALR. — Admissibility of telephone conversations in evidence, 71 A.L.R. 5; 105 A.L.R. 326.

Admissibility of evidence obtained by government or other public officer by intercepting letter or telegraph or telephone message, 134 A.L.R. 614.

Mode of establishing that information obtained by illegal wiretapping has or has not led to evidence introduced by prosecution, 28 A.L.R.2d 1055.

Persons other than client or attorney affected by, or included within, attorney-client privilege, 96 A.L.R.2d 125; 31 A.L.R.4th 1226.

Construction of statute creating privilege against disclosure of communications made to stenographer or confidential clerk, 96 A.L.R.2d 159.

Admissibility, in criminal prosecution, of evidence obtained by electronic surveillance of prisoner, 57 A.L.R.3d 172.

Propriety of governmental eavesdropping on communications between accused and his attorney, 44 A.L.R.4th 841.

16-11-69. Penalty for violations of part.

Except as otherwise provided in subsection (d) of Code Section 16-11-66.1, any person violating any of the provisions of this part shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or a fine not to exceed $10,000.00, or both. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3010, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1993, p. 299, § 2.)

Law reviews. — For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 109 (1993).

JUDICIAL DECISIONS

Cited in State v. Birge, 240 Ga. 501, 241 S.E.2d 213 (1978); Glazner v. Glazner, 347 F.3d 1212 (11th Cir. 2003).

RESEARCH REFERENCES

ALR. — Validity, construction, and effect of state legislation making wiretapping a criminal offense, 74 A.L.R.2d 855.

Propriety of governmental eavesdropping on communications between accused and his attorney, 44 A.L.R.4th 841.

Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. § 2520) authorizing civil cause of action by person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of Act, 164 A.L.R. Fed. 139.

16-11-70. Telephone records privacy protection.

(a) As used in this Code section, the term:

(1) "End user" means any person, corporation, partnership, firm, municipality, cooperative, organization, governmental agency, building owner, or other entity provided with a telecommunications service for its own consumption and not for resale.

(2) "Telephone record" means information retained by a telecommunications company that relates to the telephone number dialed by the customer, the number of telephone calls directed to a customer, or other data related to the telephone calls typically contained on a customer telephone bill, such as the time the calls started and ended, the duration of the calls, the time of day the calls were made, and any charges applied. For purposes of this Code section, any information collected and retained by, or on behalf of, customers utilizing caller identification or other similar technology does not constitute a telephone record.

(3) "Telephone records broker" means any person or organization that is neither a telecommunications company nor a vendor or supplier for a telecommunications company obligated by contract to protect the confidentiality of telephone records and that purchases, acquires, sells, or releases the telephone record of any third party with whom it has no prior or existing business relationship or that attempts to purchase, acquire, sell, or release the telephone record of any party with whom it has no prior or existing business relationship.

(b) It is unlawful for any telephone records broker to purchase, acquire, sell, or release the telephone records of any person who is a Georgia resident or to attempt to purchase, acquire, sell, or release the telephone record of any third party who is a Georgia resident. This Code section applies whether the customer's telephone record is obtained by

the telephone records broker directly from a telecommunications company or from any other third-party source. For purposes of this Code section, a person is a Georgia resident if the individual has a Georgia billing address.

(c) A violation of any provision of this Code section shall be punishable by a civil fine in an amount not to exceed $10,000.00 for each violation. The prosecuting attorney or the Attorney General shall be authorized to prosecute the civil case. Each telephone record purchased, acquired, sold, or released and each attempt to purchase, acquire, sell, or release a telephone record constitutes a separate violation of this Code section.

(d) Any violation of this Code section shall constitute a tort and shall create a right of action in the person or entity whose telephone records have been purchased, acquired, sold, or released for which damages may be recovered. Special damages may be inferred by the violation. Reasonable attorney's fees shall be awarded to the plaintiff where the plaintiff has prevailed in the underlying action.

(e) No provision of this Code section shall be construed to prevent any action by a law enforcement agency or any officer, employee, or agent of a law enforcement agency to obtain the telephone records or personal identifying information of any third party who is a Georgia resident in connection with the performance of the official duties of the agency, officer, employee, or agent. (Code 1981, § 16-11-70, enacted by Ga. L. 2006, p. 562, § 3/SB 455.)

Editor's notes. — Ga. L. 2006, p. 562, § 1/SB 455, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Telephone Records Privacy Protection Act.'"

Ga. L. 2006, p. 562, § 2/SB 455, not codified by the General Assembly, provides that: "The General Assembly finds that:

"(1) Telephone records can be of great use to criminals because the information contained in call logs listed in such records include a wealth of personal data;

"(2) Many call logs reveal the names of telephone users' doctors, public and private relationships, business associates, and more;

"(3) Although other personal information such as social security numbers may appear on public documents, which can be accessed by data brokers, the only warehouse of telephone records is located at the telephone companies themselves;

"(4) Telephone records are sometimes accessed without authorization of the customer by:

"(A) An employee of the telephone service provider selling the data; and

"(B) 'Pretexting,' whereby a data broker or other person pretends to be the owner of the telephone and convinces the telephone company's employees to release the data to such person; and

"(5) Telephone companies encourage customers to manage their accounts online with many setting up the online capability in advance, although many customers never access their account online. If someone seeking the information activates the account before the customer, he or she can gain unfettered access to the telephone records and call logs of that customer."

PART 2

PREPARATION OF FEDERAL AND STATE INCOME TAX RETURNS

16-11-80. "Business of preparing federal or state income tax returns or assisting taxpayers in preparing such returns" defined.

For the purposes of this part, a person is engaged in the business of preparing federal or state income tax returns or assisting taxpayers in preparing such returns if he does either of the following:

(1) Advertises or gives publicity to the effect that he prepares or assists others in the preparation of state or federal income tax returns; or

(2) Prepares or assists others in the preparation of state or federal income tax returns for compensation. (Ga. L. 1972, p. 446, § 2.)

Cross references. — State income taxes generally, T. 48, C. 7.

16-11-81. Disclosure of information obtained in business of preparing federal or state income tax returns or assisting in preparation.

It shall be unlawful for any person, including an individual, firm, corporation, association, partnership, joint venture, or any employee or agent thereof, to disclose any information obtained in the business of preparing federal or state income tax returns or assisting taxpayers in preparing such returns unless such disclosure is within any of the following:

(1) Consented to in writing by the taxpayer in a separate document;

(2) Expressly authorized by state or federal law;

(3) Necessary to the preparation of the return;

(4) Pursuant to court order; or

(5) Transmitted to a computer center for preparation. (Ga. L. 1972, p. 446, § 1.)

16-11-82. Contacting taxpayer to obtain written consent.

Contacting a taxpayer to obtain his written consent to disclosure does not constitute a violation of this part. (Ga. L. 1972, p. 446, § 3.)

16-11-83. Penalty for violations of part.

Any person violating the provisions of this part shall be guilty of a misdemeanor. (Ga. L. 1972, p. 446, § 4.)

Part 3

Invasion of Privacy

16-11-90. Prohibition on nude or sexually explicit electronic transmissions.

(a) As used in this Code section, the term:

(1) "Harassment" means engaging in conduct directed at a depicted person that is intended to cause substantial emotional harm to the depicted person.

(2) "Nudity" means:

(A) The showing of the human male or female genitals, pubic area, or buttocks without any covering or with less than a full opaque covering;

(B) The showing of the female breasts without any covering or with less than a full opaque covering; or

(C) The depiction of covered male genitals in a discernibly turgid state.

(3) "Sexually explicit conduct" shall have the same meaning as set forth in Code Section 16-12-100.

(b) A person violates this Code section if he or she, knowing the content of a transmission or post, knowingly and without the consent of the depicted person:

(1) Electronically transmits or posts, in one or more transmissions or posts, a photograph or video which depicts nudity or sexually explicit conduct of an adult when the transmission or post is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person; or

(2) Causes the electronic transmission or posting, in one or more transmissions or posts, of a photograph or video which depicts nudity or sexually explicit conduct of an adult when the transmission or post is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person.

(c) Any person who violates this Code section shall be guilty of a misdemeanor of a high and aggravated nature; provided, however, that

upon a second or subsequent violation of this Code section, he or she shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one nor more than five years, a fine of not more than $100,000.00, or both.

(d) A person shall be subject to prosecution in this state pursuant to Code Section 17-2-1 for any conduct made unlawful by this Code section which the person engages in while:

(1) Either within or outside of this state if, by such conduct, the person commits a violation of this Code section which involves an individual who resides in this state; or

(2) Within this state if, by such conduct, the person commits a violation of this Code section which involves an individual who resides within or outside this state.

(e) The provisions of subsection (b) of this Code section shall not apply to:

(1) The activities of law enforcement and prosecution agencies in the investigation and prosecution of criminal offenses;

(2) Legitimate medical, scientific, or educational activities;

(3) Any person who transmits or posts a photograph or video depicting only himself or herself engaged in nudity or sexually explicit conduct;

(4) The transmission or posting of a photograph or video that was originally made for commercial purposes;

(5) Any person who transmits or posts a photograph or video depicting a person voluntarily engaged in nudity or sexually explicit conduct in a public setting; or

(6) A transmission that is made pursuant to or in anticipation of a civil action.

(f) There shall be a rebuttable presumption that an information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet, for content provided by another person, does not know the content of an electronic transmission or post.

(g) Any violation of this Code section shall constitute a separate offense and shall not merge with any other crimes set forth in this title. (Code 1981, § 16-11-90, enacted by Ga. L. 2014, p. 220, § 1/HB 838; Ga. L. 2015, p. 5, § 16/HB 90.)

Cross references. — Constitutional guarantee of free speech and press, Ga. Const. 1983, Art. I, Sec. I, Para. V. Libel and slander, C. 5, T. 51.

Law reviews. — For annual survey of criminal law, see 67 Mercer L. Rev. 31 (2015).

JUDICIAL DECISIONS

No private right of action for violation. — Trial court erred in awarding civil damages to a girlfriend under O.C.G.A. § 16-11-90, which criminalized the transmission of photography or video depicting nudity or sexually explicit conduct of an adult without his or her consent, because it was a criminal statute that did not provide for a private right of action; further, creation of such a right from the statute would violate the separation of powers clause, Ga. Const. 1983, Art. I, Sec. II, Para. III, and also O.C.G.A. § 9-2-8(a). Somerville v. White, 337 Ga. App. 414, 787 S.E.2d 350 (2016).

OPINIONS OF THE ATTORNEY GENERAL

Updating of crimes and offenses for which Georgia Crime Information Center is authorized to collect and file fingerprints. — Pursuant to authority granted to the Attorney General in O.C.G.A. § 35-3-33(a)(1)(A)(v), any misdemeanor offenses arising under O.C.G.A. §§ 16-8-14.1(a), 16-8-22, 16-11-90(b), 16-11-130.2, and 33-24-53, are designated as ones for which those charged are to be fingerprinted. 2014 Op. Att'y Gen. No. 2014-2.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Proof of Liability for Violation of Privacy of Internet User by Use of Cookies or Other Means, 67 POF3d 249.

16-11-91. Use or installation of device to film underneath or through an individual's clothing under certain circumstances.

(a) As used in this Code section, the term:

(1) "Device" means an instrument or apparatus used for observing, photographing, videotaping, recording, or transmitting visual images, including but not limited to a camera, photographic equipment, video equipment, mobile phone, or other similar equipment.

(2) "Intimate parts" shall have the same meaning as set forth in Code Section 16-6-22.1.

(b)(1) Notwithstanding Code Section 16-11-90, it shall be unlawful for any person to, knowingly and without the consent of the individual observed, use or install a device for the purpose of surreptitiously observing, photographing, videotaping, filming, or video recording such individual underneath or through such individual's clothing, for the purpose of viewing the intimate parts of the body of or the undergarments worn by such individual, under circumstances in

which such individual has a reasonable expectation of privacy, regardless of whether it occurs in a public place.

(2) It shall be unlawful to disseminate any image or recording with knowledge that it was taken or obtained in violation of paragraph (1) of this subsection.

(c) Any person convicted of violating this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one year nor more than five years, a fine of not more than $10,000.00, or both, or in the discretion of the court, as for a misdemeanor.

(d) Subsection (b) of this Code section shall not apply to:

(1) The lawful activities of law enforcement and prosecution agencies; or

(2) A business's or entity's surveillance device used in the ordinary course of its business, provided that signage conspicuously warns of such surveillance and the use of such device is primarily designed to detect unlawful activity.

(e) Any violation of this Code section shall constitute a separate offense and shall not merge with any other crimes set forth in this title. (Code 1981, § 16-11-91, enacted by Ga. L. 2017, p. 417, § 5A-1/SB 104.)

Effective date. — This Code section became effective July 1, 2017.

Law reviews. — For article on the 2017 enactment of this Code section, see 34 Ga. St. U.L. Rev. 61 (2017). For annual survey on criminal law, see 69 Mercer L. Rev. 73 (2017).

ARTICLE 4

DANGEROUS INSTRUMENTALITIES AND PRACTICES

Cross references. — Interstate purchase of rifles and shotguns, § 10-1-100 et seq.

PART 1

GENERAL PROVISIONS

Cross references. — Right to keep and bear arms generally, U.S. Const., amend. 2; Ga. Const. 1983, Art. I, Sec. I, Para. VIII; and § 1-2-6. Legal weapons for hunting wildlife generally, § 27-3-4. Prohibition against use of firearms, explosives, or weapons for purpose of catching, killing, fish, § 27-4-8. Penalty for unauthorized possession of weapon by inmate, § 42-5-63. License requirement for firearms dealers, T. 43, C. 16.

RESEARCH REFERENCES

ALR. — Liability of private citizen or his employer for injury or damage to third person resulting from firing of shots at fleeing criminal, 29 A.L.R.4th 144.

Liability of one who provides, by sale or otherwise, firearm or ammunition to adult who shoots another, 39 A.L.R.4th 517.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

16-11-100. Abandoning, discarding, or leaving unattended containers which lock or fasten automatically; abandoning or discarding motor vehicle which does not have door or window removed.

(a) A person is guilty of a misdemeanor when that person leaves in any place accessible to children any abandoned, unattended, or discarded container which has a compartment of more than 1 1/2 cubic feet capacity and a door or lid which locks or fastens automatically when closed and which cannot easily be opened from the inside, without first removing the lid, door, or locking device from such container.

(b) A person is guilty of a misdemeanor when that person leaves in any place accessible to children any abandoned or discarded motor vehicle which does not have at least one door which can easily be opened from the inside or one door or window which has been removed. (Ga. L. 1953, Nov.-Dec. Sess., p. 273, §§ 1, 2; Code 1933, § 26-2911, enacted by Ga. L. 1968, p. 1249, § 2; Ga. L. 1992, p. 2552, § 1.)

Law reviews. — For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 225 (1992).

16-11-101. Furnishing knuckles or a knife to person under the age of 18 years.

A person is guilty of a misdemeanor of a high and aggravated nature when he or she knowingly sells to or furnishes to a person under the age of 18 years knuckles, whether made from metal, thermoplastic, wood, or other similar material, or a knife designed for the purpose of offense and defense. (Ga. L. 1876, p. 112, § 1; Code 1882, § 4540b; Penal Code 1895, § 344; Penal Code 1910, § 350; Code 1933, § 26-5108; Code 1933, § 26-2905, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1994, p. 1012, § 11; Ga. L. 1995, p. 10, § 16; Ga. L. 2008, p. 533, § 3/SB 366; Ga. L. 2009, p. 8, § 16/SB 46.)

Editor's notes. — Ga. L. 1994, p. 1012, § 1, not codified by the General Assembly, provides that the Act shall be known and may be cited as the "School Safety and Juvenile Justice Reform Act of 1994".

Ga. L. 1994, p. 1012, § 2, not codified by

the General Assembly, sets forth legislative findings and determinations for the "School Safety and Juvenile Justice Reform Act of 1994".

Ga. L. 1994, p. 1012, § 29, not codified by the General Assembly, provides for severability.

Law reviews. — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969).

JUDICIAL DECISIONS

Purpose of former Penal Code 1910, § 350 (see now O.C.G.A. § 16-11-101) was to protect minors, to prevent injury resulting from negligent handling of dangerous weapons, and to prevent acquisition of criminal tendencies on part of minors. Hulsey v. Hightower, 44 Ga. App. 455, 161 S.E. 664 (1931).

Former Penal Code 1895, § 344 (see now O.C.G.A. § 16-11-101) did not contemplate toy imitations of weapons. Mathews v. Caldwell, 5 Ga. App. 336, 63 S.E. 250 (1908).

Whether a thing is a weapon or a toy is a question of fact for jury, and this is to be determined irrespective of name by which it is called or purpose for which it is sold or used in a particular case. Mathews v. Caldwell, 5 Ga. App. 336, 63 S.E. 250 (1908).

OPINIONS OF THE ATTORNEY GENERAL

There is no restriction against carrying an unloaded shotgun in a vehicle through this state. 1970 Op. Att'y Gen. No. U70-30.

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Weapons and Firearms, § 37.

C.J.S. — 43 C.J.S., Infants, §§ 198, 199. 94 C.J.S., Weapons, §§ 65, 66.

ALR. — Contributory negligence or assumption of risk of one injured by firearm or air gun discharged by another, 25 A.L.R.3d 518.

Liability for injury or death of minor or other incompetent inflicted upon himself by gun made available by defendant, 75 A.L.R.3d 825.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

16-11-101.1. Furnishing pistol or revolver to person under the age of 18 years.

(a) For the purposes of this Code section, the term:

(1) "Minor" means any person under the age of 18 years.

(2) "Pistol or revolver" means a handgun as defined in subsection (a) of Code Section 16-11-125.1.

(b) It shall be unlawful for a person intentionally, knowingly, or recklessly to sell or furnish a pistol or revolver to a minor, except that it shall be lawful for a parent or legal guardian to permit possession of a pistol or revolver by a minor for the purposes specified in subsection (c) of Code Section 16-11-132 unless otherwise expressly limited by subsection (c) of this Code section.

(c)(1) It shall be unlawful for a parent or legal guardian to permit possession of a pistol or revolver by a minor if the parent or legal guardian knows of a minor's conduct which violates the provisions of Code Section 16-11-132 and fails to make reasonable efforts to prevent any such violation of Code Section 16-11-132.

(2) Notwithstanding any provisions of subsection (c) of Code Section 16-11-132 or any other law to the contrary, it shall be unlawful for any parent or legal guardian intentionally, knowingly, or recklessly to furnish to or permit a minor to possess a pistol or revolver if such parent or legal guardian is aware of a substantial risk that such minor will use a pistol or revolver to commit a felony offense or if such parent or legal guardian who is aware of such substantial risk fails to make reasonable efforts to prevent commission of the offense by the minor.

(3) In addition to any other act which violates this subsection, a parent or legal guardian shall be deemed to have violated this subsection if such parent or legal guardian furnishes to or permits possession of a pistol or revolver by any minor who has been convicted of a forcible felony or forcible misdemeanor, as defined in Code Section 16-1-3, or who has been adjudicated for committing a delinquent act under the provisions of Article 6 of Chapter 11 of Title 15 for an offense which would constitute a forcible felony or forcible misdemeanor, as defined in Code Section 16-1-3, if such minor were an adult.

(d) Upon conviction of a violation of subsection (b) or (c) of this Code section, a person shall be guilty of a felony and punished by a fine not to exceed $5,000.00 or by imprisonment for not less than three nor more than five years, or both. (Code 1981, § 16-11-101.1, enacted by Ga. L. 1994, p. 1012, § 13; Ga. L. 2000, p. 1630, § 1; Ga. L. 2010, p. 963, § 2-6/SB 308; Ga. L. 2013, p. 294, § 4-9/HB 242.)

Editor's notes. — Ga. L. 1994, p. 1012, § 1, not codified by the General Assembly, provides that the Act shall be known and may be cited as the "School Safety and Juvenile Justice Reform Act of 1994".

Ga. L. 1994, p. 1012, § 2, not codified by the General Assembly, sets forth legislative findings and determinations for the "School Safety and Juvenile Justice Reform Act of 1994".

Ga. L. 1994, p. 1012, § 29, not codified by the General Assembly, provides for severability.

Ga. L. 2010, p. 963, § 3-1/SB 308, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty

for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011).

For note on 2000 amendment of this Code section, see 17 Ga. St. U.L. Rev. 97 (2000).

JUDICIAL DECISIONS

O.C.G.A. § 16-11-101 was intended to protect minors from their own inability to protect themselves from their dangerous conduct when in possession of handguns, including their own lack of judgment or inability to resist various peer pressures. McEachern v. Muldovan, 234 Ga. App. 152, 505 S.E.2d 495 (1998).

Liability of seller of gun. — Fundamental purpose of O.C.G.A. § 16-11-101 would be defeated if a minor were permitted to assume the risk vis-a-vis the seller thereby relieving the seller of responsibility for injury resulting from the use of an illegally sold or furnished handgun. McEachern v. Muldovan, 234 Ga. App. 152, 505 S.E.2d 495 (1998).

16-11-102. Pointing or aiming gun or pistol at another.

A person is guilty of a misdemeanor when he intentionally and without legal justification points or aims a gun or pistol at another, whether the gun or pistol is loaded or unloaded. (Ga. L. 1880-81, p. 151, § 1; Code 1882, § 4528a; Penal Code 1895, § 343; Penal Code 1910, § 349; Code 1933, § 26-5107; Code 1933, § 26-2908, enacted by Ga. L. 1968, p. 1249, § 1.)

JUDICIAL DECISIONS

Purpose of former Penal Code 1910, § 349 (see now O.C.G.A. § 16-11-102) was to protect life and property. Parsons v. State, 16 Ga. App. 212, 84 S.E. 974 (1915).

Scope and application. — O.C.G.A. § 16-11-102 applies only where the victim is not placed in reasonable apprehension of immediate violent injury by the pointing of the firearm (e.g., when the victim is unaware a weapon has been pointed at the victim), since otherwise the act of pointing a firearm at a person comes within the definition of aggravated assault. Watson v. State, 199 Ga. App. 825, 406 S.E.2d 509 (1991).

Section applies to law enforcement officers. — Even a marshal, policeman, or other arresting officer, who intentionally points a pistol at another when the use of a weapon is unnecessary to the discharge of the official's duties, is guilty of a violation of former Penal Code 1910, § 349 (see now O.C.G.A. § 16-11-102). Reynolds v. State, 9 Ga. App. 227, 70 S.E. 969 (1911).

Probable cause for arrest after witnesses claimed to see pointed gun. — When an arrestee was involved in an altercation with three men while leaving a bar and an officer obtained a warrant for the arrestee's arrest, the arrestee's Fourth Amendment malicious prosecution claim against the officer failed because the testimony of the three witnesses was sufficient to cause a person of reasonable caution to believe that the arrestee had pointed a gun at another without justification. Chancy v. Bruno, No. 15-14077, 2017 U.S. App. LEXIS 2498 (11th Cir. Feb. 13, 2017) (Unpublished).

Road rage. — Evidence was sufficient to convict defendant of pointing a pistol at the victim in violation of O.C.G.A. § 16-11-102 because, while driving slowly in heavy traffic, defendant became angry

about the way the victim had been driving, and, after a brief exchange of words and gestures from inside their cars, defendant pulled a handgun from behind the passenger seat and pointed the gun at the victim, and the victim, who was unarmed, ducked the victim's head and turned into the victim's workplace as defendant continued along the road, and after a witness called the police and provided the police with defendant's license number, defendant was arrested. Taylor v. State, 276 Ga. App. 424, 623 S.E.2d 237 (2005).

Pointing must be intentional to constitute this offense. Herrington v. State, 121 Ga. 141, 48 S.E. 908 (1904); Edwards v. State, 4 Ga. App. 167, 60 S.E. 1033, later appeal, 4 Ga. App. 849, 62 S.E. 565 (1908); Leonard v. State, 133 Ga. 435, 66 S.E. 251 (1909); Hawkins v. State, 8 Ga. App. 705, 70 S.E. 53 (1911); Parsons v. State, 16 Ga. App. 212, 84 S.E. 974 (1915).

To aim a weapon at another is to point weapon intentionally. Livingston v. State, 6 Ga. App. 805, 65 S.E. 812 (1909).

Child may have necessary intent. — Thirteen year old child intentionally aimed gun at another child without any legal justification and therefore violated O.C.G.A. § 16-11-102. A reasonable 13-year old should have anticipated that serious injury would result from intentionally aiming and firing a .38 revolver at or near a person's head and that a bullet wound is a foreseeable and expected result of pointing a loaded gun at another and pulling the trigger. Allstate Ins. Co. v. Dillard, 859 F. Supp. 1501 (M.D. Ga. 1994), aff'd, 70 F.3d 1285 (11th Cir. 1995).

Mentally retarded may have necessary intent. — Defendant admitted to knowing that the defendant should not discharge a gun within the city limits, that the defendant was already in trouble for shooting a dog, and the defendant knew that the defendant was still holding the gun when the defendant pointed the gun at a person; thus, the defendant, even though mentally retarded, could be convicted of reckless conduct. Cox v. State, 216 Ga. App. 86, 453 S.E.2d 471 (1995).

Intention may be inferred from circumstances surrounding pointing. Hawkins v. State, 8 Ga. App. 705, 70 S.E. 53 (1911); Parsons v. State, 16 Ga. App. 212, 84 S.E. 974 (1915).

It is not essential that pointing be done with intention to shoot. Winkles v. State, 114 Ga. 449, 40 S.E. 259 (1901).

It is immaterial whether pointing be in fun or otherwise. Leonard v. State, 133 Ga. 435, 66 S.E. 251 (1909).

Playful pointing of gun. — If the pointing of the pistol was done playfully or was accompanied by the declaration that there was no intention to shoot, and a disclaimer of any criminal intent, it would not amount to a criminal assault. Edwards v. State, 4 Ga. App. 167, 60 S.E. 1033, later appeal, 4 Ga. App. 849, 62 S.E. 565 (1908).

Former Penal Code 1895, § 343 (see now O.C.G.A. § 16-11-102) did not apply to pointing of toy imitation pistol, which was not reasonably capable of being put to use for which corresponding weapon was intended. Mathews v. Caldwell, 5 Ga. App. 336, 63 S.E. 250 (1908).

Whether a pistol is in fact a toy or weapon is for jury determination. Mathews v. Caldwell, 5 Ga. App. 336, 63 S.E. 250 (1908).

Neither name of thing or purpose for which sold or used is controlling. — Neither name by which thing is called nor purpose for which sold or used in a particular case is controlling in determining its character. Mathews v. Caldwell, 5 Ga. App. 336, 63 S.E. 250 (1908).

Opprobrious, insulting, or abusive language furnished no justifiable provocation under former Penal Code 1895, § 343 (see now O.C.G.A. § 16-11-102). Skinner v. State, 98 Ga. 127, 26 S.E. 475 (1896); Winkles v. State, 114 Ga. 449, 40 S.E. 259 (1901).

Involuntary manslaughter. — Accidental shooting, causing death, following intentional pointing of pistol at another, constitutes involuntary manslaughter. Leonard v. State, 133 Ga. 435, 66 S.E. 251 (1909); Irvin v. State, 9 Ga. App. 865, 72 S.E. 440 (1911).

Trial court's instruction on felony involuntary manslaughter as a lesser included offense of felony murder was not improper when there was evidence that the defendant intentionally pointed a gun at the

victim in violation of O.C.G.A. § 16-11-102 just before the gun fired. Moore v. State, 286 Ga. App. 313, 649 S.E.2d 337 (2007).

Given evidence at trial that the defendant, age 15, was playing with a gun near the back of the defendant's father's head when the defendant shot the defendant's father, the trial court erred in refusing the defendant's request to charge on involuntary manslaughter as a lesser included offense of malice murder, not just as a lesser included offense of felony murder, and appellate counsel was ineffective in failing to make this argument. The "unlawful act" required for involuntary manslaughter could have been reckless conduct under O.C.G.A. § 16-5-60. Seabolt v. Norris, 298 Ga. 583, 783 S.E.2d 913 (2016).

Offense of pointing a gun is a lesser included offense of aggravated assault. — Simple assault under former Code 1933, § 26-1301 (see now O.C.G.A. § 16-5-20) and pointing a gun or pistol at another under former Code 1933, § 26-2908 (see now O.C.G.A. § 16-11-102) are both misdemeanors and included in greater crime of aggravated assault with deadly weapon. Morrison v. State, 147 Ga. App. 410, 249 S.E.2d 131 (1978).

Indictment which specified the charge of "aggravated assault" but was described as making an assault with a handgun by pointing the weapon did not create an ambiguity which rendered the charges indistinguishable from the misdemeanor charge of pointing or aiming a gun or pistol at another; preparing a defense to the lesser included offense of pointing a pistol at another would be intrinsic to any preparation of a defense to the aggravated assault charge. Dobbs v. State, 204 Ga. App. 83, 418 S.E.2d 443 (1992).

Although pointing a firearm at another is an offense included in aggravated assault, it is not error to refuse a charge on it when the evidence does not reasonably raise the issue that defendant may be guilty of only the lesser crime. Head v. State, 233 Ga. App. 655, 504 S.E.2d 499 (1998); Stobbart v. State, 272 Ga. 608, 533 S.E.2d 379 (2000).

Not lesser included offense of attempted murder. — Offense of O.C.G.A. § 16-11-102 was not a lesser included offense of attempted murder and aggravated assault on a police officer since the evidence showed that the latter crimes were completed. Thomas v. State, 226 Ga. App. 441, 487 S.E.2d 75 (1997).

Lesser included offense instruction inappropriate. — When evidence showed that the defendant pointed a gun at a hijacking victim and ordered the victim to comply with the defendant's commands, the defendant was not entitled to a lesser included instruction under O.C.G.A. § 16-11-102, which applies only when the victim was not placed in reasonable apprehension of immediate violent injury by the pointing of the firearm. Collis v. State, 252 Ga. App. 659, 556 S.E.2d 221 (2001).

Offense may be established when greater offense which includes it is itself not proved. For example, under a charge of assault with intent to murder, there may be a conviction for pointing a gun at another. Jenkins v. State, 92 Ga. 470, 17 S.E. 693 (1893); Livingston v. State, 6 Ga. App. 208, 64 S.E. 709 (1909).

Indictment must charge intentional pointing, either expressly or by necessary implication. Herrington v. State, 121 Ga. 141, 48 S.E. 908 (1904); Livingston v. State, 6 Ga. App. 208, 64 S.E. 709 (1909); Parsons v. State, 16 Ga. App. 212, 84 S.E. 974 (1915); Edwards v. State, 28 Ga. App. 466, 111 S.E. 748 (1922).

In the homicide trial, the defendant's act was clearly the felony of aggravated assault, not the misdemeanor of pointing a weapon at another, when the testimony showed that the victim, as well as the three passengers in the victim's car, were aware of and understandably apprehensive of immediate violent injury, and defendant's own testimony ("I was showing the gun to him so he would leave me alone.") revealed that the defendant's purpose in pointing the weapon was to place the victim in apprehension of immediate violent injury, and the request for a charge on misdemeanor manslaughter was properly denied. Rhodes v. State, 257 Ga. 368, 359 S.E.2d 670 (1987); Rameau v. State, 267 Ga. 261, 477 S.E.2d 118 (1996).

Absence of justification as an element. — Guilty verdict for aggravated

assault under O.C.G.A. § 16-5-21(a) was not necessarily inconsistent because an O.C.G.A. § 16-11-102 pointing a gun count (for which petitioner inmate was found not guilty) included the element of acting without justification, an element not involved in the aggravated assault charge; counsel was not ineffective for not requesting an instruction on the specific method of committing the aggravated assault charged. Leroy Banks v. Georgia, 517 Fed. Appx. 709 (11th Cir. 2013) (Unpublished).

Charge properly refused. — Requested charges on involuntary manslaughter, pointing a firearm at another, and simple assault, were properly refused, where defendant's testimony (that defendant fired shots with the intention of frightening a group) established as a matter of law the offense of aggravated assault, and the testimony that members of the group were frightened and dropped to the ground was inconsistent with the requested charges. Hawkins v. State, 260 Ga. 138, 390 S.E.2d 836 (1990).

Trial court did not err by refusing to charge the jury regarding pointing or aiming a gun or pistol at another as a lesser included offense of aggravated assault. Rowe v. State, 266 Ga. 136, 464 S.E.2d 811 (1996).

Defendant was not entitled to a jury charge on the misdemeanors of pointing a gun at another, O.C.G.A. § 16-11-102, as a lesser included offense of the felony counts of aggravated assault because the victims were placed in reasonable apprehension of immediately receiving a violent injury when the defendant pointed a gun at the victims; the only testimony was that the weapon was pointed as a threat and perceived as such and, therefore, an assault. Dailey v. State, 313 Ga. App. 809, 723 S.E.2d 43 (2012), cert. denied, No. S12C0969, 2012 Ga. LEXIS 551 (Ga. 2012).

Conviction of licensed bondsman. — Licensed bondsman was not justified in pointing gun at person other than the person specified in pickup order and arrest warrant and thus was properly convicted of pointing a pistol at another. Mease v. State, 165 Ga. App. 746, 302 S.E.2d 429 (1983).

Conviction upheld despite self-defense argument. — Defendant was properly convicted of pointing or aiming a gun or pistol at another when the defendant pulled a gun on security personnel at a tavern after security took defendant's keys because of the defendant's intoxicated condition, notwithstanding the defendant's contention that the defendant acted in self-defense. Richardson v. State, 233 Ga. App. 890, 505 S.E.2d 57 (1998).

Cited in Kerbo v. State, 230 Ga. 241, 196 S.E.2d 424 (1973); Hardin v. State, 137 Ga. App. 391, 224 S.E.2d 82 (1976); Fleming v. State, 137 Ga. App. 805, 224 S.E.2d 792 (1976); Thomas v. State, 237 Ga. 690, 229 S.E.2d 458 (1976); Ramsey v. Mercer, 142 Ga. App. 827, 237 S.E.2d 450 (1977); Leach v. State, 143 Ga. App. 598, 239 S.E.2d 177 (1977); Mitchell v. State, 154 Ga. App. 399, 268 S.E.2d 360 (1980); Henderson v. State, 153 Ga. App. 801, 266 S.E.2d 522 (1980); Beckum v. State, 156 Ga. App. 484, 274 S.E.2d 829 (1980); Raines v. State, 247 Ga. 504, 277 S.E.2d 47 (1981); Nutt v. State, 159 Ga. App. 46, 282 S.E.2d 696 (1981); Smith v. State, 249 Ga. 801, 294 S.E.2d 525 (1982); Richardson v. State, 250 Ga. 506, 299 S.E.2d 715 (1983); Padgett v. State, 170 Ga. App. 98, 316 S.E.2d 523 (1984); Green v. State, 175 Ga. App. 92, 332 S.E.2d 385 (1985); Smith v. State, 186 Ga. App. 303, 367 S.E.2d 573 (1988); Vincent v. State, 203 Ga. App. 874, 418 S.E.2d 138 (1992); Pruitt v. State, 211 Ga. App. 654, 440 S.E.2d 248 (1994); Taylor v. State, 226 Ga. App. 254, 485 S.E.2d 830 (1997); In the Interest of C.A., 249 Ga. App. 280, 548 S.E.2d 37 (2001).

OPINIONS OF THE ATTORNEY GENERAL

There is no restriction against carrying an unloaded shotgun in a vehicle through this state. 1970 Op. Att'y Gen. No. U70-30.

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Assault and Battery, §§ 4, 32, 33, 35, 47, 49. 79 Am. Jur. 2d, Weapons and Firearms, § 32.

C.J.S. — 94 C.J.S., Weapons, § 57 et seq.

ALR. — Contributory negligence or assumption of risk of one injured by firearm or air gun discharged by another, 25 A.L.R.3d 518.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

16-11-103. Discharge of gun or pistol near public highway; penalty.

(a) As used in this Code section, the term:

(1) "Firearm" means any handgun, rifle, or shotgun.

(2) "Public highway" means every public street, road, and highway in this state.

(3) "Sport shooting range" means an area designated and operated by a person or entity for the sport shooting of firearms, target practice, trapshooting, skeet shooting, or shooting sporting clays and not available for such use by the general public without payment of a fee, membership contribution, or dues or without the invitation of an authorized person, or any area so designated and operated by a unit of government, regardless of the terms of admission thereto.

(4) "Unit of government" means any of the departments, agencies, authorities, or political subdivisions of the state, cities, municipal corporations, townships, or villages and any of their respective departments, agencies, or authorities.

(b) Except as provided in subsection (c) of this Code section, it shall be unlawful for any person, without legal justification, to discharge a firearm on or within 50 yards of a public highway.

(c) This Code section shall not apply to a discharge of a firearm which occurs within 50 yards of a public highway if such discharge is shielded from the view of a traveler on the public highway and occurs at:

(1) An indoor or outdoor sport shooting range;

(2) Facilities used for firearm or hunting safety courses sponsored by a unit of government, nonprofit corporation, or commercial enterprise; or

(3) The business location of any person, firm, retail dealer, wholesale dealer, pawnbroker, or corporation licensed as a firearm dealer.

(d) Any person who violates subsection (b) of the Code section shall be guilty of a misdemeanor. (Ga. L. 1882-83, p. 131, §§ 1, 2; Penal Code

1895, § 508; Penal Code 1910, § 504; Code 1933, § 26-7301; Code 1933, § 26-2909, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2014, p. 200, § 1/HB 773; Ga. L. 2017, p. 774, § 16/HB 323.)

The 2017 amendment, effective May 9, 2017, part of an Act to revise, modernize, and correct the Code, deleted "pursuant to Chapter 16 of Title 43" following "dealer" at the end of paragraph (c)(3).

Cross references. — Prohibition against discharging weapon across public road while hunting, § 27-3-10.

JUDICIAL DECISIONS

No merger into conviction for felony murder. — Conviction under O.C.G.A. § 16-11-103 for discharging a gun within 50 yards of a public highway does not merge into a felony murder conviction. Hawkins v. State, 262 Ga. 193, 415 S.E.2d 636 (1992).

Not lesser included offense of attempted murder. — Offense of O.C.G.A. § 16-11-103 was not a lesser included offense of attempted murder and aggravated assault on a police officer when the evidence showed that the latter crimes were completed. Thomas v. State, 226 Ga. App. 441, 487 S.E.2d 75 (1997).

Mentally retarded individuals. — Defendant admitted to knowing that defendant should not discharge a gun within the city limits, that defendant was already in trouble for shooting a dog, and defendant knew that defendant was still holding the gun when defendant pointed the gun at a person; thus, defendant, even though mentally retarded, could be convicted of reckless conduct. Cox v. State, 216 Ga. App. 86, 453 S.E.2d 471 (1995).

Defense of accidental homicide was not involved when death results from violation of former Code 1933, § 26-7301 (see now O.C.G.A. § 16-11-103). Creel v. State, 216 Ga. 233, 115 S.E.2d 552 (1960).

Evidence sufficient to support conviction. — When a witness testified that the defendant fired a gun from "right there at a clothesline" and an officer testified that the distance from the clothesline to the street was "right at 50 yards," the evidence was sufficient to support a conviction. Parker v. State, 234 Ga. App. 137, 505 S.E.2d 784 (1998).

Evidence was sufficient to support a juvenile's delinquency adjudication based on charges of aggravated assault, possession of a firearm by a minor, and discharge of a gun or pistol near a street, in violation of O.C.G.A. §§ 16-5-21(a), 16-11-132(b), and 16-11-103, as the juvenile was at a party and went outside with a crowd of others due to a fight, and the juvenile fired a gun into the air while standing in the midst of a crowd; the juvenile was identified by three eyewitnesses, whose testimony established that the eyewitnesses were placed in reasonable apprehension of immediate violent injury due to the juvenile's actions. In the Interest of C.D.G., 279 Ga. App. 718, 632 S.E.2d 450 (2006).

No fatal variance between the indictment and the proof at trial was shown since the indictment specifically alleged that defendant discharged a firearm, a .380 caliber handgun, near a public road and highway and the state offered proof of that very conduct. Jett v. State, 246 Ga. App. 429, 540 S.E.2d 209 (2000).

Cited in Burns v. State, 240 Ga. 827, 242 S.E.2d 579 (1978).

OPINIONS OF THE ATTORNEY GENERAL

There is no restriction against carrying an unloaded shotgun in a vehicle through this state. 1970 Op. Att'y Gen. No. U70-30.

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Weapons and Firearms, § 32.

C.J.S. — 94 C.J.S., Weapons, § 62 et seq.

16-11-104. Discharge of firearms on property of another.

(a) It shall be unlawful for any person to fire or discharge a firearm on the property of another person, firm, or corporation without having first obtained permission from the owner or lessee of the property. This Code section shall not apply to:

(1) Persons who fire or discharge a firearm in defense of person or property; and

(2) Law enforcement officers.

(b) Any person who violates subsection (a) of this Code section is guilty of a misdemeanor. (Code 1933, § 26-2909.1, enacted by Ga. L. 1977, p. 1333, § 1.)

JUDICIAL DECISIONS

Firing handgun at street light from hotel. — Trial court did not err in denying the defendant's motion to suppress evidence officers found during the booking process at the detention center because its finding there was probable cause for the defendant's arrest for firing a handgun at a street light at a hotel and was not clearly erroneous when the combined facts and circumstances known to the arresting officers were sufficient to warrant a prudent person in believing that the defendant had committed the offense of discharging a firearm on the property of another without permission in violation of O.C.G.A. § 16-11-104(a); the defendant matched the unique description of one of the shooters provided by the eyewitness and communicated to the responding officers, and the defendant was encountered by the officers near the scene of the shooting incident shortly after the incident occurred. Davis v. State, 304 Ga. App. 355, 696 S.E.2d 381 (2010).

OPINIONS OF THE ATTORNEY GENERAL

There is no restriction against carrying an unloaded shotgun in a vehicle through this state. 1970 Op. Att'y Gen. No. U70-30.

RESEARCH REFERENCES

C.J.S. — 94 C.J.S., Weapons, § 62 et seq.

16-11-105. Discharge of firearm on Sunday; exceptions; penalty.

Reserved. Repealed by Ga. L. 2005, p. 641, § 2/SB 259, effective July 1, 2005.

Editor's notes. — This Code section was based on Ga. L. 1898, p. 107, §§ 1, 2; Penal Code 1895, § 418; Code 1933, § 26-6907; Ga. L. 1968, p. 1246, §§ 1, 2; Ga. L. 1976, p. 1437, § 1; Ga. L. 1977, p. 1333, § 2; Ga. L. 1983, p. 448, § 1.

16-11-106. Possession of firearm or knife during commission of or attempt to commit certain crimes.

(a) For the purposes of this Code section, the term "firearm" shall include stun guns and tasers. A stun gun or taser is any device that is powered by electrical charging units such as batteries and emits an electrical charge in excess of 20,000 volts or is otherwise capable of incapacitating a person by an electrical charge.

(b) Any person who shall have on or within arm's reach of his or her person a firearm or a knife having a blade of three or more inches in length during the commission of, or the attempt to commit:

(1) Any crime against or involving the person of another;

(2) The unlawful entry into a building or vehicle;

(3) A theft from a building or theft of a vehicle;

(4) Any crime involving the possession, manufacture, delivery, distribution, dispensing, administering, selling, or possession with intent to distribute any controlled substance or marijuana as provided in Code Section 16-13-30, any counterfeit substance as defined in Code Section 16-13-21, or any noncontrolled substance as provided in Code Section 16-13-30.1; or

(5) Any crime involving the trafficking of cocaine, marijuana, or illegal drugs as provided in Code Section 16-13-31,

and which crime is a felony, commits a felony and, upon conviction thereof, shall be punished by confinement for a period of five years, such sentence to run consecutively to any other sentence which the person has received.

(c) Upon the second or subsequent conviction of a person under this Code section, the person shall be punished by confinement for a period of ten years. Notwithstanding any other law to the contrary, the sentence of any person which is imposed for violating this Code section a second or subsequent time shall not be suspended by the court and probationary sentence imposed in lieu thereof.

(d) The punishment prescribed for the violation of subsections (b) and (c) of this Code section shall not be reducible to misdemeanor punishment as is provided by Code Section 17-10-5.

(e) Any crime committed in violation of subsections (b) and (c) of this Code section shall be considered a separate offense. (Ga. L. 1968, p. 982,

§§ 1, 2; Ga. L. 1974, p. 385, § 1; Ga. L. 1976, p. 1591, §§ 1, 2; Ga. L. 1985, p. 425, § 1; Ga. L. 1986, p. 1205, § 1; Ga. L. 1987, p. 624, § 1; Ga. L. 2000, p. 1618, § 1; Ga. L. 2001, p. 4, § 16.)

JUDICIAL DECISIONS

Analysis

General Consideration
Application
Jury Instructions
Punishment

General Consideration

O.C.G.A. § 16-11-106 does not require undue specificity, but only that the crime be a felony falling within one of the categories set forth therein. Gatlin v. State, 199 Ga. App. 500, 405 S.E.2d 118 (1991).

Defendant's claim to the contrary notwithstanding, the record was replete with evidence corroborating the testimony of defendant's accomplice which identified defendant as one of the perpetrators of an armed robbery. The fact that there was no claim that a store clerk's opinion as to the identity of the perpetrators was unfounded, the clerk's undisputed res gestae testimony that the clerk heard a customer identify one of the perpetrators as defendant, and the clerk's testimony that the clerk had been sprayed in the face with mace corroborated this aspect of the accomplice's testimony as well. Carter v. State, 266 Ga. App. 691, 598 S.E.2d 76 (2004).

Unconstitutional to convict defendant of unindicted charge. — When a reasonable probability existed that the jury convicted the defendant of a firearms charge in a manner not charged in the indictment (through burglary, rather than during an aggravated assault), the error violated the defendant's due process rights and was sufficiently egregious to preclude a finding that the error was waived. Levin v. State, 222 Ga. App. 123, 473 S.E.2d 582 (1996).

Section applies to possession of firearm even with a valid license. — These provisions do not make it a crime to be illegally in possession of a firearm during commission of another crime, but makes it a crime to be in possession of a firearm even with a valid license during commission of a crime. Spence v. State, 233 Ga. 527, 212 S.E.2d 357 (1975).

"Possession" specifically proscribed by O.C.G.A. § 16-11-106(b) is the act of having on or within arm's reach of one's person a knife having a blade of three or more inches in length. White v. State, 203 Ga. App. 889, 418 S.E.2d 149 (1992).

When cocaine and a gun were found in a residence controlled by defendant, the jury could consider evidence of the small size and crowded conditions within the residence and infer that it was inevitable that defendant passed even momentarily within arm's reach of the gun. Gibson v. State, 223 Ga. App. 103, 476 S.E.2d 863 (1996).

Subsection (e) does not demonstrate intent to impose multiple convictions. — In light of this legislative history, O.C.G.A. § 16-11-106(e) does not demonstrate a legislative intent to impose multiple convictions for possession of a weapon based on multiple predicate felonies. Instead, it evidences only the legislative intent to provide punishment for both the possession offense and the predicate felony. Thus, subsection (e) would require that the possession offense stand even when the predicate felony merges as a matter of fact into another offense. State v. Marlowe, 277 Ga. 383, 589 S.E.2d 69 (2003).

Meaning of "on his person." — Evidence that firearms were in the rear of and on the floor of a van near where defendants were seated does not come within the meaning of "on his person," referred to in subsection (a) (now O.C.G.A.

General Consideration (Cont'd)

§ 16-11-106(b)). Beal v. State, 175 Ga. App. 234, 333 S.E.2d 103 (1985) (decided prior to 1987 amendment which inserted "within arm's reach of" in subsection (b)).

O.C.G.A. § 16-11-106 requires that the weapon be either on or within arm's reach of the person charged with possessing a firearm during the commission of the felony; the legislature did not intend to criminalize the mere possession of a weapon by a person who after putting the weapon away subsequently commits a felony. Carswell v. State, 251 Ga. App. 733, 555 S.E.2d 124 (2001).

Meaning of "within arm's reach." — The 1987 amendment, adding the phrase "or within arm's reach" in O.C.G.A. § 16-11-106(b), was clearly a substantive change as it altered the evidence required to be found guilty of the offense, and its misapplication to a defendant would be subject to the constitutional prohibition against ex post facto laws. McIntosh v. State, 185 Ga. App. 612, 365 S.E.2d 454 (1988).

Meaning of "theft of a vehicle." — Statutory phrase, "theft of a vehicle," is very general language and, most reasonably construed, includes the various methods of theft rather than limiting it to theft by taking. Allen v. State, 192 Ga. App. 306, 384 S.E.2d 467 (1989).

Length of blade determination. — While there was no evidence as to the length of the knife, the trial court was authorized to determine if the blade met the requirements for the defendant's conviction for possession of a knife during the commission of a crime. Petro v. State, 327 Ga. App. 254, 758 S.E.2d 152 (2014).

Active employment of gun. — Defendant's prior O.C.G.A. § 16-11-106(b)(4) conviction for possessing a firearm during a crime was a firearms offense within U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A)(iii), as it would have been an offense under 18 U.S.C. § 924(c) and it was wrong to suggest § 924(c) required "active employment" of a gun whereas § 16-11-106(b)(4) did not. United States v. Lopez-Garcia, 565 F.3d 1306 (11th Cir. 2009), cert. denied, 558 U.S. 1092, 130 S. Ct. 1012, 175 L. Ed. 2d 620 (2009).

Sufficiency of indictment. — Offense of possession of a firearm during the commission of a crime can be committed by possessing a firearm during the commission of a crime against or involving the person of another or by possessing a firearm during the commission of a theft from a building; an indictment was not void merely because the indictment alleged an armed robbery not of a person, but of a building. Dowdell v. State, 278 Ga. App. 142, 628 S.E.2d 226 (2006).

Indictment sufficiently alleged possession of a weapon during commission of certain crimes, O.C.G.A. § 16-11-106, by alleging that the defendant had a handgun during the commission of the crime of aggravated assault; if the defendant sought to know to which of the two aggravated assault counts was referred to, the defendant's motion was a special demurrer and was untimely under O.C.G.A. § 17-7-110. Allen v. State, 300 Ga. 500, 796 S.E.2d 708 (2017).

No speedy trial violation. — Convictions for armed robbery, aggravated assault with the intent to rob, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon were proper because the defendant's right to a speedy trial was not violated by the 20-month delay between the date the indictment was issued to the date of the defendant's actual trial as the delay was due to a higher priority of statutory speedy trial demands, so it was not a deliberate delay on the part of the state, and as the defendant failed to show any prejudice from the delay. Herndon v. State, 277 Ga. App. 374, 626 S.E.2d 579 (2006).

Severance of trials. — After the defendants were convicted of possession of a firearm during a crime, the trial court did not abuse the court's discretion by denying the defendants' motions to sever the defendants' trials as the defendants failed to make a clear showing of prejudice and a denial of due process protection. Attaway v. State, 259 Ga. App. 822, 578 S.E.2d 529 (2003).

In a prosecution on two counts of attempting to hijack a motor vehicle, four counts of aggravated assault, possession of a firearm during the commission of a

crime, and criminal trespass, because the offenses committed by a defendant and a codefendant amounted to a series of continuous acts connected together both in time and the area in which committed, and there was no likelihood of confusion, the trial court did not abuse the court's discretion in denying the defendant's motion to sever the trial from that of the codefendant; furthermore, the mere fact that the codefendants' defenses were antagonistic was insufficient in itself to warrant separate trials. Diaz v. State, 280 Ga. App. 413, 634 S.E.2d 160 (2006).

Defendant's motion to sever the failure to register as a sex offender counts under former O.C.G.A. § 42-1-12 from the remaining aggravated sodomy and child molestation counts was properly denied as: (1) the defendant was not entitled to severance as a matter of right since the charges involved a series of acts which were connected together; (2) the case was not so complex as to impair the jury's ability to distinguish the evidence and to apply the law intelligently to the counts as joined; and (3) the failure to sever the failure to register as a sex offender counts was proper, even applying an analogy to cases involving possession of a firearm by a convicted felon, as the failure to report charges were legally material to the crimes against two children because the failure constituted evasive conduct that was circumstantial evidence of guilt and evidence of the conduct underlying the defendant's conviction of a sex offense in North Carolina was admissible as a similar transaction. Bryson v. State, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

No merger if different victims and different incidents despite same weapon. — Defendant's two convictions of violating O.C.G.A. § 16-11-106 were based on felonies charged in separate indictments that arose out of unrelated incidents and involved different victims. The fact that the same weapon may have been used was irrelevant; consequently, the offenses did not merge. Little v. State, 263 Ga. App. 893, 589 S.E.2d 656 (2003).

Convictions merged since single victim. — Two convictions for possession of a firearm, one involving an aggravated assault and the other an armed robbery, should have been merged as there was a single victim. Wells v. State, 294 Ga. App. 277, 668 S.E.2d 881 (2008).

Although the defendant was engaged in a continuous crime spree consisting of murder, possession of a firearm during the commission of a crime, and, as a party to the crime, possession of a firearm during the commission of a crime, because only one victim was involved in the crime spree, the defendant could only be convicted once under O.C.G.A. § 16-11-106(b)(1) for possession of a firearm during the commission of a crime. Stovall v. State, 287 Ga. 415, 696 S.E.2d 633 (2010).

Multiple convictions. — When multiple crimes are committed together during the course of one continuous crime spree, a defendant may be convicted once for possession of a firearm during the commission of a crime as to every individual victim of the crime spree as provided under O.C.G.A. § 16-11-106(b)(1), and additionally once for firearm possession for every crime enumerated in paragraphs (b)(2) through (5). State v. Marlowe, 277 Ga. 383, 589 S.E.2d 69 (2003).

Trial court erred by sentencing defendant on both the possession of a knife during the commission of murder and on the possession of a knife during the commission of kidnapping with bodily injury in a case alleging that defendant killed defendant's estranged spouse by stabbing the spouse. Bell v. State, 278 Ga. 69, 597 S.E.2d 350 (2004).

Two of the five convictions for possession of a firearm during the commission of a crime must be vacated, because there were two individual victims and the defendant was convicted of burglary, a crime enumerated in O.C.G.A. § 16-11106(b)(2). Accordingly, the statute authorized imposition of sentence on the defendant for three of the guilty verdicts returned on the five counts charging the defendant with being in possession of a firearm during the commission of a crime: the count in which burglary was the underlying felony, one of the counts in which one person was the victim, and one of the counts in which another person was the victim. Grell v. State, 291 Ga. 615, 732 S.E.2d 741 (2012).

General Consideration (Cont'd)

Pre- and post-Miranda statements properly admitted. — In a prosecution for aggravated assault and possession of a firearm during the commission of a crime, despite testimony from the arresting officer that the defendant was complaining of physical problems and under the influence of alcohol, both the pre- and post-Miranda statements made, as well as the numerous voluntary and unsolicited remarks which were not made in response to any form of interrogation, were properly admitted. Dorsey v. State, 285 Ga. App. 510, 646 S.E.2d 713 (2007).

Conviction for possession had to be vacated because conviction for criminal damage was reversed. — After a juvenile was convicted of first degree criminal damage to property and possession of a firearm during the commission of this crime, and the conviction for first degree criminal damage to property was reversed, the conviction for possession of a weapon during this crime had to be vacated. In the Interest of M.D.L., 271 Ga. App. 738, 610 S.E.2d 687 (2005).

Sentence not excessive. — Trial court did not err in sentencing defendant because the sentence the court imposed on defendant was ten years in prison and ten years probation for aggravated assault, ten years in prison to run concurrently for aggravated battery, and five years confinement to run consecutively for possession of a firearm during the commission of a crime as each part of defendant's sentence was well within the statutory limits for the respective crime involved; accordingly, defendant's sentence would not be modified on appeal. King v. State, 269 Ga. App. 658, 605 S.E.2d 63 (2004).

Although the victim was unable to identify defendant in court as the person who robbed the victim at gunpoint, due to defendant's changed appearance, the victim positively identified defendant from a photo lineup both immediately after the robbery and at trial; therefore, the evidence was sufficient to convict defendant of possession of a firearm during the commission of a felony. Garcia v. State, 271 Ga. App. 794, 611 S.E.2d 92 (2005).

Evidence of possession sufficient. — There was sufficient evidence to convict the defendant of the possession of a firearm while committing the felony of cocaine trafficking; an undercover officer testified that the weapon seized by police was the same gun the defendant had brandished after the defendant sold cocaine to the officer at a residence, and the gun and a briefcase of cocaine were found hidden in the same room where the defendant had gone before admitting other officers to the residence no more than an hour later. Daugherty v. State, 283 Ga. App. 664, 642 S.E.2d 345 (2007).

When the defendants, a married couple who were in a car with a third person, were charged with trafficking in cocaine, possession of cocaine with intent to distribute, possession of amphetamine, and possession of a firearm during certain crimes, there was sufficient evidence that the defendants had joint constructive possession of a duffel bag in which drugs and a weapon were found. The evidence showed that one spouse exercised control over the car that transported the contraband and that the other spouse tried to retrieve a paper sack inside the duffel bag at the sheriff's office with suspicious and inconsistent explanations. Howard v. State, 291 Ga. App. 289, 661 S.E.2d 644 (2008).

Because testimony about the circumstances of the victim's visit to a home when defendant was shot was relevant and admissible to explain defendant's motive in shooting the victim, the evidence was sufficient to convict defendant of malice murder, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony. Taylor v. State, 287 Ga. 440, 696 S.E.2d 652 (2010).

Sufficient evidence showed the defendant committed possession of a firearm, under O.C.G.A. § 16-11-106(b), in the process of hijacking a victim's vehicle and committing an aggravated assault of the victim, because the defendant undisputedly possessed a handgun during the commission of these crimes and fled the scene. Campbell v. State, 314 Ga. App. 299, 724 S.E.2d 24 (2012).

Evidence was sufficient to convict the defendant of aggravated assault, motor-vehicle hijacking, and possession of

a firearm during the commission of a crime, under O.C.G.A. §§ 16-5-21(a)(2), 16-5-44.1(b), and 16-11-106(b)(1), because the defendant waited in a getaway vehicle while an accomplice hijacked the victim's vehicle, and possessed the gun that the accomplice used in the crime. Gordon v. State, 316 Ga. App. 42, 728 S.E.2d 720 (2012).

As the first defendant aided and abetted in effecting a plan to steal the victim's car, and as the second defendant took the victim's money, the evidence was sufficient to convict both of the defendants of armed robbery, hijacking a motor vehicle, and possession of a firearm during the commission of a crime under O.C.G.A. §§ 16-5-44.1, 16-8-41(a), and 16-11-106. Copeny v. State, 316 Ga. App. 347, 729 S.E.2d 487 (2012).

Sufficient evidence supported the defendant's convictions for armed robbery, hijacking a motor vehicle, and two counts of possession of a firearm because the evidence showed that the defendant was identified by the victim, the defendant was arrested about an hour and a half after the crimes occurred in the Lincoln Town car used during the commission of the crimes, which the defendant admitted belonged to the defendant, and the cell phone that the victim had reported stolen was found in the car in addition to guns matching the victim's description of the weapons used. Hinton v. State, 321 Ga. App. 445, 740 S.E.2d 394 (2013).

Evidence sufficient to support convictions. — Evidence including DNA evidence, the victim's testimony regarding the nature of the attack and description of the attacker, and the store surveillance video of an individual who wore clothing similar to that worn by the attacker and who appeared to be the same race as the attacker, supported the defendant's convictions for rape, kidnapping, armed robbery, theft by taking, and three counts of possession of a gun during the commission of a crime. Glaze v. State, 317 Ga. App. 679, 732 S.E.2d 771 (2012).

Evidence was sufficient to convict the defendant of felony obstruction, possession of a knife during the commission of a felony, and disorderly conduct because the defendant slammed the refrigerator door twice, breaking items stored in the door; the victim called 9-1-1 seeking assistance for a domestic dispute in progress; when one of the responding officers told the defendant that the defendant would have to leave the house as the victim did not want the defendant living there, the defendant told the officer that the officer could not make the defendant leave; and, when the officer unsnapped a taser from the taser's holster and approached the defendant, the defendant grabbed a knife with an eight-inch blade and threatened the officers with the knife. Owens v. State, 329 Ga. App. 455, 765 S.E.2d 653 (2014).

Prior convictions properly admitted for both impeachment and sentencing purposes. — Trial court properly admitted certified copies of the defendant's two prior convictions of aggravated assault and possession of a firearm during the commission of a felony as: (1) the court carefully balanced the competing interests; (2) the prior offenses had a substantial probative value which outweighed the offense's prejudicial effect; and (3) nothing prevented the use of a defendant's convictions for both impeachment and sentencing purposes. Moreover, the court rejected the defendant's claim that by adding the word "substantially" to the balancing test, the Georgia legislature meant to incorporate the standard for admissibility embodied in Fed. R. Evid. 609(b). Newsome v. State, 289 Ga. App. 590, 657 S.E.2d 540 (2008), cert. denied, No. S08C1042, 2008 Ga. LEXIS 494 (Ga. 2008).

Cited in Roberts v. State, 228 Ga. 298, 185 S.E.2d 385 (1971); Chumley v. State, 235 Ga. 540, 221 S.E.2d 13 (1975); Brock v. State, 239 Ga. 326, 236 S.E.2d 835 (1977); Dunbar v. State, 163 Ga. App. 243, 292 S.E.2d 897 (1982); Teague v. State, 165 Ga. App. 470, 301 S.E.2d 667 (1983); Miller v. State, 165 Ga. App. 638, 302 S.E.2d 394 (1983); Pittman v. State, 172 Ga. App. 22, 322 S.E.2d 71 (1984); Weaver v. State, 178 Ga. App. 91, 341 S.E.2d 921 (1986); King v. State, 178 Ga. App. 343, 343 S.E.2d 401 (1986); Allen v. State, 180 Ga. App. 701, 350 S.E.2d 478 (1986); Donaldson v. State, 180 Ga. App. 879, 350 S.E.2d 849 (1986); Johnson v. State, 181 Ga. App. 822, 357 S.E.2d 161 (1987); Rus-

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sell v. State, 183 Ga. App. 209, 358 S.E.2d 631 (1987); McMachren v. State, 187 Ga. App. 793, 371 S.E.2d 445 (1988); Curtis v. State, 190 Ga. App. 173, 378 S.E.2d 516 (1989); In re M.J.H, 193 Ga. App. 621, 388 S.E.2d 738 (1989); Tatum v. State, 195 Ga. App. 349, 393 S.E.2d 494 (1990); Hollingsworth v. State, 195 Ga. App. 502, 394 S.E.2d 131 (1990); Whatley v. State, 196 Ga. App. 73, 395 S.E.2d 582 (1990); Busch v. State, 234 Ga. App. 766, 507 S.E.2d 868 (1998); Daniels v. State, 238 Ga. App. 511, 519 S.E.2d 269 (1999); Green v. State, 249 Ga. App. 546, 547 S.E.2d 569 (2001); Guild v. State, 255 Ga. App. 285, 564 S.E.2d 862 (2002); Darnell v. State, 257 Ga. App. 555, 571 S.E.2d 547 (2002); Clark v. State, 258 Ga. App. 347, 574 S.E.2d 344 (2002); Jackson v. State, 262 Ga. App. 451, 585 S.E.2d 745 (2003); Fernandez v. State, 263 Ga. App. 750, 589 S.E.2d 309 (2003); Blake v. State, 272 Ga. App. 181, 612 S.E.2d 33 (2005); Hill v. State, 281 Ga. 795, 642 S.E.2d 64 (2007); Fagan v. State, 283 Ga. App. 784, 643 S.E.2d 268 (2007); Jaheni v. State, 285 Ga. App. 266, 645 S.E.2d 735 (2007); Rivera v. State, 282 Ga. 355, 647 S.E.2d 70 (2007); Swain v. State, 285 Ga. App. 550, 647 S.E.2d 88 (2007); Withers v. State, 282 Ga. 656, 653 S.E.2d 40 (2007); Smith v. State, 289 Ga. App. 742, 658 S.E.2d 156 (2008); Lemming v. State, 292 Ga. App. 138, 663 S.E.2d 375 (2008); Johnson v. State, 293 Ga. App. 32, 666 S.E.2d 452 (2008); Williams v. State, 293 Ga. App. 193, 666 S.E.2d 703 (2008); Abdullah v. State, 284 Ga. 399, 667 S.E.2d 584 (2008); Burton v. State, 293 Ga. App. 822, 668 S.E.2d 306 (2008); Gordon v. State, 294 Ga. App. 908, 670 S.E.2d 533 (2008); Fisher v. State, 295 Ga. App. 501, 672 S.E.2d 476 (2009); Mathis v. State, No. A09A0215; No. A09A0308, 2009 Ga. App. LEXIS 586 (May 20, 2009); Bonker v. State, 298 Ga. App. 867, 681 S.E.2d 256 (2009); Verdree v. State, 299 Ga. App. 673, 683 S.E.2d 632 (2009); Crawford v. State, 301 Ga. App. 633, 688 S.E.2d 409 (2009); Souder v. State, 301 Ga. App. 348, 687 S.E.2d 594 (2009); Gutierrez v. State, 285 Ga. 878, 684 S.E.2d 652 (2009); Martinez v. State, 303 Ga. App. 166, 692 S.E.2d 766 (2010); Anthony v. State, 315 Ga. App. 701, 727 S.E.2d 528 (2012); Russell v. State, 319 Ga. App. 472, 735 S.E.2d 797 (2012); Hyman v. State, 320 Ga. App. 106, 739 S.E.2d 395 (2013); Vann v. State, 322 Ga. App. 148, 742 S.E.2d 767 (2013); Martin v. State, 324 Ga. App. 252, 749 S.E.2d 815 (2013); Banks v. State, 329 Ga. App. 174, 764 S.E.2d 187 (2014); Young v. State, 328 Ga. App. 857, 763 S.E.2d 137 (2014); Young v. State, 329 Ga. App. 70, 763 S.E.2d 735 (2014); Williams v. State, 330 Ga. App. 606, 768 S.E.2d 788 (2015); Howard v. State, 334 Ga. App. 7, 778 S.E.2d 19 (2015); Wiggins v. State, 334 Ga. App. 54, 778 S.E.2d 60 (2015); McGil v. State, 339 Ga. App. 130, 793 S.E.2d 442 (2016).

Application

Probable cause for arrest. — Police search of a defendant's bag and person, which produced handguns, cocaine, cash, and other drugs was lawful because the search was made pursuant to the police officers' lawful warrantless arrest of the defendant when the defendant arrived at a motel room exactly answering a detailed description provided by a confidential informant, who stated that the defendant would be carrying a shoulder bag containing drugs and a loaded handgun. Green v. State, 302 Ga. App. 388, 691 S.E.2d 283 (2010).

Marijuana is not a controlled substance under O.C.G.A. § 16-13-30 for the purpose of a prosecution for possession of a firearm during the commission of a "crime involving the possession, manufacture, delivery, distribution, dispensing, administering, selling, or possession with intent to distribute any controlled substance." Asberry v. State, 220 Ga. App. 40, 467 S.E.2d 225 (1996).

Evidence was sufficient to convict the defendant of armed robbery, two counts of aggravated assault, and possession of a firearm during the commission of a felony because the credibility of the victim's identification of the defendant was a matter to be determined by the jury; and, even though the defendant was covered from head to toe in clothing with only the defendant's eyes visible, the victim was able to identify the defendant, who spoke during the robbery, as the defendant was

a regular customer and the victim watched the defendant grow up. Wiggins v. State, 334 Ga. App. 54, 778 S.E.2d 60 (2015).

Predicate felony offense involving marijuana. — Trial counsel was not ineffective for failing to object to the trial court's jury instruction on possession of a firearm during the commission of a crime that referenced possession of marijuana as a potential predicate felony offense because there was sufficient evidence to support the defendant's felony conviction for possession of marijuana with intent to distribute, which could serve as the predicate felony offense for the defendant's conviction of possession of a firearm during the commission of a crime; and there was not a reasonable probability that, if the trial court had omitted the reference to simple possession of marijuana from the instruction, the outcome of the trial would have been more favorable to the defendant. McNorrill v. State, 338 Ga. App. 466, 789 S.E.2d 823 (2016).

Evidence of knife blade length sufficient. — Victim's testimony that the blade of a knife used by the defendant to stab the victim was longer and wider than the blade of a facsimile knife blade, which itself exceeded three inches in length, along with presentation of the facsimile to the jury, although it was not admitted into evidence, was sufficient to support conviction under O.C.G.A. § 16-11-106. Fuller v. State, 235 Ga. App. 436, 509 S.E.2d 79 (1998).

While no witness testified to the length of the blade, proof of the length of the knife blade was sufficient because the knife was admitted into evidence and the jury was charged in two separate instances, that defendant could not be convicted unless the jury found that the knife had a "blade three inches or more in length." Johnson v. State, 247 Ga. App. 157, 543 S.E.2d 439 (2000).

There was sufficient evidence about a knife blade's length to support a conviction under O.C.G.A. § 16-11-106(b): (1) there was witness testimony that the defendant carried a five-inch knife with a long blade; (2) it could be inferred from another witness's testimony about the witness's own knife that the defendant's knife was longer than three inches; and (3) there was expert and eyewitness testimony that the victim's wound was at least two and a half inches deep and was gaping in nature. Stanley v. State, 283 Ga. 36, 656 S.E.2d 806 (2008).

Despite the defendant's claim that no trial witness testified that the knife used had a blade of any certain length, because the knife itself was introduced into evidence, the jury was authorized to use the jury's senses to determine if the knife blade was of the requisite length. Mitchell v. State, 283 Ga. 341, 659 S.E.2d 356 (2008).

Stabbing of victim with knife. — Conviction of possession of a knife during the commission of a felony was supported by sufficient evidence that, after the victim confronted the defendant about a comment made to the victim's wife, the defendant stabbed the victim to death; witnesses saw the defendant fighting with the victim, saw the defendant fold up a knife after the victim fell, and the defendant admitted to stabbing the victim. Williams v. State, 280 Ga. 297, 627 S.E.2d 32 (2006).

Firearm capable of being fired not required. — O.C.G.A. § 16-11-106 does not require that the state prove that the firearm "within arm's reach" must be capable of being fired. Smith v. State, 214 Ga. App. 631, 448 S.E.2d 906 (1994); Herndon v. State, 229 Ga. App. 457, 494 S.E.2d 262 (1997), overruled on other grounds, Howard v. State, 233 Ga. App. 724, 505 S.E.2d 768 (1998), overruled on other grounds, Gomillion v. State, 236 Ga. App. 14, 512 S.E.2d 640 (1999), overruled on other grounds, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003).

Evidence of bullets properly admitted. — With regard to a defendant's convictions on two counts of armed robbery, possession of a firearm during the commission of a crime, failure to obey a traffic control device, fleeing and attempting to elude a police officer, reckless driving, failure to stop at the scene of an accident, and possession of a firearm by a convicted felon, the trial court properly denied the defendant's motion for a new trial and sufficient evidence existed to support the defendant's convictions as the trial court

Application (Cont'd)

did not err in admitting into evidence certain bullets found in the defendant's possession at the time of the defendant's arrest based on the state allegedly not providing a proper chain of custody; the bullets, unlike fungible articles, were distinct and recognizable physical objects that were identifiable by observation, eliminating the necessity of a chain-of-custody showing. Green v. State, 287 Ga. App. 248, 651 S.E.2d 174 (2007).

Possession of pellet gun not prohibited. — Legislature did not intend to have O.C.G.A. § 16-11-106 prohibit the possession of a "Marksman repeater pellet pistol" (otherwise described as a ".177 caliber Marksman Repeater B-B pistol ...") as this weapon is not mentioned in the statute and there is no proof that the weapon is capable of discharging a projectile via force of gunpowder. Fields v. State, 216 Ga. App. 184, 453 S.E.2d 794 (1995).

Possession of black powder guns sufficient. — Evidence that the defendant was found in possession of two black powder guns was sufficient to support the convictions for possession of a firearm during the commission of a crime and by a convicted felon. Hall v. State, 322 Ga. App. 313, 744 S.E.2d 833 (2013).

Use of firearm is aggravating circumstance. — The use of a firearm to commit a murder for pecuniary gain is an aggravating circumstance which warrants separate consideration. Simpkins v. State, 268 Ga. 219, 486 S.E.2d 833 (1997).

Felony requirement. — Conviction of possession of a weapon during the commission of a felony must stand or fall in conjunction with the underlying felony upon which the charge is predicated. Strong v. State, 223 Ga. App. 434, 477 S.E.2d 866 (1996) (overruling Cleveland v. State, 212 Ga. App. 361, 441 S.E.2d 820 (1994)).

Evidence showed that defendant's commission of crimes against the victim while holding a gun on the victim were felonies; the crime of possession of a firearm during the commission of a crime against the person of another, such as the rape and armed robbery of the victim, or during an unlawful entry into a building, such as defendant's act in kicking in the door of the victim's residence to unlawfully gain entry, were felonies because the rape, armed robbery, and burglary were each felonies punishable by imprisonment for more than 12 months. Moore v. State, 261 Ga. App. 752, 583 S.E.2d 588 (2003).

Offense of criminal damage to property in the first degree, pursuant to O.C.G.A. § 16-7-22(a)(1), involves a person, and thus may serve as a predicate for a conviction for possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b)(1). Craft v. State, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

No merger of related offenses. — As separate facts were used to prove each crime, the trial court did not err by refusing to merge the offenses of armed robbery, aggravated assault, and possession of a firearm during the commission of the felonies. Blocker v. State, 265 Ga. App. 846, 595 S.E.2d 654 (2004).

No merger into conviction for felony murder. — A conviction for possession of a firearm during the commission of a felony (O.C.G.A. § 16-11-106) does not merge with a conviction for felony murder. Hawkins v. State, 262 Ga. 193, 415 S.E.2d 636 (1992).

Possession of firearm conviction did not merge with attempted armed robbery. — Possession of a firearm during the commission of a felony did not merge with an attempted armed robbery conviction because the crime of possession of a firearm is considered to be a separate offense under O.C.G.A. § 16-11-106(b) and (e). McKinney v. State, 274 Ga. App. 32, 619 S.E.2d 299 (2005).

Merger for continuous crime spree. — When a defendant was convicted of aggravated assault, armed robbery, and two counts of kidnapping, but each crime occurred within the course of one continuous crime spree against two victims, two of the defendant's four firearm possession offenses were to be merged. Lenon v. State, 290 Ga. App. 626, 660 S.E.2d 16 (2008).

Robbers in a home robbery and murder had one gun, and there were two victims of the crimes, the decedent and the decedent's grandmother; therefore, under O.C.G.A. § 16-11-106(b)(1), the defendant

should have been convicted of only two counts of possession of a firearm while committing a crime, one for each of the victims, and the third count should have been merged. Moore v. State, 294 Ga. 682, 755 S.E.2d 703 (2014).

Double punishment included. — Counts of possession of a firearm during the commission of a crime and armed robbery did not merge. Baker v. State, 214 Ga. App. 640, 448 S.E.2d 745 (1994).

When the defendant's codefendant was within arm's length of two pistols during the commission of the crime, the defendant is guilty of the offense as a party to the crime. Victrum v. State, 203 Ga. App. 377, 416 S.E.2d 740, cert. denied, 203 Ga. App. 907, 416 S.E.2d 740 (1992).

Armed robbery by use of a firearm. standing alone and without further proof also demonstrates a violation of O.C.G.A. § 16-11-106. Coleman v. State, 163 Ga. App. 173, 293 S.E.2d 395 (1982).

Defendant's armed robbery conviction was upheld based on the defendant's accomplice's testimony that the defendant pointed a shotgun at a resident during a robbery and evidence that a shotgun and items taken during the robbery were found in the defendant's bedroom. This evidence also supported the defendant's conviction for possession of a firearm during the commission of a crime. Mays v. State, 306 Ga. App. 507, 703 S.E.2d 21 (2010).

Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault, false imprisonment, and possession of a firearm during the commission of a felony in violation of O.C.G.A. §§ 16-8-41, 16-5-21, 16-5-41, and 16-11-106, based on testimony from witnesses inside the bank, defendant's clothing, a text message between the defendant and defendant's accomplice, and the defendant's accomplice's testimony, which was corroborated as required by O.C.G.A. § 24-14-8. Odle v. State, 331 Ga. App. 146, 770 S.E.2d 256 (2015).

Jury was authorized to find the defendant guilty of armed robbery and possession of a firearm during the commission of a felony based on the witnesses' positive identification of the defendant's distinctive speech; the ski mask and salad bag found in the defendant's vehicle from the restaurant robbed; and the sudden, labored, and sweaty appearance of the defendant immediately after the robbery and high speed chase. Walker v. State, 329 Ga. App. 369, 765 S.E.2d 599 (2014).

Use of shotgun. — Because the defendant kicked open the door of a home while shouting that the defendant was a "federal agent," fired a shotgun through a door, shooting off a victim's thumb, inserted the barrel of the shotgun in the same man's mouth, and demanded money, which the victims turned over, two codefendants identified the defendant as the user of the shotgun, and the defendant's DNA was found on a ski mask recovered from the getaway car and the defendant's fingerprints were found on the car, evidence supported convictions for armed robbery, possession of a weapon during the commission of a crime, aggravated assault, burglary, aggravated battery, and impersonating an officer. Garrison v. State, 276 Ga. App. 243, 622 S.E.2d 910 (2005).

Armed while in possession of controlled substance. — O.C.G.A. § 16-11-106 includes those persons who are armed while in possession of controlled substances. Singleton v. State, 194 Ga. App. 5, 389 S.E.2d 496 (1990).

Possession of firearm. — Various counts of possession of a firearm during the commission of a crime are not lesser included offenses of, and do not merge with, the offenses of burglary, kidnapping, armed robbery, or aggravated assault. Golden v. State, 233 Ga. App. 703, 505 S.E.2d 242 (1998); Pace v. State, 239 Ga. App. 506, 521 S.E.2d 444 (1999); Banks v. State, 244 Ga. App. 191, 535 S.E.2d 22 (2000).

Evidence that the defendant or an accomplice either carried or was within arm's length of a weapon during the commission of a crime authorized a finding of guilty for violating O.C.G.A. § 16-11-106(b). Hill v. State, 276 Ga. 220, 576 S.E.2d 886 (2003).

Evidence was sufficient to convict defendant of possessing a firearm during the commission of a crime under O.C.G.A. § 16-11-106(b)(1) because after defendant hurled a glass bowl at a motel manager,

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causing injuries, the defendant pointed a gun at the manager, a desk clerk, and a guest, and threatened to kill all of them. Watson v. State, 301 Ga. App. 824, 689 S.E.2d 104 (2009).

There was sufficient evidence to find that a defendant was within arms' reach of three firearms during the commission of felonies such that the defendant was in possession of the firearms within the meaning of O.C.G.A. § 16-11-106(b). Davenport v. State, 308 Ga. App. 140, 706 S.E.2d 757 (2011).

Armed while trafficking in drugs. — O.C.G.A. § 16-11-106 includes those persons who are armed while trafficking in cocaine even though their involvement with others is limited to the commission of the felony of trafficking. Belcher v. State, 161 Ga. App. 442, 288 S.E.2d 299 (1982).

Evidence was sufficient to authorize the jury's finding that defendant was in joint constructive possession of the cocaine, marijuana, and pistol found inside the driver's car because the drugs were in plain view inside a car that smelled of raw marijuana, defendant was nervous about the impending search and gave evasive answers to the officers, defendant was in possession of an unusually large amount of cash and was in a position to see the pistol when the driver took the driver's proof of insurance from the glove box and, given the trafficking amount of cocaine found, the jury was authorized to infer that the driver and defendant possessed a loaded handgun to protect their illegal drug trade; thus, the evidence was sufficient to support the jury's finding that defendant was guilty of trafficking in cocaine, possession of marijuana, and possession of a firearm during the commission of a crime. Lopez v. State, 259 Ga. App. 720, 578 S.E.2d 304 (2003).

Trial court erred in convicting the defendant of trafficking in cocaine, O.C.G.A. § 16-13-31(a)(1), trafficking in methamphetamine, O.C.G.A. § 16-13-31(e), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(a)(5), because the state failed to prove any connection between the defendant and the contraband other than spatial proximity; no drugs were found on the defendant's person, and the defendant was not seen in proximity to the well-hidden drugs. Cobarrubias-Garcia v. State, 316 Ga. App. 787, 730 S.E.2d 455 (2012).

Misdemeanor offense of theft by taking did not support conviction under O.C.G.A. § 16-11-106. Harrison v. State, 213 Ga. App. 366, 444 S.E.2d 613 (1994).

Real issue was who were parties and not possession issue. — Assuming that it was obviously erroneous for the trial court to fail to remind the jury about the "within arm's reach" element when the court described the offense of unlawful possession of a firearm during the commission of a felony, that failure did not constitute plain error as it had no effect on the outcome of the defendant's trial as that element was properly included in the indictment; the jury was instructed that the state had to prove every material allegation in the indictment beyond a reasonable doubt; whoever used a gun to shoot the victim actually had a firearm within arm's reach at the time of the shooting; and the only issue at trial was whether one of the defendants was the shooter and the others were parties to the crime. Anderson v. State, 299 Ga. 193, 787 S.E.2d 202 (2016).

Lack of proper jury instruction resulted in improper conviction. — When an original indictment charged defendant with murder and with possessing a firearm during the commission of that murder, but the jury found defendant guilty of the lesser included offense of voluntary manslaughter, defendant was improperly convicted of possession of a firearm during the commission of a crime as there was no instruction identifying voluntary manslaughter as a felony. Prather v. State, 259 Ga. App. 441, 576 S.E.2d 904 (2003).

Jury was authorized to find defendant guilty as a principal since the evidence was sufficient to establish that defendant was concerned, either as an aider or an abettor, in the commission of the crime of the codefendant's actual possession of a firearm during the commission of an armed robbery. Wilcox v. State, 177 Ga. App. 596, 340 S.E.2d 243 (1986).

Defendant may properly be convicted of possession of a firearm during the commission of a crime on the ground that defendant was a party or aider or abettor to the offense. Perkins v. State, 194 Ga. App. 189, 390 S.E.2d 273 (1990); Victrum v. State, 203 Ga. App. 377, 416 S.E.2d 740, cert. denied, 203 Ga. App. 907, 416 S.E.2d 740 (1992).

When a party has committed armed robbery and possession of a firearm during commission of a felony, an accomplice who is concerned in the commission of those crimes is likewise guilty of both offenses, notwithstanding the fact that the accomplice did not have actual possession of the firearm. Howze v. State, 201 Ga. App. 96, 410 S.E.2d 323 (1991).

Although the defendant was found not guilty of murder, where the evidence was sufficient to establish that appellant was concerned in the commission of the crime of the codefendant's actual possession of the firearm during commission of the murder, the jury was authorized to find appellant guilty as a principal under O.C.G.A. § 16-11-106. Brooks v. State, 208 Ga. App. 869, 432 S.E.2d 612 (1993).

In a case involving a defendant's cohort shooting a man at a gas station, the evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt as a party to the crime of aggravated assault with a deadly weapon and possession of a firearm during the commission of a felony since the evidence showed that the defendant willingly drove the cohort to the gas station, waited in a stolen truck while armed with an assault rifle as the cohort pulled the victim out of the victim's car and then shot the victim, and then rescued the injured cohort and fled the police; the defendant's criminal intent was properly inferred from the defendant's conduct before, during, and after the commission of the crime. McClendon v. State, 287 Ga. App. 238, 651 S.E.2d 165 (2007).

Two intruders entered a house through a window, threatened the occupants with handguns, and stole items from the house. As circumstantial evidence established that the defendant drove the get-away vehicle, the defendant was properly convicted as a party to the possession of a firearm during the commission of a burglary. Olds v. State, 293 Ga. App. 884, 668 S.E.2d 485 (2008).

Jury's verdict of acquittal on an aggravated assault charge and guilty on the charge of possession of a firearm during the commission of a crime was not necessarily inconsistent because the jury was free to reject the defendant's testimony that the defendant did not know the defendant's passenger had a gun and accept the defendant's testimony that the defendant was unaware of the intended robbery. Morrell v. State, 313 Ga. App. 443, 721 S.E.2d 643 (2011), cert. denied, No. S12C0800, 2012 Ga. LEXIS 484 (Ga. 2012).

Evidence of previous incident admissible. — In a prosecution for aggravated assault, under O.C.G.A. § 16-5-21, and possession of a knife during the commission of a crime, under O.C.G.A. § 16-11-106(b)(1), evidence that defendant stabbed another in an incident eight years previously was admissible to show whether defendant intended to threaten or harm the victim when defendant brandished a knife, and the evidence was not more prejudicial than probative, given the prior incident's relevance to a necessary element of the current crimes. Ledford v. State, 275 Ga. App. 107, 620 S.E.2d 187 (2005).

Evidence of subsequent arrest admitted. — Evidence of the defendant's subsequent arrest on other charges while driving the same vehicle defendant had been driving on the night of the robbery and of the seizure from that vehicle of a pistol which was similar in appearance to the one alleged to have been used by defendant during the robbery was clearly relevant in that it connected defendant both to the vehicle and to the weapon. When evidence is otherwise relevant and material to the issues being tried, the evidence is not rendered inadmissible merely because the evidence may incidentally place the defendant's character in issue. Worthy v. State, 180 Ga. App. 506, 349 S.E.2d 529 (1986).

Acquittal of possession of a knife during the commission of a crime did not compel acquittal on the armed robbery charge because the jury was free to com-

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promise on the verdict. Oliver v. State, 232 Ga. App. 816, 503 S.E.2d 28 (1998).

Conviction for possession of a firearm reversed where predicate felony conviction reversed. — Because the possession of a firearm count of the indictment named only hijacking as the predicate felony, the state's failure to prove hijacking under O.C.G.A. § 16-5-44.1(b) resulted in reversal of the defendant's conviction for possession of a firearm in violation of O.C.G.A. § 16-11-106(b). Jackson v. State, 309 Ga. App. 24, 709 S.E.2d 44 (2011).

Convictions as aider and abettor proper despite lack of personal involvement. — Defendant's contention that the crimes against a stabbing victim were solely committed by a codefendant was rejected, pursuant to O.C.G.A. § 16-2-20(a), as ample evidence existed to conclude that defendant either committed the crimes or was a party to the crimes, including that both defendant and the codefendant drove to the stabbing victim's home, that victim was stabbed to death, and a wallet and checkbook were stolen so that both defendants could have money to buy more drugs. Odom v. State, 279 Ga. 599, 619 S.E.2d 636 (2005).

Sufficient evidence supported the defendant's convictions as a party to the crimes of armed robbery, aggravated assault against the manager and cashier, and possession of a firearm during the commission of the armed robbery because the law allowed the defendant to be charged with and convicted of the same offenses as the codefendant since the evidence showed that the defendant drove the codefendant to the fast food restaurant that was robbed and waited as the getaway driver. Broyard v. State, 325 Ga. App. 794, 755 S.E.2d 36 (2014).

Possession due to dangerous nature of business argument rejected. — Defendant objected to defendant's sentences for the firearm violations because defendant had not used a handgun "in furtherance" of the drug sales, but only had it available because of the dangerous nature of defendant's pawn shop business. However, there is no exception under O.C.G.A. § 16-11-106 for someone who may otherwise be in lawful possession of a firearm. Shirley v. State, 260 Ga. App. 309, 581 S.E.2d 320 (2003).

Identification of defendant sufficient. — Victim's testimony at trial sufficiently identified the defendant as the assailant who fired shots at the victim, and the evidence was sufficient to support convictions for aggravated assault, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon, since the victim knew the defendant from a previous encounter and although it was dark, the victim was able to see the defendant's face during the incident because the area was illuminated by a streetlight. Johnson v. State, 279 Ga. App. 153, 630 S.E.2d 661 (2006).

There existed sufficient evidence to uphold the defendant's convictions for armed robbery and possession of a firearm during the commission of a felony because the evidence established that the victim, an airline pilot, was robbed at gunpoint at approximately 4 A.M., with the perpetrator taking the victim's luggage and fleeing in a Ford Ranger pickup truck and that, within two to three minutes after calling 9-1-1, an officer stopped the speeding Ford Ranger and apprehended the defendant, who was wearing clothing as described by the victim and the luggage was found in the back of the pickup truck. Feaster v. State, 283 Ga. App. 417, 641 S.E.2d 635 (2007).

As a cashier was only two feet from two robbers during the crime, which lasted about a minute, and the cashier looked at their faces, the fact that the cashier identified the defendant twice from photo arrays, and once at trial as the robber who had held the gun was sufficient to convict the defendant of armed robbery and possession of a firearm during the commission of a crime. Shabazz v. State, 293 Ga. App. 560, 667 S.E.2d 414 (2008).

Evidence was sufficient to convict a defendant of possession of a weapon during the commission of a crime as the testimony of the defendant's accomplice that the defendant raped the victim at gunpoint was corroborated by the victim's out-of-court and in-court identification of the defendant as the rapist and the fact

that the defendant's DNA was found on the victim's clothing. Williams v. State, 295 Ga. App. 9, 670 S.E.2d 828 (2008).

Trial court did not err in convicting the defendant of armed robbery of a restaurant, O.C.G.A. § 16-8-41(a), and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), because sufficient evidence corroborated an accomplice's testimony that the defendant participated in the robbery; the driver corroborated that the driver picked the defendant up and dropped the defendant and the accomplice off at the defendant's residence near the restaurant about two-and-one-half hours before the robbery, the driver overheard the defendant speaking to the accomplice about committing a robbery, and two more witnesses confirmed that the two were together that evening. Jones v. State, 302 Ga. App. 147, 690 S.E.2d 460 (2010).

Defendant's convictions for armed robbery, aggravated assault with a deadly weapon, burglary, and possession of a firearm during the commission of a crime were supported by sufficient evidence. While the defendant contended that the evidence against the defendant was purely circumstantial, an eyewitness's identification of the defendant as the second gunman during the photographic lineup constituted direct evidence of the defendant's guilt. Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Defendant's new trial motion based on insufficient evidence lacked merit as the evidence was sufficient to support the defendant's convictions for aggravated assault and a weapons possession charge under O.C.G.A. §§ 16-5-21(a)(2) and 16-11-106(b)(1); issues of credibility regarding the witnesses' identification of the defendant as the shooter were within the jury's province pursuant to former O.C.G.A. § 24-9-80 (see now O.C.G.A. § 24-6-620). Williams v. State, 317 Ga. App. 248, 730 S.E.2d 726 (2012).

Variance in indictment and proof at trial was not fatal. — Defendant's convictions were upheld on appeal because a variance in the indictment and the proof at trial was not fatal since: (1) the names subject to the alleged variance in fact referred to the same person; and (2) the testimony of a codefendant, when combined with the defendant's post-arrest admissions, sufficiently proved the defendant's commission of an armed robbery and possession of a firearm during the commission of a crime as a party to the crimes. Brown v. State, 289 Ga. App. 421, 657 S.E.2d 322 (2008).

Parents had authority to consent to searches resulting in conviction for possession of weapon. — With regard to defendant's convictions for armed robbery and possession of a gun during a crime, the trial court properly denied the defendant's motions to suppress the evidence found in the defendant's bedroom and in the vehicle that the defendant operated as the defendant's parents had authority to give consent to the police to search the defendant's unlocked bedroom since the defendant did not pay rent and was only home for the summer from college. As to the vehicle, the parents asked the police to locate their vehicle and the police properly seized the vehicle, impounded the vehicle, and obtained a search warrant; thus, the rifle used during the robberies that was found in the trunk of the vehicle was not the product of an illegal search. Warner v. State, 299 Ga. App. 56, 681 S.E.2d 624 (2009), cert. denied, No. S09C1952, 2010 Ga. LEXIS 35 (Ga. 2010).

Evidence sufficient to support conviction. — See Worthy v. State, 180 Ga. App. 506, 349 S.E.2d 529 (1986); McKenzie v. State, 187 Ga. App. 840, 371 S.E.2d 869, cert. denied, 187 Ga. App. 907, 371 S.E.2d 869 (1988); Olsen v. State, 191 Ga. App. 763, 382 S.E.2d 715 (1989); Glover v. State, 192 Ga. App. 798, 386 S.E.2d 699 (1989); Nelson v. State, 197 Ga. App. 898, 399 S.E.2d 748 (1990); Stoudemire v. State, 261 Ga. 49, 401 S.E.2d 482 (1991); Merritt v. State, 201 Ga. App. 150, 410 S.E.2d 349 (1991); Byrd v. State, 261 Ga. 808, 411 S.E.2d 709 (1992); Adside v. State, 216 Ga. App. 129, 453 S.E.2d 139 (1995); Tanksley v. State, 226 Ga. App. 505, 487 S.E.2d 98 (1997); Combs v. State, 268 Ga. 398, 500 S.E.2d 328 (1997); Copeland v. State, 228 Ga. App. 734, 492 S.E.2d 723 (1997); Abrams v. State, 229 Ga. App. 152, 493 S.E.2d 561 (1997); Collins v. State, 229 Ga. App. 210,

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493 S.E.2d 592 (1997); Young v. State, 229 Ga. App. 497, 494 S.E.2d 226 (1997); Louis v. State, 230 Ga. App. 897, 497 S.E.2d 824 (1998); Cheney v. State, 233 Ga. App. 66, 503 S.E.2d 327 (1998); Bartlett v. State, 244 Ga. App. 49, 537 S.E.2d 362 (2000); Solomon v. State, 244 Ga. App. 289, 534 S.E.2d 915 (2000); Green v. State, 244 Ga. App. 697, 536 S.E.2d 565 (2000); Respres v. State, 244 Ga. App. 689, 536 S.E.2d 586 (2000); Hemidi v. State, 245 Ga. App. 417, 537 S.E.2d 804 (2000); Williams v. State, 247 Ga. App. 99, 543 S.E.2d 408 (2000); LaCount v. State, 265 Ga. App. 352, 593 S.E.2d 885 (2004); Crawford v. State, 265 Ga. App. 393, 593 S.E.2d 915 (2004); Davis v. State, 267 Ga. App. 668, 600 S.E.2d 742 (2004); McGordon v. State, 298 Ga. App. 161, 679 S.E.2d 743 (2009).

Gun under floor mat. — Evidence was sufficient to show that the defendant possessed a firearm since a revolver was found under the floor mat in the car where the defendant was sitting. Carter v. State, 248 Ga. App. 821, 547 S.E.2d 613 (2001).

Evidence that the defendant, a convicted felon, accompanied the victim to a store with the codefendant; shot the victim in the head with a handgun that the defendant had in defendant's possession; thereby, causing a wound in which the victim lost one eye; and along with the codefendant took all the victim's money was sufficient to support the defendant's conviction for possession of a firearm during the commission of a crime. Drummer v. State, 264 Ga. App. 617, 591 S.E.2d 481 (2003).

Victim's testimony that the defendant kicked in the door of the victim's residence, entered without permission, pointed a shotgun at the victim, and threatened to shoot the victim if the victim did not give the defendant money was sufficient in itself to support the defendant's conviction for possession of a firearm during the commission of a crime in violation of O.C.G.A. § 16-11-106(b)(1). Reed v. State, 293 Ga. App. 479, 668 S.E.2d 1 (2008).

Evidence that the defendant, who was brandishing a handgun, and the defendant's sibling entered a victim's home demanding money, and that the victim, after being shot, gave cash to the sibling, was sufficient to convict the defendant of possession of a firearm during the commission of a crime in violation of O.C.G.A. § 16-11-106(b)(1). Serchion v. State, 293 Ga. App. 629, 667 S.E.2d 624 (2008).

Sufficient evidence was presented to convict a defendant of possession of a firearm during the commission of a felony based on evidence that the defendant and a codefendant approached the victims' rental car and brandished guns; while pistol whipping the victims and robbing them of their property, the defendant's gun went off and fatally wounded the first victim; and a gun matching the caliber of bullet recovered from the first victim during the autopsy was found during the execution of a search warrant at a hotel where the defendant had visited a guest on three occasions. Watkins v. State, 285 Ga. 107, 674 S.E.2d 275 (2009).

Gun found in vehicle. — Defendant was not entitled to a directed verdict of acquittal because the jury was authorized to find the defendant guilty of possession of a firearm during the commission of a felony in violation of O.C.G.A. § 16-11-106(b)(5); a handgun was found on the driver's side floorboard of the vehicle the defendant had just been driving. Flores v. State, 308 Ga. App. 368, 707 S.E.2d 578 (2011), cert. denied, No. S11C1072, 2011 Ga. LEXIS 527 (Ga. 2011).

Possession of knife. — When the defendant's girlfriend arranged to meet with the victim at the victim's home, then the victim was running late and left a message for the girlfriend on the voicemail account the girlfriend shared with the defendant, then when the victim arrived at the girlfriend's mobile home, the defendant emerged from a closet armed with a knife, the girlfriend fled, leaving the defendant alone with the victim, who was subsequently found dead in the mobile home, and when the defendant's shirt was covered with the victim's blood, the defendant still had the knife in the defendant's possession when the police arrived, and the defendant admitted to the police that the defendant killed the victim, the evidence was sufficient to support the defen-

dant's convictions of felony murder, aggravated assault, and possession of a knife during the commission of a felony. Watson v. State, 289 Ga. 39, 709 S.E.2d 2 (2011).

Defendant's convictions for kidnapping, hijacking a motor vehicle, armed robbery, possession of a firearm during the commission of a felony, carrying a concealed weapon, and possession of a weapon on school property were authorized because, pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the victim's testimony alone established the essential elements of the offenses. Lester v. State, 309 Ga. App. 1, 710 S.E.2d 161 (2011).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder and possession of a firearm during the commission of a felony because the defendant and a codefendant began shooting across a street at someone, who returned fire, and the victim was an innocent 16-year-old bystander who was killed during the shootout. Norris v. State, 289 Ga. 154, 709 S.E.2d 792 (2011).

Evidence was sufficient to support a conviction for possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b)(1) since, while possessing a firearm, the defendant knowingly and without authority interfered with property in a manner endangering human life by shooting at an inhabited apartment building. Craft v. State, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

Evidence was sufficient to support the defendant's conviction for malice murder, aggravated assault, conspiracy to commit armed robbery, and possession of a firearm during the commission of a crime because evidence was presented that the defendant and a codefendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed that the defendant heard gunshots and left the restaurant, while the codefendant gave a similar statement to the police. Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of possession of a firearm during the commission of a bus hijacking, O.C.G.A. § 16-11-106(b)(1), and possession of a firearm during the commission of aggravated assault, § 16-11-106(b)(1), because the defendant committed the substantive offenses of bus hijacking and aggravated assault with a handgun; therefore, the evidence was sufficient for a rational trier of fact to have found the defendant guilty beyond a reasonable doubt of possession of a firearm during the commission of the defendant's felony convictions. Cannon v. State, 310 Ga. App. 262, 712 S.E.2d 645 (2011).

Evidence of the circumstances was sufficient to establish the defendant's identity as the perpetrator and the defendant's guilt of armed robbery, O.C.G.A. § 16-8-41, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106, because the defendant matched the description of the perpetrator given by both a convenience store clerk and another store employee; when the defendant was apprehended, an officer recovered next to the defendant's person the contraband and instrumentalities used in the commission of the robbery. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Issue of which defendant held weapon immaterial. — Because the victim's testimony was legally sufficient under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) to establish that the defendants assaulted the victim with intent to rob, the issue of which defendant actually held the weapon was immaterial; therefore, pursuant to O.C.G.A. § 16-2-20(a), the evidence was sufficient to find both the defendants guilty of aggravated assault with intent to rob and of possession of a firearm during the commission of a felony under O.C.G.A. §§ 16-5-21(a)(1) and 16-11-106. Clark v. State, 311 Ga. App. 58, 714 S.E.2d 736 (2011).

Trial court did not err in denying the defendant's motion for a directed verdict because the evidence was sufficient for a rational trier of fact to find the defendant

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guilty beyond a reasonable doubt of distribution of marijuana, O.C.G.A. § 16-13-30(j), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(4); the testimony of a party to the transaction was corroborated by the observations of the detectives, the marijuana taken into evidence, the written statements of the parties regarding the defendant's involvement, and the defendant's own statement to a detective. Arnett v. State, 311 Ga. App. 811, 717 S.E.2d 312 (2011).

Evidence was sufficient to support the defendant's conviction for possession of a firearm during the commission of a crime, under O.C.G.A. § 16-11-106(b), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told them what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. Donald v. State, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find the defendant guilty of felony murder, aggravated assault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. Lytle v. State, 290 Ga. 177, 718 S.E.2d 296 (2011).

Jury was authorized to find the defendant guilty of voluntary manslaughter, O.C.G.A. § 16-5-2(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), carrying a concealed weapon, O.C.G.A. § 16-11-126(b), and possession of a firearm by a convicted felon, O.C.G.A. § 16-11-131(b), because during an argument with the victims, the defendant shot the victims and threatened to kill the victims. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Because the driver of a delivery truck was forced at gunpoint by the defendant's accomplice to drive a substantial distance to a secluded dirt road, and because the defendant followed the truck in another vehicle, pursuant to O.C.G.A. §§ 16-2-20 and 16-5-40(a), the evidence was sufficient to convict the defendant of kidnapping and possession of a firearm during the commission of a felony. Sipplen v. State, 312 Ga. App. 342, 718 S.E.2d 571 (2011).

Rational trier of fact could have found beyond a reasonable doubt that the evidence was sufficient to establish that the defendant was guilty of aggravated assault, possession of a firearm during the commission of a felony, hijacking a motor vehicle, and armed robbery because there was ample evidence, based upon the defendant's actions and presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than "merely present" during the commission of the crimes and was a party to the crimes pursuant to O.C.G.A. § 16-2-20; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and during the incident, the defendant did not say or do anything to intervene. Cook v. State, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Evidence was sufficient to support the defendant's convictions for felony murder, aggravated assault, possession of a firearm during the commission of a crime, and participation in criminal street gang activity. The defendant and fellow gang

members walked toward a group of teenagers in a front yard while yelling and making gang signals; the defendant fired once into the crowd, killing the victim, who was unarmed; and the defendant, who fled the scene, was the only person who fired a weapon and was identified to police as the shooter by witnesses who knew the defendant by name. Jackson v. State, 291 Ga. 25, 727 S.E.2d 120 (2012).

Evidence was sufficient to support a finding that the defendant was guilty beyond a reasonable doubt of aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), and possession of a firearm during the commission of a crime against another person, O.C.G.A. § 16-11-106(b)(1), because a witness and a friend testified that they saw the defendant shoot the victim. Redinburg v. State, 315 Ga. App. 413, 727 S.E.2d 201 (2012).

Evidence was sufficient to sustain convictions for armed robbery and possession of a firearm during the commission of a felony since the evidence showed that the defendant either directly committed or was a party to the armed robberies of both victims at the rest area. A custodian present at the scene identified the defendant as one of the perpetrators who had participated in the crimes, and the defendant's flight from the rest area, flight from the officers, act of driving the getaway car, and possession of one victim's driver's license and clothing items linked the defendant to the crimes. Bryson v. State, 316 Ga. App. 512, 729 S.E.2d 631 (2012).

Sufficient evidence supported the defendant's conviction for possession of a firearm during the commission of a felony, despite the defendant's claim that the defendant took nothing from the victim and did not point a weapon at the victim, because: (1) it was undisputed that the crime occurred; and, (2) whether the defendant or the defendant's accomplice pointed the gun and took the property, the defendant could be convicted through the defendant's role as a party, under O.C.G.A. § 16-2-21. Bush v. State, 317 Ga. App. 439, 731 S.E.2d 121 (2012).

Evidence was sufficient to authorize the defendant's convictions for hijacking a motor vehicle, in violation of O.C.G.A. § 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant's involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence presented was that: (1) when two people walked past the victim's parked vehicle, one of the people held a knife to the victim's stomach and ordered the victim to give the person the victim's wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver's seat and the other person, who had stood nearby during the incident, got into the passenger seat; (3) the victim identified the defendant as the person who got into the passenger seat; (4) the people drove away, but were apprehended; (5) the victim's wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the victim, who was without money, wanted to leave the area because there was a warrant for the defendant's arrest. Harrelson v. State, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Evidence was sufficient to convict the defendant of burglary, aggravated assault, possession of a firearm during the commission of the aggravated assault, and possession of a firearm by a convicted felon because a house-sitter returned to a residence to discover an intruder inside; the intruder flashed a gun and told the house-sitter that the intruder would shoot the house-sitter; the house-sitter identified the defendant, whom the house-sitter had known for over 20 years, as the intruder; and a back window of the home had been shattered. Davis v. State, 325 Ga. App. 572, 754 S.E.2d 151 (2014).

Evidence from a victim that the defendant robbed the victim of cash, cell phones, and a GPS unit at knifepoint was sufficient pursuant to O.C.G.A. § 24-14-8 to establish that the defendant committed armed robbery with a knife in violation of O.C.G.A. §§ 16-8-41(a) and 16-11-106(b)(1), although the defendant testified that the victim gave the defendant these items for drugs. Sanders v. State, 324 Ga. App. 4, 749 S.E.2d 14 (2013).

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Victim's testimony that the victim and the defendant were fighting, the defendant left the room and later returned with a gun that the defendant held to the victim's side, and the victim heard a gunshot and turned to face the defendant, who told the victim that the defendant had been meaning to do that and ran, supported the defendant's convictions for aggravated assault, aggravated battery, and possession of a firearm during the commission of a felony. Jones v. State, 326 Ga. App. 151, 756 S.E.2d 267 (2014).

Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault, and possession of a firearm during the commission of a felony because, although the two passengers of the car committed the actual armed robbery, there was evidence that the defendant, the driver of the car, knew that the two passengers were armed and that the defendant "kind of sort of" knew what they were going to do, which supported a finding that the defendant participated in the robbery as the getaway driver. Smith v. State, 325 Ga. App. 745, 754 S.E.2d 788 (2014).

Evidence that the defendant invited the victim to physically fight the defendant after a verbal dispute arose over a dice bet, and that the victim was unarmed while the defendant had concealed a firearm in a pocket, was sufficient to defeat the defendant's justification defense and support the convictions for aggravated assault and possession of a firearm during the commission of a felony. Robinson v. State, 326 Ga. App. 59, 755 S.E.2d 865 (2014).

Evidence, including the defendant's statement to police that the defendant had shot the victim, had meant to shoot the victim, and would have shot the victim again, was sufficient to support the defendant's convictions for aggravated assault and possession of a firearm during the commission of a crime. Taylor v. State, 327 Ga. App. 288, 758 S.E.2d 629 (2014).

Victim's testimony that the defendant pointed a gun at the victim, gave the gun to an accomplice, and took the victim's possessions, and that the victim was 100% sure the defendant was one of the robbers was sufficient to support a conviction for possession of a firearm during the commission of a crime. Hogan v. State, 330 Ga. App. 596, 768 S.E.2d 779 (2015).

Testimony of the victim identifying the defendant as the person who robbed the victim and identifying the handgun, and the testimony of the security guard and the bystander which aligned with the victim's account of the robbery was sufficient to support the defendant's convictions for armed robbery and possession of a firearm during the commission of a felony. Murphy v. State, 333 Ga. App. 722, 776 S.E.2d 657 (2015).

Evidence was sufficient to convict the defendant of malice murder and possession of a knife during the commission of a crime because, although the defendant testified that the victim attacked the defendant without provocation and that the defendant stabbed the victim merely to end a physical assault, the evidence of the disparity between the ages and physical sizes of the defendant and the victim, the defendant's lack of injuries from the encounter, the fact that the victim was unarmed and was seated or lying down when attacked, and the obvious savagery of the stabbing as shown by the victim's multiple and severe wounds, permitted not only findings of implied malice, but belied the claim that the killing was as an act of self-defense. Mosley v. State, 300 Ga. 521, 796 S.E.2d 684 (2017).

Evidence that the defendant shot at a man who laughed when the defendant yelled anyone selling drugs in the neighborhood would have to give the defendant a commission, and then began shooting and hit two others was sufficient to support the defendant's convictions for aggravated battery and possession of a firearm during the commission of a felony. Thompson v. State, 341 Ga. App. 883, 802 S.E.2d 713 (2017).

Testimony that the defendant was in possession of a firearm when the defendant entered the victim's apartment and that the defendant remained in possession of that firearm throughout the incident was sufficient to establish that the defendant was in possession of the handgun while each of the predicate offenses

were committed. Taylor v. State, 344 Ga. App. 122, 809 S.E.2d 76 (2017).

Weapon within reach. — Defendant's convictions for possession of marijuana and a firearm were affirmed because, although circumstantial, the evidence was sufficient to show that the weapon was within arm's reach of the defendant during the commission of a crime. Under the circumstances, the trial court could find that, given the close proximity, the defendant passed within reach of the handgun while handling the marijuana. Carter v. State, 319 Ga. App. 609, 737 S.E.2d 714 (2013).

Evidence that the defendant kicked in a door and entered an occupied apartment with others, the defendant provided the guns used, the defendant placed a gun to one victim's head, a victim's wallet and key were taken, and marijuana, digital scales, and a device used to grind marijuana were found at the defendant's house was sufficient to support the defendant's convictions for four counts of aggravated assault, three counts of false imprisonment, and one count each of armed robbery, burglary, possession of marijuana with intent to distribute, and possession of a firearm during the commission of a felony. Thompson v. State, 320 Ga. App. 150, 739 S.E.2d 434 (2013).

Defendant's claim that the evidence was insufficient to support the convictions for malice murder and possession of a firearm during the commission of a felony because the state was unable to present evidence to disprove the earlier incident between the defendant and the victim or disprove that the defendant acted in self-defense when the defendant shot the victim failed because testimony from eyewitnesses to the shooting and forensic evidence belied the claim that the defendant acted in self-defense. Among other things, the defendant testified the defendant shot the victim because the victim pulled out a knife, claiming the defendant saw the blade; however, two closed pocket knives were found. Hoffler v. State, 292 Ga. 537, 739 S.E.2d 362 (2013).

Testimony from two witnesses that the witnesses recognized the defendant from the defendant's distinctive walk and that one also recognized the defendant from the defendant's posture, shoulders, complexion, and nose; the fact that a dark fiber like one that could have been from the shooter's wig was found in the defendant's truck; and the defendant's admission to an inmate that the defendant shot the victim supported the defendant's convictions for malice murder and possession of a firearm during the commission of a felony. Hayes v. State, 292 Ga. 506, 739 S.E.2d 313 (2013).

Victim's testimony that the defendant approached the victim, thrust a gun about six inches from the victim's face, took the victim's cell phone and keys, and told the victim to "get out of here", while waving a gun, was sufficient to support the defendant's convictions for armed robbery, possession of a firearm during the commission of a crime, aggravated assault, and theft by taking. Wright v. State, 319 Ga. App. 723, 738 S.E.2d 310 (2013).

Testimony of an accomplice that the defendant was with the others during the robbery of the first victim and ran off and ate pizza with everyone afterward and the testimony of the second victim identifying the defendant at trial as the man the second victim spoke to about selling a Blackberry while an accomplice put a gun to the second victim's neck, searched the second victim's pockets, and took the second victim's Blackberry and wallet, was sufficient to support the defendant's convictions for armed robbery and possession of a firearm during the commission of a felony. Fuller v. State, 320 Ga. App. 620, 740 S.E.2d 346 (2013).

Evidence was sufficient to support convictions for armed robbery and possession of a firearm during the commission of a crime as the state presented the requisite corroboration to the codefendant's testimony; the getaway driver's testimony about the height of the defendant and the codefendant was consistent with the gas station clerk's comparison of their heights, and there was evidence that the defendant, who had no job, was spending significant amounts of money on cars and expensive clothing. Harrell v. State, 322 Ga. App. 115, 744 S.E.2d 105 (2013).

Testimony of an inmate, who had been housed with the defendant when the defendant was in prison on an unrelated

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charge, that the defendant admitted to the inmate that the defendant killed the victim because the victim had beaten the defendant up and taken the defendant's wallet, and that the defendant and another individual participated in the shooting, was sufficient to support the defendant's conviction for possession of a firearm during the commission of a crime based on the theory of party to a crime. Jackson v. State, 322 Ga. App. 196, 744 S.E.2d 380 (2013).

Evidence that the defendant was found in the laundry room of the home that was the subject of the home burglary; police found masks, gloves, money, a gun, and some of the victim's jewelry in or near the laundry room; and the defendant's DNA was found on one of the masks recovered supported the defendant's convictions for armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of a crime. Rudison v. State, 322 Ga. App. 248, 744 S.E.2d 444 (2013).

Evidence including testimony as to the gang's criminal activities, corroborating the defendant's participation in the armed robberies; the defendant's admission to participating in two murders; and a gun the defendant used in the attempted armed robbery of the first victim was sufficient to support the defendant's convictions for criminal street gang activity, criminal attempt to commit armed robbery, two counts of aggravated assault, and possession of a firearm during the commission of a felony. Morris v. State, 322 Ga. App. 682, 746 S.E.2d 162 (2013).

Evidence was sufficient to convict the defendant of terroristic threats, six counts of aggravated assault, and possession of a firearm during the commission of a felony because a witness testified that a vehicle fitting the description of the defendant's car was driven by the shooter who shot at the house of the complainant's mother where the complainant was staying; multiple gunshot holes were found in the side of the home; the complainant testified that, earlier that morning, the defendant had threatened to come to the house and kill the complainant; and the complainant received text messages from the defendant later that morning apologizing for what had happened. Brown v. State, 325 Ga. App. 237, 750 S.E.2d 453 (2013).

As there was evidence that the officers identified themselves as police, the defendant admitted to shooting a rifle in the direction of the officers, and there was undisputed evidence that one officer was hit, the evidence was sufficient to support the jury's guilty verdict as to four counts of possession of a firearm during the commission of a felony. Stover v. State, 324 Ga. App. 467, 751 S.E.2d 115 (2013).

Evidence only sufficient to support one count since there was only one victim. — Defendant could not be convicted of two counts of possession of a firearm during the commission of a felony since there was only one victim. Barnes v. State, 319 Ga. App. 509, 736 S.E.2d 471 (2013).

Evidence only sufficient to support two of three counts. — Defendant could only be convicted of two of the three possession of a firearm during the commission of a crime counts because there were only two victims; thus, the defendant's third conviction involving one of the same victims had to be vacated. Bradley v. State, 292 Ga. 607, 740 S.E.2d 100 (2013).

Murder, other offenses, and possession shown. — Evidence sufficient to support convictions of murder, aggravated assault, armed robbery, burglary, and possession of a firearm in the commission of a felony. Baty v. State, 257 Ga. 371, 359 S.E.2d 655 (1987).

Rational trier of fact could have found the defendant guilty of murder, aggravated assault, and possession of a firearm during the commission of a crime beyond a reasonable doubt. Walden v. State, 264 Ga. 92, 441 S.E.2d 247 (1994).

Evidence was sufficient to enable a rational trier of fact to find appellant guilty of malice murder, felony murder, aggravated assault, and possession of a firearm by a convicted felon in the shooting deaths of two victims. Burtts v. State, 269 Ga. 402, 499 S.E.2d 326 (1998).

Evidence was sufficient to convict defendant of malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a crime

against a person because: (1) the codefendant jumped out of the car defendant was driving and told the victim and two other men to empty their pockets as the codefendant was robbing them and then codefendant began shooting; and (2) the victim was shot in the head and later died. Thomas v. State, 275 Ga. 882, 572 S.E.2d 537 (2002).

Evidence was sufficient to support convictions for felony murder, aggravated assault, and possession of a firearm during the commission of a crime since the record revealed that defendant was riding in a car, made a gang sign to some people on the street, and in response to their obscene gesture, defendant took out a gun and fired at the people, killing two people and wounding one; defendant's contention that defendant was acting to protect oneself and others in the car, that defendant fired into the air, and that defendant did not mean to hurt anyone was found to lack merit. Ingram v. State, 276 Ga. 223, 576 S.E.2d 855 (2003).

Evidence was sufficient to support the defendant's convictions of malice murder and possession of a firearm during the commission of a felony in relation to the shooting death of a man whom defendant allegedly suspected of killing defendant's father after: (1) three witnesses identified defendant as the shooter; (2) another witness, who had heard defendant say that defendant was going to kill the victim to avenge the death of defendant's father, placed defendant at the crime scene with a gun; (3) two other witnesses averred that defendant told the witnesses that defendant had killed the victim; and (4) defendant was arrested two weeks after the murder while carrying the same kind of weapon which was used to kill the victim. Smith v. State, 276 Ga. 263, 577 S.E.2d 548 (2003).

Evidence was sufficient to support the defendant's conviction of malice murder, felony murder, burglary, aggravated assault, kidnapping with bodily injury, and possession of a firearm during the commission of a felony since the defendant: (1) planned the defendant's crimes, and armed himself with a gun and handcuffs; (2) broke into his in-laws' house after severing their phone line; (3) shot and killed his father-in-law and wounded his mother-in-law while they lay in bed; (4) handcuffed his bleeding mother-in-law to her nine-year-old son and left them tethered to a bed rail in a room with her dead husband and defendant's two-year-old son; and (5) abducted his estranged wife and her 17-year-old sister to a mobile home where he made them take showers while he watched, and then raped them both. Sallie v. State, 276 Ga. 506, 578 S.E.2d 444, cert. denied, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

Defendant was found guilty of malice murder, aggravated assault, and possession by a first offender probationer when defendant fired a gun at a woman, the bullet grazed the woman, went through a wall, and killed another person. George v. State, 276 Ga. 564, 580 S.E.2d 238 (2003).

Evidence that defendant and another person hijacked the victim, put the victim in the trunk of the car, the other person later shot the victim, both subsequently dumped the body and returned the car, was sufficient to support defendant's conviction of malice murder and possession of a weapon during a felony. Washington v. State, 276 Ga. 655, 581 S.E.2d 518 (2003).

Evidence was sufficient to support defendant's conviction for possession of a firearm during the commission of a felony as the evidence showed that defendant held a pistol on the victim and shot the victim, as part of a sequence of events that involved defendant and two other individuals robbing the victim, shooting the victim and transporting the victim while alive to another location, and then murdering the victim at the second location by shooting the victim to death. Conaway v. State, 277 Ga. 422, 589 S.E.2d 108 (2003).

When defendant shot a victim in the head after an argument and also shot at another victim but failed to hit the second victim, a rational trier of fact could have found beyond a reasonable doubt that defendant was guilty of felony murder, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon. Hightower v. State, 278 Ga. 39, 597 S.E.2d 362 (2004).

Evidence was sufficient to support defendant's convictions on two counts of felony murder, predicated on the underlying

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felony of aggravated assault, one count of armed robbery, and two counts of possession of a firearm in the commission of a crime as the evidence showed that defendant brandished a handgun and forced the two victims to give defendant money, and that defendant then fatally shot the victims after one victim argued with other people defendant was with regarding the purity of a drug purchase the one victim had just made. Harden v. State, 278 Ga. 40, 597 S.E.2d 380 (2004).

Evidence was sufficient to allow the jury to find defendant guilty of malice murder and possession of a firearm during the commission of an aggravated assault because: (1) one eye-witness testified to seeing the victim speaking to an occupant of a car, then hearing a shot, seeing the victim try to peddle the bicycle away, and then falling to the ground; (2) another witness testified that on the night of the shooting, defendant told the witness that defendant shot a person on a bicycle and that the witness helped defendant dispose of a gun in a lake; (3) a third witness testified that defendant told the third witness that defendant had shot and killed a man on a bicycle; and (4) defendant made a videotaped statement during which defendant admitted to shooting the victim. Roberts v. State, 278 Ga. 541, 604 S.E.2d 500 (2004).

In addition to the second codefendant's testimony, the state showed that, shortly after the murder, defendant was in possession of the victim's cab, that the victim's blood was found in the vehicle and on defendant, and that defendant made incriminating admissions to others; thus, the evidence was sufficient to authorize a rational trier of fact to find proof beyond a reasonable doubt of defendant's guilt of malice murder, armed robbery, aggravated assault, hijacking a motor vehicle, and possession of a firearm during the commission of a felony. Wicks v. State, 278 Ga. 550, 604 S.E.2d 768 (2004).

Sufficient evidence supported defendant's convictions for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony because, inter alia: (1) the shooting victim was the boyfriend of defendant's former girlfriend; (2) the victim had beaten defendant earlier; (3) witnesses saw defendant at the scene of the killing, in daylight from about two feet away, saw defendant draw a gun, and then heard shots; (4) a witness saw one perpetrator run from the scene; (5) the witnesses gave the police a description of the shooter, and within hours, independently identified defendant as the perpetrator from a photo lineup; and (6) a few days later, defendant admitted to a former girlfriend that defendant was the shooter. Wallace v. State, 279 Ga. 26, 608 S.E.2d 634 (2005).

Evidence supported defendant's conviction for malice murder and possession of a firearm during the commission of a felony because defendant admitted that defendant took money from the victim, that defendant arranged for a meeting with the victim, and that defendant did not return the money before defendant shot the victim. Flanders v. State, 279 Ga. 35, 609 S.E.2d 346 (2005).

Evidence that defendant's vehicle was seen at the victim's residence around the time the victim was murdered, the defendant's subsequent arrest in a hotel room paid for with the victim's credit card, and the presence of the victim's blood on defendant's boots when defendant was arrested was sufficient to support defendant's convictions for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony. Moore v. State, 279 Ga. 45, 609 S.E.2d 340 (2005).

Evidence supported defendant's conviction for malice murder, cruelty to a child, and possession of a firearm during the commission of a felony because defendant pointed a loaded revolver at the victim and pulled the gun's trigger twice, while driving, fatally wounding the victim, the victim's two-year-old child was also in the car, and defendant did not call 9-1-1 from defendant's cell phone and drove past a hospital. Reed v. State, 279 Ga. 81, 610 S.E.2d 35 (2005).

Evidence was sufficient to support convictions for malice murder and possession of a firearm in the commission of a felony because an eyewitness identified defen-

dant as one of two armed men seen getting out of a van and two other eyewitnesses testified that the witnesses saw defendant fire shots at the victim; the medical evidence showed that the victim died from gunshot wounds to the head and neck. Cox v. State, 279 Ga. 223, 610 S.E.2d 521 (2005).

Evidence was sufficient to support defendant's guilt of malice murder and possession of a firearm during the commission of a felony because, although the codefendant fired the shot that killed the victim, eyewitness testimony showed that defendant was a party to the crimes. Cox v. State, 279 Ga. 223, 610 S.E.2d 521 (2005).

Evidence supported defendant's conviction of malice murder, possession of a firearm during the commission of a crime, and concealing the death of another; the victim was shot in the back of the head with defendant's gun in the woods behind defendant's family's property, the victim's body was found in a landfill two days later, defendant's friend confided to a friend that defendant shot the victim and then called the friend to help dispose of the body, the friend confessed to a role in the concealment and secretly videotaped a conversation with defendant about the shooting and, on the tape, defendant bragged about killing the victim and demonstrated how defendant did the killing. Bragg v. State, 279 Ga. 156, 611 S.E.2d 17 (2005).

Evidence was sufficient to support defendant's convictions for malice murder and possession of a firearm during the commission of a felony as the circumstantial evidence showed defendant shot the victim three times, that defendant did so in retaliation for the victim allegedly arranging to rob the codefendants of certain property the defendants planned to sell to buy drugs, that defendant did not report the shooting but, instead, fled the scene, and stated that "he just shot that damn boy," but did not claim to have shot the victim accidentally. Glenn v. State, 279 Ga. 277, 612 S.E.2d 478 (2005).

Evidence that defendant took money from the one victim, beat the victim while doing so, that defendant was armed at the time, that defendant had the victim removed from defendant's house by the codefendants so that the one victim could be murdered elsewhere, and that the second victim was removed from the defendant's house by another codefendant, all after the one victim and the second victim were suspected of plotting to rob defendant, who was selling illegal drugs from defendant's home, was sufficient to support defendant's convictions for malice murder, kidnapping, armed robbery, and being in possession of a firearm during the commission of a felony. Mason v. State, 279 Ga. 636, 619 S.E.2d 621 (2005).

Evidence was sufficient to support defendant's convictions for felony murder, aggravated assault, and possession of a firearm in the commission of a felony in a case because defendant, who had engaged in previous altercations with the victim, got out of defendant's car after seeing the victim on the street, ran up to the victim, shot the victim, returned to defendant's car, ran back to the victim and shot the victim again, and then got in defendant's car and drove off, as all of the elements of those offenses were established. Hayes v. State, 279 Ga. 642, 619 S.E.2d 628 (2005).

Expert testimony that a shell casing at the crime scene came from a pistol found in defendant's apartment, along with two witnesses' identifications of defendant, and expert testimony that a bullet extracted from a victim's head possibly came from defendant's pistol, although it was too damaged to say with complete certainty, sufficiently supported defendant's convictions for murder, armed robbery, and possession of a firearm during the commission of a felony. Escobar v. State, 279 Ga. 727, 620 S.E.2d 812 (2005).

There was sufficient evidence to find defendant guilty of malice murder, burglary, and possession of a gun during the commission of a crime because a witness testified that the witness, defendant, and defendant's brother drove around looking for a home to burglarize and that while in a house, the two victims came home unexpectedly and were killed; also, DNA found at the crime scene matched the defendant. Denny v. State, 280 Ga. 81, 623 S.E.2d 483 (2005).

Evidence was sufficient to support the convictions of murder, armed robbery, ag-

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gravated assault, burglary, and a statutory violation, all in violation of O.C.G.A. §§ 16-5-1, 16-8-41, 16-5-21, 16-7-1, and 16-11-106, respectively, since the defendant and the codefendant went to a club with the intention of robbing someone, met the victim and drove the victim back to the victim's home, beat and fatally stabbed the victim, and upon leaving the victim's apartment, took some of the victim's belongings. Willoughby v. State, 280 Ga. 176, 626 S.E.2d 112 (2006).

Sufficient evidence supported convictions of felony murder, armed robbery, aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm in the commission of a felony since, upon pulling into an apartment complex to turn around and ask for directions, the victims were approached by defendant and another man, then defendant pulled out a gun and told the victims to "give it up," following which, when one of the victims hesitated, defendant shot the victim, defendant then stole that victim's money and jewelry, and then, later, the gunshot victim died, and the second victim described defendant, who was wearing a specific jersey at the time of the crimes, and then two witnesses who knew defendant testified that defendant robbed and shot the victim while wearing that jersey. Davis v. State, 280 Ga. 442, 629 S.E.2d 238 (2006).

Defendant's convictions of murder, felony murder, armed robbery, burglary, possession of a firearm during the commission of an armed robbery, and possession of a firearm during the commission of a burglary were supported by sufficient evidence that, the day before the three murder victims were found shot in the head, the defendant borrowed the defendant's sister's car to visit one of the victims, who owed the defendant money, the defendant admitted going to the victims' home twice on the day of the murders, but stated that the victims were not home during either visit, neighbors heard gunshots around the home at approximately 7:30 P.M., near the last time that the two younger victims were heard from, and again at 10:00 P.M. that evening, when the older victim returned home for the day, a number of items stolen from the victims' home at the time of the murders were subsequently found in a dumpster next to a storage locker the defendant shared with a friend, the items were contained in plastic bags which had the defendant's fingerprints on them, and the plastic bags came from a roll of trash bags found in the trunk of the car which the defendant borrowed on the day of the murders. Griffin v. State, 280 Ga. 683, 631 S.E.2d 671 (2006).

Convictions of malice murder and possession of a firearm during the commission of a felony were supported by sufficient evidence, including the proper introduction of the pretrial statement of a witness who identified the defendant as the shooter in the murder, and the pretrial statement of a second witness who claimed that the defendant had admitted that the defendant had killed a man five hours after the fatal shooting and that the witness had frequently seen the defendant carrying the sort of pistol that fired the fatal shots. Cummings v. State, 280 Ga. 831, 632 S.E.2d 152 (2006).

Convictions of felony murder, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon were supported by sufficient evidence showing that, during an argument involving the defendant and the two victims, the defendant told one of the victims to go get the victim's guns, adding that the defendant had guns, the victim went to the victim's vehicle and retrieved two handguns, approached with arms crossed and a gun in each hand, and the defendant took a gun out of the waistband of the defendant's pants and started shooting, wounding one victim and killing the other victim. McKee v. State, 280 Ga. 755, 632 S.E.2d 636 (2006).

Evidence was sufficient to find the defendant guilty of voluntary manslaughter in violation of O.C.G.A. § 16-5-2, felony murder predicated on possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-5-1, two counts of aggravated assault in violation of O.C.G.A. § 16-5-21, possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-11-131, and possession of a firearm during the commission of a felony murder

in violation of O.C.G.A. § 16-11-106, as the defendant was angered by the victim's presence in the residence, the defendant assaulted the victim with a baseball bat and threatened to kill the victim if the victim did not leave the residence, and when the victim returned to the residence, the defendant fatally shot the victim in the stomach. Lawson v. State, 280 Ga. 881, 635 S.E.2d 134 (2006).

Defendant's conviction for malice murder, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon was supported by the evidence as: (1) the defendant told the defendant's girlfriend that the defendant knew who had taken the defendant's drugs from a motel room and that the defendant was going to get them; (2) the defendant and an accomplice forced a woman with something "glossy" on the woman's forehead; (3) the defendant told the driver to stop at a secluded area so that the defendant could put the woman "somewhere safe"; (4) the defendant threw a gun from a bridge on the return; (5) the defendant instructed the driver to clean blood from the car's backseat; and (6) the defendant told the defendant's girlfriend that the defendant had killed the person who had the defendant's drugs and told a cell mate that the defendant had shot a person. Walker v. State, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Sufficient evidence supported the defendant's convictions of two counts of felony murder under O.C.G.A. § 16-5-1, armed robbery under O.C.G.A. § 16-8-41, aggravated assault under O.C.G.A. § 16-5-21, possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106, and possession of a firearm by a first offender probationer under O.C.G.A. § 16-11-131; two witnesses testified that the defendant had told the witnesses that the defendant shot the victim, and one of the witnesses testified that the defendant stated that the shooting occurred during a robbery, the defendant discarded a gun that was later found to be the murder weapon while fleeing police on another crime, and the defendant admitted to police that the murder weapon was the defendant's, that the defendant stole $100 from the victims, and that the defendant shot the murder victim. Chenoweth v. State, 281 Ga. 7, 635 S.E.2d 730 (2006).

Evidence supported a defendant's conviction for malice murder, felony murder while in commission of an aggravated assault, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony as: (1) the defendant came to a tenant's apartment and told the victim that the defendant just shot someone in the backyard; (2) the tenant heard the victim calling the tenant's name; (3) another witness heard a series of gunshots and then someone being beaten, was familiar with the victim and recognized the victim's voice as the victim hollered, "You stomping me. I've been shot. You already done shot me," and saw the defendant emerge from behind the residence with a gun in the defendant's hand; (4) the defendant held the gun to the head of the witness, but then instructed the witness to leave the area; and (5) the victim's death was caused by two fatal gunshot wounds to the neck and chest and there was blunt force trauma to the head. Compton v. State, 281 Ga. 45, 635 S.E.2d 766 (2006).

There was sufficient evidence to convict the defendant of malice murder under O.C.G.A. § 16-5-1, burglary under O.C.G.A. § 16-7-1, and possession of a firearm during the commission of a crime under O.C.G.A. § 16-11-106; the defendant was arrested in the white van seen at the scene of the crime, a person resembling the defendant was seen at the scene, the defendant's brother was tied by DNA evidence to the offense, and the defendant and the defendant's brother were known to commit burglaries together. Denny v. State, 281 Ga. 114, 636 S.E.2d 500 (2006).

Evidence supported a defendant's conviction of felony murder, aggravated assault, and possession of a firearm during the commission of a felony as: (1) the defendant told the victim that the defendant was going to shoot the victim and then the defendant shot the victim in the stomach, argued with the victim some more, and shot the victim again; (2) the victim never admitted cheating on the

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defendant; (3) after the second shot, the defendant and a friend took the victim to a hospital in a car; (4) while en route, the defendant persisted in the defendant's efforts to get the victim to admit to cheating on the defendant; and (5) the defendant wiped down the revolver and threw the revolver out of the car. Durham v. State, 281 Ga. 208, 636 S.E.2d 513 (2006).

Evidence supported a defendant's convictions for malice murder, felony murder, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony as: (1) the defendant repeatedly followed the victim in and out of a restaurant, and eventually chased the victim from the restaurant, firing at the victim at least nine times; (2) after the shooting, the defendant jumped into a silver truck and sped away; (3) the victim died as a result of the gunshot wounds; and (4) two witnesses identified the defendant from photographic lineups. Waters v. State, 281 Ga. 119, 636 S.E.2d 538 (2006).

Eyewitness's identification of the defendant and the statement made to police by the mother of the defendant's children in which the mother stated that the defendant admitted to shooting someone provided sufficient evidence to convict the defendant of malice murder in violation of O.C.G.A. § 16-5-1 and possession of a firearm during the commission of a felony in violation of O.C.G.A. § 16-11-106; the weight accorded to the identification and the statement to police was a matter for the jury. Wells v. State, 281 Ga. 253, 637 S.E.2d 8 (2006).

Evidence was sufficient to convict the defendant of malice murder under O.C.G.A. § 16-5-1 and of possession of a knife in the commission of a felony in violation of O.C.G.A. § 16-11-106; the defendant called 9-1-1 to report the defendant's killing of the victim, who had earlier broken up with the defendant, and the victim was found with fatal stab wounds and a five-inch knife blade embedded in the victim's neck. Perez v. State, 281 Ga. 175, 637 S.E.2d 30 (2006).

Defendant's convictions of malice murder, armed robbery, and possession of a firearm during the commission of a felony were supported by the evidence, which included use of the murder weapon during a later robbery by the defendant's accomplices, a video that provided a corroborating account of the shooting, and the defendant's spontaneous inculpatory statements while being transported from Maryland to Georgia. Stokes v. State, 281 Ga. 825, 642 S.E.2d 82 (2007).

Evidence supported a defendant's conviction of malice murder and possession of a firearm during the commission of a felony as: (1) believing that the victim was involved in the murder of the defendant's brother five months before the incident, the defendant told a first witness that the defendant intended to kill the victim and offered to pay the first witness for information as to the victim's whereabouts; (2) a second witness saw the defendant and two other men approach the victim, call out the victim's name, and open fire on the victim as the victim ran away; (3) the victim died from gunshot wounds; (4) the second witness had met the defendant and, after the shooting, the second victim noticed the defendant's gold teeth, and identified the defendant by the defendant's street name from a photographic lineup and in court; and (5) the defendant threatened to kill the second witness if the second witness testified against the defendant. Woodruff v. State, 281 Ga. 235, 637 S.E.2d 391 (2006).

Evidence supported a defendant's conviction for malice murder, aggravated assault, and possession of a firearm in the commission of a felony as: (1) during a van ride, the defendant fought with an assault victim, striking the assault victim in the head with a gun, and was told to stop hitting the assault victim; (2) a gunshot was heard and the passengers saw a murder victim lying dead and the defendant holding the gun; (3) the gun was inside the murder victim's mouth when the gun was fired; (4) the assault victim and another passenger fled; and (5) the defendant and an accomplice dumped the body in an industrial area. Johnson v. State, 281 Ga. 229, 637 S.E.2d 393 (2006).

Evidence supported a defendant's conviction for malice murder, aggravated battery, and possession of a firearm during the commission of a felony as: (1) the

defendant had threatened to kill the victim, who was seeking a divorce from the defendant; (2) the defendant shot the victim eight times with an AK-47 assault rifle, killing the victim; (3) in woods located approximately 10 miles from the crime scene, investigators found the defendant's car, a bag of the defendant's personal items, some of which had the defendant's name written on the items, and the defendant's AK-47 rifle and ammunition; and (4) the defendant admitted to firing defendant's AK-47 many times at the victim's home at what the defendant described as an unknown assailant who shot at the defendant first. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639 (2006).

Evidence sufficient to support convictions of malice murder, felony murder, and possession of a knife during the commission of a felony based on the defendant's telephone call to a friend admitting to the murder; and expert medical testimony which explained how the killing was committed and how the defendant "worked up the courage" to inflict the deep cut that stretched across the victim's throat, severing the victim's left carotid artery and right internal jugular vein, causing the victim to bleed to death; further, the defendant had sufficient notice of the specific deadly weapon allegedly used for purposes of the felony murder charge by the language in count three. Jones v. State, 282 Ga. 47, 644 S.E.2d 853 (2007).

Because sufficient evidence was presented that the defendant was provoked by an attack on a sibling, and that the defendant had a history of abusive relationships with several others, the voluntary manslaughter of the victim was supported by the evidence; moreover, evidence of the victim's stabbing and death also supported the jury's verdict with respect to the aggravated assault with a deadly weapon, felony murder, and possession of a knife during the commission of a felony charges. Breland v. State, 285 Ga. App. 251, 648 S.E.2d 389 (2007).

Evidence was sufficient to support the three defendants' convictions of malice murder, aggravated assault, and possession of a firearm during the commission of a felony since: the victims were shot from a gold SUV and the first defendant owned a gold SUV; the first defendant, who had been robbed the day before, stated that the first defendant "wanted to straighten about the money"; the third defendant met the first two defendants at a hotel and transferred weapons into the gold SUV; the first defendant pointed to a person outside the hotel and said "Let him have it"; and the third defendant later wondered if one of the victims was dead. Stokes v. State, 281 Ga. 875, 644 S.E.2d 116 (2007).

Evidence supported the defendant's convictions of malice murder, felony murder, armed robbery, aggravated assault, and possession of a firearm during the commission of a felony since the defendant had gone to the victim's laundromat and waited until the victim opened a change machine, pointed a gun at the victim's head and ordered the victim to put the money in a bag, told the victim, "Hell, yeah, I'll kill you," and shot the victim multiple times; eyewitnesses, including two who knew the defendant, had identified the defendant as the perpetrator. Cooper v. State, 281 Ga. 760, 642 S.E.2d 817 (2007).

Because no reversible error resulted from excepting a prosecution witness from sequestration, the admission of certain recorded out-of-court statements by three witnesses and one of the codefendants, and the jury charge on impeachment, the defendant's felony murder and possession of a firearm during the commission of a felony convictions were upheld on appeal; hence, the trial court properly denied the defendant a new trial. Warner v. State, 281 Ga. 763, 642 S.E.2d 821 (2007).

Based on the evidence explaining the circumstances and events leading up to the victim's death, including testimony from the medical examiner as to the cause of death, the weapon found, and the defendant's own statements, the appeals court concluded that overwhelming evidence existed to support the defendant's convictions of malice murder and possession of a firearm during the commission of a crime. Sturgis v. State, 282 Ga. 88, 646 S.E.2d 233 (2007).

There was sufficient evidence to support the defendant's convictions of felony murder, aggravated assault, and possession of

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a firearm during the commission of a felony, and the jury was entitled to disbelieve family members who testified that the defendant was out of state when the crimes occurred; the defendant pointed a handgun at the two victims and told the victims to give the defendant the keys to the van in which the victims were loading scooters, shot one victim in the chest, and ran away, after which the defendant's companions drove the van after the defendant. Edwards v. State, 282 Ga. 259, 646 S.E.2d 663 (2007).

There was sufficient evidence to support the defendant's convictions of felony murder, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony; a witness who sold drugs for the defendant had gotten into a dispute with a third person over drugs before the shooting, the defendant upon seeing the victim asked the witness if the victim was the third person in question and then shot the victim, and witnesses placed the defendant at the scene of the crime and testified that the witnesses saw the defendant carrying a gun. Johnson v. State, 282 Ga. 235, 647 S.E.2d 48 (2007).

Even if the defendant filed a motion for a directed verdict of acquittal on charges of felony murder, aggravated assault, and possession of a firearm during the commission of a felony, the evidence was sufficient to support the convictions; the evidence showed that the defendant had drove three times into a crowd of people playing basketball, left after an altercation, retrieved a handgun, then returned, hid in some bushes, and fired into the crowd, striking the victim. Spiller v. State, 282 Ga. 351, 647 S.E.2d 64 (2007), cert. denied, 552 U.S. 1079, 128 S. Ct. 812, 169 L. Ed. 2d 612 (2007).

There was sufficient evidence to support the defendant's convictions of malice murder, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony; the defendant and the victim lived in the same rooming house where the defendant often intimidated the victim and demanded money from the victim, on the night of the crime the defendant sent the victim to buy crack cocaine and became angry when the victim returned empty-handed, the defendant argued with the victim and shot the victim in the eye, and at the hospital the victim repeatedly declined to say who shot the victim, except to say that a person with a first name other than the defendant's shot the victim accidentally. Jones v. State, 282 Ga. 306, 647 S.E.2d 576 (2007).

Evidence supported the defendant's convictions of felony murder, aggravated assault, and possession of a weapon during the commission of a crime in relation to incidents in 2001, after an assailant approached the victims with a gun and pistol-whipped one of the victims, and in 2002, after an assailant shot one of the victims after the other victim reached for the assailant's gun; two of the three victims of the 2001 incident identified the defendant as the assailant, the third victim who was also a victim in 2002 could not identify the defendant at trial but had picked the defendant's photograph out of a lineup after the 2002 incident and had testified that the same person was involved in both incidents, and there was evidence of a similar incident in 2003. Hall v. State, 282 Ga. 294, 647 S.E.2d 585 (2007).

Evidence supported the defendant's convictions of malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony; the two surviving victims testified that the defendant began shooting at the victims after arriving at an apartment, and the testimony of the victims, the location of shell casings, and the evidence showing that the deceased victim was shot from a distance of over three feet, significantly refuted the defendant's claim of self-defense. Jackson v. State, 282 Ga. 494, 651 S.E.2d 702 (2007).

There was sufficient evidence to support a defendant's convictions of malice murder, armed robbery, kidnapping, third-degree arson, burglary, and possession of a firearm during the commission of a crime when the evidence showed that the defendant made the defendant's accomplice shoot a convenience store clerk after the defendant forced the clerk at

gunpoint into a wooded area, took money from a cash register in the store, and started a fire in the store. The accomplice's testimony was sufficiently corroborated by the defendant's admission that the defendant owned the shotgun that was used in the shooting, the defendant's admission that the defendant gave the shotgun to the accomplice, the testimony of a third person that the accomplice gave the third person the shotgun after the robbery, and the fact that shotgun shells found in the defendant's home matched shells taken from the clerk's body. Judkins v. State, 282 Ga. 580, 652 S.E.2d 537 (2007).

Evidence was sufficient to support the defendant's convictions of malice murder, felony murder, burglary, aggravated assault, and possession of a firearm during the commission of a felony. Two off-duty police officers who worked as security guards for the apartment building where the victim was shot heard a "pop" and saw two people running from the apartment where the victim was shot; the victim's friend testified that the defendant and the codefendant had been at the apartment in the days before the murder and had asked about a gun the victim had; and a neighbor testified that around the time of the shooting, the defendant and the codefendant followed the victim to the apartment, then pushed open the door without knocking, and that the defendant had a weapon. Walker v. State, 282 Ga. 703, 653 S.E.2d 468 (2007).

Defendant's convictions were upheld on appeal because sufficient testimonial, identification, and physical evidence was presented to support the defendant's convictions of malice murder, felony murder, and possession of a firearm during the commission of a crime so that the jury could reject the defendant's self-defense claim. Rivers v. State, 283 Ga. 1, 655 S.E.2d 594 (2008).

Sufficient evidence existed to support a defendant's convictions of malice murder and possession of a knife during the commission of a felony under O.C.G.A. § 16-11-106(b): there was (1) eyewitness testimony that the defendant stabbed the victim, who was involved in a dispute with a relative of the defendant, in the chest with a knife; (2) evidence supporting a finding that the knife was three inches or longer; (3) the defendant's admission to "sticking" the victim; and (4) testimony that the defendant had twice pulled a knife on the victim before. Stanley v. State, 283 Ga. 36, 656 S.E.2d 806 (2008).

Evidence was sufficient to find a defendant guilty of malice murder, felony murder, and possession of a firearm during the commission of a crime: the defendant, who had shot the defendant's estranged spouse, (1) confessed both to the victim's sibling and to police; (2) was seen driving away from the scene shortly after the shooting; and (3) presented conflicting evidence as to an insanity defense. Foster v. State, 283 Ga. 47, 656 S.E.2d 838 (2008).

Evidence supported a defendant's convictions of felony murder, aggravated assault, and possession of a firearm during the commission of a felony. Witnesses saw the defendant walk with the victim from a store to the victim's car and later run from the scene following the sounds of a gunshot and a car crash, and the defendant admitted pulling a gun on the victim and said that the gun had gone off during a struggle, after which the victim tried to drive away. Petty v. State, 283 Ga. 268, 658 S.E.2d 599 (2008).

Evidence supported convictions of malice murder, aggravated assault, burglary, and possession of a firearm during the commission of a crime. The victim had been struck twice in the head with a pistol, strangled, and shot twice in the head; the victim's wallet and keys were missing; and the defendant, who told police where the wallet could be found, admitted shooting the victim and claimed that the defendant had done so after the victim tried to hug and kiss the defendant and things got "ugly." Brown v. State, 283 Ga. 327, 658 S.E.2d 740 (2008).

Evidence supported the defendant's convictions for malice murder, felony murder, aggravated assault, armed robbery, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime. The four victims were found dead in two hotel rooms from gunshot wounds to the back of their heads; identification documents belonging to the four victims were found in the

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defendant's car; there was expert testimony that the defendant's gun had been used to kill the victims; the defendant's baseball cap contained one victim's deoxyribonucleic acid; there was evidence that the defendant and two friends used three victims' tickets to attend a football game after the victims were murdered; the defendant was identified as being in an elevator with one victim; the defendant was seen leaving the hotel with one victim's cooler; and a duffle bag belonging to one victim was in the defendant's car when the defendant was arrested on weapons charges. Dawson v. State, 283 Ga. 315, 658 S.E.2d 755 (2008), cert. denied, 129 S. Ct. 169, 172 L.Ed.2d 122 (2008).

Evidence supported defendant's convictions of felony murder during commission of aggravated assault and of possessing a firearm while committing the murder; after defendant argued with the victim and hit the victim while they were riding in a car, defendant and the victim got out of the car where defendant shot at the victim multiple times, defendant fled the scene but later surrendered to authorities and stated that defendant had murdered the victim, and at trial defendant claimed that the gun accidentally discharged when defendant was trying to return the gun to the victim. Lashley v. State, 283 Ga. 465, 660 S.E.2d 370 (2008).

Testimony from two eyewitnesses that the defendant fatally shot the victim with an assault rifle and aimed the rifle at one of the witnesses, and evidence that the defendant then fled and tried to elude authorities, was sufficient to convict the defendant of felony murder, aggravated assault with a deadly weapon, aggravated assault, and possession of a firearm during the commission of a felony. McKenzie v. State, 284 Ga. 342, 667 S.E.2d 43 (2008).

Evidence supported convictions of malice murder, concealing a death, and possession of a firearm during the commission of a crime. A codefendant testified that the defendant, who was jealous of one victim, shot the victims in the defendant's home, then put the bodies in the second victim's car, drove the car away, poured gasoline on the car, and set the car on fire; an officer who had known the defendant for years testified that the defendant called the officer twice about surrendering to authorities; police found blood, human tissue, shotgun pellets, part of a shotgun, and ammunition in the defendant's home, a trail of blood leading away from the house, and a shotgun shell casing and a gas can in the defendant's truck; and a cellmate testified that the defendant told the cellmate that the defendant shot two people, that the defendant inquired whether fingerprints could be retrieved from a burned vehicle, and that the defendant said that the defendant had soaked up blood on the defendant's carpet with cat litter. Hendrix v. State, 284 Ga. 420, 667 S.E.2d 597 (2008).

Evidence supported convictions of malice murder, possessing a firearm during the commission of that murder, and possession of a weapon by a convicted felon. A drug dealer told police that the drug dealer saw the defendant shoot the victim, although the drug dealer said at trial that the drug dealer did not see the shooting; the drug dealer's spouse testified as to a statement by the drug dealer that was inconsistent with the drug dealer's trial testimony; and another prosecution witness testified that before the shooting, the defendant said that the defendant was "going to get" the victim and that afterward, the defendant said, "I told you I was going to do" the victim. Broner v. State, 284 Ga. 402, 667 S.E.2d 613 (2008).

Evidence was sufficient to support convictions of malice murder and of the possession of a firearm during the commission of a crime. Witnesses testified that after getting into a confrontation with a second person at a nightclub, the defendant threatened to kill the second person, that the defendant retrieved a gun and waited outside the club for the second person, and that after being wrestled to the ground, the defendant fired shots, one of which fatally wounded a bystander. Savior v. State, 284 Ga. 488, 668 S.E.2d 695 (2008).

Following evidence was sufficient to support a defendant's conviction for malice murder and possession of a firearm

during the commission of a crime: (1) a person fitting the defendant's description was seen talking to a person in a car at the victim's home; (2) a neighbor found the victim sitting behind the wheel of the car with gunshot wounds to the head; (3) the victim told several witnesses that the defendant was the shooter and described the vehicle the defendant had been driving; and (4) paint found on the bumper of the defendant's vehicle was consistent with the paint on the victim's car. Thomas v. State, 284 Ga. 540, 668 S.E.2d 711 (2008).

Evidence was sufficient to convict the defendant of murder, felony murder, and possession of a knife during the commission of a crime when the defendant stabbed the victim, the defendant's spouse, in the chest with a butcher knife after the victim accused the defendant of having an affair. Although the defendant claimed at the scene that the defendant did not mean for the knife to go so far into the victim's body and that the stabbing had occurred by accident, the defendant later admitted at trial that the defendant tried to force the victim back with the knife when the defendant felt the knife penetrate the victim's body. Hudson v. State, 284 Ga. 595, 669 S.E.2d 94 (2008).

Evidence supported the convictions of felony murder, aggravated assault, and possession of a knife during the commission of a felony. The victim's grandchild saw the defendant stab the victim after an argument, then went to a relative for help; the defendant then attacked the relative and fled, throwing the knife the defendant used to stab the victim in the bushes; when the defendant was found by police shortly thereafter, the defendant admitted to stabbing the victim; and a medical examiner testified that the bulk of the victim's stabs came from behind and that the cut on the defendant's hand was an offensive wound likely sustained as the defendant was stabbing the victim with enough force to break one of the victim's ribs. Butler v. State, 285 Ga. 518, 678 S.E.2d 92 (2009).

Sufficient evidence supported the defendant's conviction of possession of a firearm during the commission of a crime under circumstances in which the victim's father received a call originating from the victim's cell phone, and, when that number was called back, all that could be heard were noises, including gasping, gurgling, and children screaming during the second call, before the line was disconnected; officers later found the victim lying on the kitchen floor with a cell phone in the victim's hand, dead from a single gunshot wound to the head, and a handgun retrieved on the premises was later determined to have fired the bullet that killed the victim. The defendant testified that the defendant and the victim were arguing inside the home, that the argument became physical, that the defendant took the children and a gun out to the defendant's truck, that the defendant returned to the house, and that the defendant did not know what happened after that. Paslay v. State, 285 Ga. 616, 680 S.E.2d 853 (2009).

Because defendant admitted to being in the back seat of the victims' car and that defendant sold the victims' drugs, and because bullets recovered from the bodies matched the pistol and ammunition found in a box in defendant's house, the evidence was sufficient to find defendant guilty of malice murder and possession of a firearm during the commission of a felony. Barnes v. State, 287 Ga. 423, 696 S.E.2d 629 (2010).

Evidence was sufficient to support the defendant's conviction for possession of a knife during the commission of a crime because, after the entry of a family violence protective order, the defendant purchased a knife with a large blade, followed the victim, who was the defendant's estranged spouse, and attempted to talk with the victim, appeared at a grocery store where the victim was, yelled at the victim, and stabbed and slashed the victim multiple times, resulting in the victim's death. Weaver v. State, 288 Ga. 540, 705 S.E.2d 627 (2011).

Conviction for possession of a firearm during the commission of a crime was affirmed because evidence was presented that: (1) the defendant, the codefendant, and an accomplice went to a drug dealer's apartment to steal money; (2) the accomplice entered the apartment to buy marijuana; (3) the defendant and the codefendant then entered the apartment; (4)

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when the drug dealer resisted, the defendant shot and killed the drug dealer; (5) the accomplice, in exchange for a plea deal, assisted the police in recording incriminating telephone conversations with the codefendant; and (6) the gun that was used in the shooting was found in the codefendant's apartment. Moon v. State, 288 Ga. 508, 705 S.E.2d 649 (2011).

Trial evidence authorized the defendant's conviction for possession of a firearm during the commission of drug felony offenses as the defendant had immediate access to a handgun when the defendant and a codefendant stood at the open trunk of a vehicle for approximately two or three minutes, depositing drugs in the defendant's bag, where the handgun was also located; the jury could conclude that the defendant had been within arm's reach of the handgun when the drugs and the handgun were placed together. Jackson v. State, 314 Ga. App. 272, 724 S.E.2d 9 (2012).

Robbery, other offenses, and possession shown. — Testimony by the victim, in which the victim positively identified defendant as the man who entered the victim's home, and committed the crimes of robbery by intimidation, kidnapping, aggravated assault, aggravated assault with a knife, aggravated battery and possession of a knife during the commission of a crime, charged in the indictment and eyewitness testimony that defendant entered the victim's premises minutes before the attack of the victim was sufficient to authorize the jury's finding that defendant was guilty, beyond a reasonable doubt, of committing the crimes charged in the indictment. Mobley v. State, 211 Ga. App. 709, 441 S.E.2d 73 (1994).

Evidence supported a defendant's conviction for robbery by intimidation, possession of a firearm during the commission of a felony, and aggravated assault with a deadly weapon as: (1) the defendant demanded that the victim give the defendant the victim's purse and then threatened the victim with a gun and told the victim that the defendant would use the gun; (2) feeling that the victim's life was in danger, the victim ran; (3) the defendant chased the victim and snatched the victim's purse; (4) two witnesses chased the defendant to an abandoned house, where the victim's purse was later found; and (5) a witness obtained the tag number of the defendant's vehicle and police traced the vehicle to the defendant's mother; even assuming that the pre-trial identification procedures were unduly suggestive, the in-court identifications by a witness and the victim were admissible as the identifications were based on independent recollections. Boatwright v. State, 281 Ga. App. 560, 636 S.E.2d 719 (2006).

Armed robbery, attempted armed robbery, and possession of a firearm during the commission of a crime convictions were upheld on appeal based on sufficient evidence supporting the defendant's guilt, specifically, a security surveillance videotape, eyewitness testimony, and the defendant's voluntary admission to police. Smith v. State, 281 Ga. App. 587, 636 S.E.2d 748 (2006).

Evidence was sufficient to support the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41 and possession of a firearm during the commission of a felony in violation of O.C.G.A. § 16-11-106(b)(1) because even though the defendant was found near a car similar to that involved in the robbery, with a shotgun similar to that used in the attack, and the defendant admitted being present at the scene of the robbery, the victim's testimony alone was sufficient to authorize the jury's verdict of guilty beyond a reasonable doubt pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8). Law v. State, 308 Ga. App. 76, 706 S.E.2d 604 (2011).

Evidence was sufficient to sustain the defendant's convictions for armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b), because the victim testified about the assault and identified the defendant as the person who committed the assault; the competent testimony of even a single witness can be enough to sustain a conviction. Brown v. State, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Armed robbery, other offenses, and possession shown. — In light of the overwhelming evidence produced at trial, even though one victim expressed some uncertainty regarding defendant's identity, a rational trier of fact could determine defendant's guilt beyond a reasonable doubt of armed robbery, aggravated assault, and possession of a firearm by a convicted felon. Billings v. State, 212 Ga. App. 125, 441 S.E.2d 262 (1994).

Voice identification testimony, along with circumstantial evidence showing invaders were familiar with the internal operations and layout of the store, allowed the jury to reach the conclusion that defendant was guilty of armed robbery, aggravated assault, and possession of a firearm during the commission of a felony. Whitehead v. State, 232 Ga. App. 140, 499 S.E.2d 922 (1998).

Evidence was sufficient to support defendant's convictions of armed robbery and possession of a firearm during the commission of a robbery since the victim testified that defendant robbed the victim of a wallet and car keys at gunpoint, the state introduced similar transaction evidence, and one of defendant's fellow inmates testified that defendant bragged to the fellow inmate that defendant had indeed robbed the victim. Cordy v. State, 257 Ga. App. 726, 572 S.E.2d 73 (2002).

Evidence was sufficient to support defendant's convictions of two counts of armed robbery, two counts of theft by taking, three counts of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2), three counts of simple battery, three counts of kidnapping, and two counts of possessing a firearm during the commission of a crime since: (1) there was evidence that defendant entered a store, placed a knife to the neck of one of the three victims, forced that victim to the back of the store, aided another assailant who was armed with a gun in binding the victims and dragging the victims to the back of the store, and stole money and other items from two of the victims; (2) defendant confessed to the crimes during interviews with law enforcement officials; and (3) defendant's confessions were corroborated by the testimony of one of the victims who, despite earlier being unable to identify the robbers, ultimately identified defendant as one of the robbers. The corroborating victim's initial inability to identify defendant posed an issue of credibility for the jury's resolution. Phanamixay v. State, 260 Ga. App. 177, 581 S.E.2d 286 (2003).

Evidence was sufficient to find defendant guilty of armed robbery, kidnapping, and possession of a firearm during the commission of a felony after the defendant directed the victim at gunpoint to walk toward a cash machine that could be used with the cash card in the victim's wallet, and when both the victim and a bystander had opportunities to view defendant. Wade v. State, 261 Ga. App. 587, 583 S.E.2d 251 (2003).

Evidence was sufficient to support defendant's convictions for armed robbery, aggravated assault, and possession of a firearm during the commission of the felonies because the only evidence of coercion came from defendant personally. To disprove the coercion defense, the victim testified that defendant did not appear nervous, that the robbery occurred very quickly, with no "fumbling" or "bumbling" on defendant's part, and that defendant commented that defendant was robbing the victim because the defendant needed a place to stay. Blocker v. State, 265 Ga. App. 846, 595 S.E.2d 654 (2004).

Evidence that defendant, wielding a gun, barged into the victim's hotel room, demanded money, pistol whipped the victim, and took the victim's wallet sufficed to sustain defendant's convictions for armed robbery, possession of a firearm during the commission of a felony, and burglary. Bay v. State, 266 Ga. App. 91, 596 S.E.2d 229 (2004).

Evidence that defendants entered the victim's apartment, took the victim by the hands and demanded money, shoved a gun into the victim's side and removed the victim's ring, watch, and money, and then forced the victim into a closet blocked with a heavy table with instructions not to come out until defendants had left was sufficient to support convictions for false imprisonment, armed robbery, burglary, and possession of a firearm during the commission of a felony. Pinson v. State, 266 Ga. App. 254, 596 S.E.2d 734 (2004).

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Determination of witness credibility, including the accuracy of eyewitness identification, is within the exclusive province of the jury. Evidence that the defendant wielded, and attempted to use, a gun during the robbery of a pool hall owner was sufficient to convict the defendant for possession of a firearm during the commission of a crime since the question of eyewitness identification of the defendant was a jury matter. Bartley v. State, 267 Ga. App. 367, 599 S.E.2d 318 (2004).

Defendant's conviction for possession of a firearm during the commission of a crime based upon defendant's and an accomplice's robbing a store at gunpoint was affirmed because the evidence was sufficient to support the conviction as latent fingerprints, which belonged to defendant, that were found in the car used in the armed robbery sufficiently corroborated the testimony of the accomplice who identified defendant as the driver of the car before the accomplice recanted the accomplice's custodial statement at trial. Brown v. State, 268 Ga. App. 24, 601 S.E.2d 405 (2004).

When defendant's victim identified defendant from a photo lineup and at trial as the person who forced the victim to open the vaults in the fast-food restaurant where the victim worked, then duct-taped the victim's limbs and repeatedly struck the victim as the victim lay face down on the floor, the evidence was sufficient beyond a reasonable doubt to allow the jury to convict defendant of kidnapping with bodily injury, armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of certain crimes. Banks v. State, 269 Ga. App. 653, 605 S.E.2d 47 (2004).

Because a burglary victim recognized defendant before a photographic lineup was introduced, defendant did not show deficient performance or prejudice based on trial counsel's failure to object to the lineup; in any event, the evidence was sufficient to sustain the convictions for armed robbery, aggravated assault, burglary, making terroristic threats, and possession of a firearm during the commission of the felonies under O.C.G.A. §§ 16-5-21, 16-7-1, 16-8-41, 16-11-37, and 16-11-106. Williams v. State, 270 Ga. App. 845, 608 S.E.2d 310 (2004).

Sufficient evidence supported defendant's convictions of armed robbery, burglary, possession of a firearm during the commission of a crime, and three counts of kidnapping arising from an incident in which defendant and a companion robbed the victim at gunpoint, then forced the victim and the victim's children into their house and tied the victim up with duct tape; the victim identified defendant from a photo line-up, defendant's fingerprints were found at the scene, a store video showed defendant buying the duct tape which was used, and the store manager identified defendant as the buyer of the duct tape. Brownlee v. State, 271 Ga. App. 475, 610 S.E.2d 118 (2005).

There was sufficient evidence to support defendants' convictions for armed robbery, O.C.G.A. § 16-8-41, aggravated assault, O.C.G.A. § 16-5-21, burglary, O.C.G.A. § 16-7-1, and possession of a firearm during the commission of certain crimes, O.C.G.A. § 16-11-106, because evidence was seen in one of the defendant's vehicles during a traffic stop, defendants were identified from the videotape of the stop, and the shotgun used by the assailant in the home invasion was found in one of the defendant's homes. Dunbar v. State, 273 Ga. App. 29, 614 S.E.2d 472 (2005).

Defendant's convictions for armed robbery, possession of a firearm during the commission of a crime, robbery by intimidation, and criminal damage to property in the second degree were supported by sufficient evidence because, inter alia, defendant's brother let defendant and two others into a restaurant after hours, defendant pointed a gun at the brother's co-worker, and then beat on a safe and pried open the cash registers looking for money; all four co-conspirators involved, including defendant, gave statements to police implicating themselves and their codefendants, and a bill was introduced showing that repair of the safe damaged during the robbery attempt cost $1,000.00. Polite v. State, 273 Ga. App. 235, 614 S.E.2d 849 (2005).

As a robber's unique shirt was recorded by a convenience store security camera,

and the defendant's girlfriend identified the shirt as the defendant's shirt, and as the defendant could not say exactly where the defendant was that evening, the evidence was legally sufficient to sustain the convictions for armed robbery and possession of a firearm during the commission of a felony. Brown v. State, 277 Ga. App. 169, 626 S.E.2d 128 (2006).

Because the person who stole the victim's vehicle had a distinctive hairstyle, and the defendant, who had the same hairstyle, was apprehended while in possession of the vehicle soon after the crime was committed, there was sufficient evidence to support a conviction for armed robbery in violation of O.C.G.A. § 16-8-41, aggravated assault with intent to rob in violation of O.C.G.A. § 16-5-21, and possessing a firearm during the commission of a felony in violation of O.C.G.A. § 16-11-106. Hall v. State, 277 Ga. App. 413, 626 S.E.2d 611 (2006).

Evidence that defendant and others approached two separate victims while defendant brandished a shotgun, that defendant threatened the victims with the gun, and that defendant and the compatriots stole both of the victims' cars, sufficed to sustain defendant's convictions of two counts of hijacking a motor vehicle, two counts of armed robbery, two counts of aggravated assault with a deadly weapon, and two counts of possession of a firearm during the commission of a felony; the jury was free to disbelieve defendant's testimony that defendant was coerced into threatening the victims at gunpoint and participating in the car thefts, and was authorized to find defendant guilty based on the evidence presented at trial. Martinez v. State, 278 Ga. App. 500, 629 S.E.2d 485 (2006).

Evidence identifying the defendant as the perpetrator who stole a victim's car and purse at gunpoint, coupled with evidence of the defendant's flight from police, possession of the stolen car, and possession of the revolver used in the crimes, was sufficient to support convictions for hijacking a motor vehicle, possession of a firearm during the commission of a felony, armed robbery, and aggravated assault with a deadly weapon; however, the conviction and sentence for aggravated assault merged as a matter of fact into the armed robbery conviction and sentence. Doublette v. State, 278 Ga. App. 746, 629 S.E.2d 602 (2006).

Convictions of armed robbery, possession of a firearm during the commission of a crime, false imprisonment, and hijacking a motor vehicle were supported by sufficient evidence since a perpetrator identified as the defendant robbed a pizza restaurant at gunpoint, ordered everyone into a cooler, and took the restaurant manager's vehicle, after which an officer discovered the defendant the next day driving the manager's vehicle and wearing a hat identical to that worn by the perpetrator, and since a customer at the restaurant identified the defendant as the robber in a photo line-up and at trial; while three of the four crimes arising out of the incident were committed after the customer, who was the only witness to identify defendant, was ordered into the cooler, only one robber entered the restaurant and the jury was authorized to infer that the person identified by the customer also committed the crimes committed after the customer was in the cooler. Head v. State, 279 Ga. App. 608, 631 S.E.2d 808 (2006).

Convictions of armed robbery, possession of a firearm during a crime, and carrying a concealed weapon were supported by sufficient evidence, including guns, money, and a knife stolen from a robbery victim found in a car in which the defendant was a passenger, the fact that the defendant, when arrested, was wearing a sweatshirt identified by the victims as the sweatshirt worn by one of the perpetrators, and the testimony of another of the perpetrators, who stated that the defendant was one of the participants in the robbery. Callahan v. State, 280 Ga. App. 323, 634 S.E.2d 102 (2006).

Evidence was sufficient to sustain a defendant's convictions for a total of 20 counts of armed robbery, possessing a firearm during the commission of a crime, terroristic threats and acts, kidnapping, and aggravated assault arising out of four separate robberies because the victims' testimony, the physical evidence, and one victim's identification of the defendant as the robber provided sufficient corrobora-

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tion of the testimony of the defendant's accomplice. Metoyer v. State, 282 Ga. App. 810, 640 S.E.2d 345 (2006).

Because conflicts and inconsistencies in the testimony of the witnesses, including the state's witness, were a matter of credibility for the jury to decide, and because the defendant cited no authority suggesting that the instructions in question were incorrect statements of the law, and did not explain an assertion that the instructions were confusing, convictions of armed robbery, aggravated assault, and possession of a firearm during the commission of a felony were upheld on appeal as supported by sufficient evidence. Lattimore v. State, 282 Ga. App. 435, 638 S.E.2d 848 (2006).

Pictures of a defendant withdrawing money from a victim's ATM account and evidence that the defendant repeatedly asked the victim for the PIN number for the victim's ATM card, held a knife to the victim's neck, cut the cord used to tie the victim, and had cash, an ATM receipt, and the victim's car keys when the defendant was arrested were sufficient to support the defendant's convictions for armed robbery, two counts of aggravated assault, kidnapping with bodily injury, and two counts of possessing a knife during the commission of a crime. Wright v. State, 282 Ga. App. 649, 639 S.E.2d 581 (2006).

Evidence was sufficient to sustain the defendant's convictions of armed robbery and of possessing a firearm during the commission of a crime since: (1) the defendant's codefendants testified that the defendant participated in the armed robberies of which the defendant was convicted; (2) one victim identified the defendant as the victim's assailant; (3) two victims identified a gun that was recovered from the vehicle of the defendant's girlfriend as the gun used to rob the victims; (4) a victim's purse was recovered from the residence where the defendant was arrested; and (5) police found a sweatshirt and a ski mask in the girlfriend's car that matched a victim's description of the items worn by one robber. Cartledge v. State, 285 Ga. App. 145, 645 S.E.2d 633 (2007).

Given that the testimony of the defendant's codefendants was sufficient to support convictions on four counts of armed robbery and four counts of possessing a firearm during the commission of a crime, the convictions were not subject to reversal. Cartledge v. State, 285 Ga. App. 145, 645 S.E.2d 633 (2007).

There was sufficient evidence supporting the defendant's convictions of armed robbery, burglary, possession of a firearm during the commission of a felony, and criminal trespass; the evidence included a custodial statement in which the defendant admitted participating in the crimes and testimony by a witness as to the preparations for the robbery, the clothing worn by the defendant and by the accomplice, and the defendant's disposal of a gun. Medlin v. State, 285 Ga. App. 709, 647 S.E.2d 392 (2007).

Because the state presented sufficient evidence supporting the convictions entered against the first two defendants, a letter one of the defendants wrote was admissible against all as a statement of a co-conspirator, no error resulted from the admission of a red baseball bat, and the first defendant's trial counsel was not ineffective; thus, the first defendant's convictions of armed robbery and possession of a firearm during the commission of a felony and the second defendants' convictions of the lesser included offense of robbery were upheld. Williamson v. State, 285 Ga. App. 779, 648 S.E.2d 118 (2007).

In a case where four persons riding in a stolen car robbed a cab driver at gunpoint, the evidence was sufficient to sustain the defendant's convictions as a party to the crimes of armed robbery and possession of a weapon during the commission of a crime; the defendant led a detective to the gun the defendant possessed and admitted being in the stolen vehicle on the date in question, and a witness testified that the witness saw the defendant holding a gun and approaching the cab driver. Jones v. State, 285 Ga. App. 866, 648 S.E.2d 183 (2007).

Because contradictions and uncertainties in the testimony did not render the evidence against the defendant insufficient, but were ultimately for the jury to decide, and the defendant's statement to

the police was corroborated by other evidence, the defendant's convictions for armed robbery, false imprisonment, and possession of a firearm during the commission of a felony were upheld on appeal. Sheely v. State, 287 Ga. App. 92, 650 S.E.2d 762 (2007).

When the victim identified the defendant less than 15 minutes after a robbery, had been face-to-face with the robber for three or four seconds, gave the police a substantially correct description of the defendant's person, and demonstrated a high degree of certainty in the identification, the evidence was sufficient to support the defendant's convictions of armed robbery, aggravated assault, and possession of a firearm during the commission of a felony, even though no physical evidence tied the defendant to the robbery; the fact that the defendant was handcuffed during the "showup" identification did not make the identification unreasonably or unfairly conducted, and the credibility of the victim was a jury question. Tiggs v. State, 287 Ga. App. 291, 651 S.E.2d 209 (2007).

Given the overwhelming evidence of the defendant's guilt, the effectiveness of trial counsel, and the absence of reversible error in excepting the lead detective from sequestration, instructing the jury, admitting similar transaction evidence, and admitting the defendant's custodial statement, the defendant's armed robbery and possession of a firearm convictions were upheld on appeal. Morgan v. State, 287 Ga. App. 569, 651 S.E.2d 833 (2007).

There was sufficient evidence to support convictions of armed robbery and of possessing a firearm during the commission of a felony. Both of the defendant's codefendants testified as to the defendant's participation in the events in question, which was sufficient evidence to find the defendant guilty; furthermore, the codefendants' testimony was corroborated by that of the victims. Hill v. State, 290 Ga. App. 140, 658 S.E.2d 863 (2008), cert. denied, 129 S. Ct. 405, 172 L.Ed.2d 287 (2008).

Evidence was sufficient to support the defendant's convictions of armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and kidnapping under O.C.G.A. §§ 16-5-21, 16-5-40, 16-8-41, and 16-11-106 as: (1) a robber ordered two store employees at gunpoint to give the robber money, then ordered the employees to go into a back room; (2) the employees described the robber and the robber's vehicle in detail; (3) the employees positively identified the defendant as the robber 15 to 20 minutes after the crime following a pursuit during which the defendant fled from police first in the defendant's vehicle, then on foot; and (4) the defendant had $281 in a pocket at the time of arrest. Lenon v. State, 290 Ga. App. 626, 660 S.E.2d 16 (2008).

Evidence was legally sufficient to convict a defendant on charges of armed robbery, aggravated assault, false imprisonment, and possession of a firearm during the commission of a crime; the testimony of one of the defendant's accomplices, which implicated the defendant in the crimes, was corroborated by evidence that the defendant was captured with the two accomplices shortly after the robbery, that defendant had a large amount of cash, a gun, and a roll of duct tape, and that the victim was able to identify all three men as the ones who robbed and assaulted the victim. Spragg v. State, 292 Ga. App. 37, 663 S.E.2d 389 (2008).

There was sufficient evidence to support a defendant's convictions of armed robbery, aggravated assault, burglary, false imprisonment, and possession of a firearm during the commission of a felony when the state showed that the defendant intentionally aided and abetted a home invasion in which the home was burglarized and the homeowner's teenage child was detained and robbed by use of a handgun. Even in the absence of evidence sufficient to show that the defendant directly committed the charged offenses, there was sufficient evidence that the defendant was a party to the offenses in that the defendant and a person armed with a gun loaded a truck with property stolen from the home during the two-hour home invasion, the defendant was present speaking with the armed person during the home invasion, and the defendant confirmed that the child was home alone. Whitley v. State, 293 Ga. App. 605, 667 S.E.2d 447 (2008).

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There was sufficient evidence to support two juveniles' adjudications of delinquency for the offenses of armed robbery, aggravated assault, and possession of a firearm during the commission of a crime based on the victim identifying the juveniles and the evidence that one of the juveniles used a gun to intimidate the victim into handing over the cash from the register of a gas station, shot the victim in the face causing severe injuries, and possessed a firearm during the commission of the crimes. In the Interest of R. S., 295 Ga. App. 772, 673 S.E.2d 280 (2009).

Evidence supported the defendant's convictions of armed robbery, kidnapping, possession of a firearm during the commission of a crime, and financial transaction card fraud. Shortly after a man called the store where the victim worked to see if the store was open, a masked man with a gun came into the store, ordered the victim to the back, and then robbed the store and took the victim's credit cards; soon afterward that same morning, the defendant bought sneakers with the victim's credit card; the clerk who sold the defendant the sneakers identified the defendant at trial and in a photographic lineup and testified that the clerk knew the defendant because the defendant was a regular customer; and the defendant's cell phone records showed that just before the robbery, the defendant called the victim's store and blocked the defendant's number. Anderson v. State, 297 Ga. App. 733, 678 S.E.2d 498 (2009), aff'd, 287 Ga. 159, 695 S.E.2d 26 (Ga. 2010).

Sufficient evidence supported the defendant's convictions for armed robbery and possession of a firearm during the commission of a felony in violation of O.C.G.A. §§ 16-8-41(a) and 16-11-106(b)(1) as a victim who was robbed at gunpoint by two assailants identified the defendant as one of the assailants; the victim had been walking on a college campus when the two assailants approached, held a gun on the victim, and searched the victim's backpack before fleeing with the victim's wallet. Ware v. State, 298 Ga. App. 232, 679 S.E.2d 797 (2009).

Sufficient evidence was presented to the jury to support the defendant's convictions for armed robbery, aggravated assault, burglary, criminal attempt to commit aggravated sodomy, and possession of a knife during the commission of a crime because the victim's testimony alone was sufficient to support the convictions; regardless of any inconsistencies in the victim's testimony, it was for the jury to assess witness credibility, and the jury chose to believe the victim's identification of the defendant as the individual who committed the crimes. Williams v. State, 300 Ga. App. 839, 686 S.E.2d 446 (2009).

Abduction and possession of weapon shown. — Regardless of whether handgun used originally in abduction of victim was ever found, the fact that a rifle was "within arm's reach" of where defendants violated the victim and held the victim against the victim's will was sufficient for convictions under O.C.G.A. § 16-11-106. Smith v. State, 214 Ga. App. 631, 448 S.E.2d 906 (1994).

Aggravated assault and possession shown. — Evidence that defendant threatened a daycare owner and two daycare workers with a handgun when they tried to stop defendant from taking defendant's daughter supported defendant's convictions of two aggravated assaults in violation of O.C.G.A. § 16-5-21(a)(2) and possessing a firearm during the commission of a felony in violation of O.C.G.A. § 16-11-106(b)(1). Diaz v. State, 255 Ga. App. 288, 564 S.E.2d 872 (2002).

Evidence that defendant unlawfully entered the victim's residence with intent to commit a felony, aggravated assault, therein, and was in possession of a gun while doing so, was sufficient to uphold convictions for aggravated assault, burglary, and possession of a firearm/knife during commission of a felony. Simmons v. State, 262 Ga. App. 164, 585 S.E.2d 93 (2003).

There was sufficient evidence for the jury to find defendant guilty beyond a reasonable doubt of aggravated assault and possession of a firearm during the commission of a crime because the testimony of the victim was sufficient to establish that defendant was the perpetrator. Davis v. State, 267 Ga. App. 668, 600 S.E.2d 742 (2004).

Evidence was sufficient to show that defendant was guilty of two counts of aggravated assault, one count of aggravated battery, and one count of possession of a firearm during the commission of a crime as the evidence showed that defendant shot the victim in the abdomen and the arm with a gun and that defendant intended to cause serious physical harm and disfigurement to the victim. King v. State, 269 Ga. App. 658, 605 S.E.2d 63 (2004).

Evidence was sufficient to support a jury's verdict convicting defendant of aggravated assault under O.C.G.A. § 16-5-21(c), and possession of a firearm during the commission of a crime under O.C.G.A. § 16-11-106, because, through the testimony of a woman whom defendant threatened with a gun after defendant shot a police officer, the evidence showed that the woman saw defendant fire a gun at the officer and recognized the gun later recovered as the weapon defendant used. Milton v. State, 272 Ga. App. 908, 614 S.E.2d 140 (2005).

Defendant's convictions for aggravated assault, aggravated battery, kidnapping with bodily injury, and possession of a knife during the commission of a felony, in violation of O.C.G.A. §§ 16-5-21, 16-5-24, 16-5-40, and 16-11-106, respectively, were supported by the evidence as defendant was engaged in a domestic dispute with defendant's spouse and son, wherein defendant argued, threatened to kill them, and locked them in a bathroom, punched and hit the spouse, and stabbed them each multiple times with a decorative sword that defendant removed from the wall; there was sufficient evidence to show that defendant did not stab them in the midst of a struggle over possession of the sword, but instead, that defendant intended to stab or cut them. Brown v. State, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

Evidence was sufficient for the jury to reject defendant's claim of self-defense and to support defendant's aggravated assault and possession of a firearm during the commission of a crime conviction because, inter alia, two witnesses yelled at defendant to put the gun away, but defendant shot the victim a second time, defendant testified that defendant believed that the victim was holding a weapon behind the victim's leg when the victim got out of the car and that defendant heard someone yell "bust," which defendant understood to mean "shoot," and another witness testified that the witness heard no such statement and that the witness did not see anything in the victim's hands when the victim exited the car. Hill v. State, 276 Ga. App. 874, 625 S.E.2d 108 (2005).

Sufficient evidence supported convictions for aggravated assault, kidnapping, armed robbery, and possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106, even though none of the victims could identify the defendant as the gunman in the robbery due to the fact that the defendant wore a mask, because defendant was found shortly after the robbery with cash, weapons, a ski mask, a car, and clothing matching the victims' description; surveillance videotape of the robbery was shown to the jury to determine whether defendant was the person on the videotape. Johnson v. State, 277 Ga. App. 41, 625 S.E.2d 411 (2005).

Evidence was sufficient to support the defendant's aggravated assault, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon convictions since the jury was entitled to give greater weight to the victim's positive contemporaneous identification of the defendant as the shooter and to conclude that the victim's subsequent uncertainty resulted from fear of retaliation by the defendant rather than from any real confusion about who fired the shot; the jury was also entitled to give little weight to a negative gunshot residue test result on defendant's hands. Haggins v. State, 277 Ga. App. 742, 627 S.E.2d 448 (2006).

Sufficient evidence supported convictions of aggravated assault with intent to rob and possession of a firearm during the commission of a crime since the defendant and two others tried to rob a market, one of the others had a pistol, which was pointed at the market's owners, the armed participant forced one of the owners to try to open the register, and during the course of the robbery, one of the owners grabbed a hidden gun and shot and killed the armed

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robber, following which the defendant and the other participant fled. Laurel v. State, 278 Ga. App. 147, 628 S.E.2d 208 (2006).

Defendant's motion for a new trial on the defendant's aggravated assault and possession of a firearm during the aggravated assault charges was properly denied as the defendant's actions before, during, and after a friend's aggravated assault and firearm possession crimes at a home showed not only that the defendant was a party to those crimes, but that the defendant was a fellow conspirator in the assault against the woman as the defendant: (1) forced the woman at gunpoint to drive to the home; (2) stayed in the nearby living room while the friend shot a gun and threatened the woman (and defendant looked into the bedroom after the gun was fired); (3) accompanied the friend and the handcuffed woman in the vehicle following the incident while the friend searched for the boyfriend's residence; (4) encouraged the friend to kill the woman; and (5) did not protest any of the friend's actions throughout the evening. Sapp v. State, 280 Ga. App. 592, 634 S.E.2d 523 (2006).

Defendant's convictions for aggravated assault with a deadly weapon, aggravated battery, and possessing a firearm during the commission of a felony were supported by evidence that: (1) the victim and the defendant had an acrimonious relationship; (2) the defendant threatened to hit the victim with a jug; and (3) the defendant's statement that the victim was not "dead yet" after the victim was shot in the back; the jury could reject the defendant's claim that the defendant fired a warning shot away from the victim and could convict the defendant, even though the victim did not see the defendant point the gun at the victim. Rowe v. State, 280 Ga. App. 881, 635 S.E.2d 251 (2006).

Aggravated assault convictions were upheld on appeal based on the defendant's act of deliberately firing a gun in the direction of another; moreover, this same evidence was likewise sufficient to support the jury's convictions on three counts of the possession of a firearm during the commission of a crime, namely the assaults. Thompson v. State, 281 Ga. App. 627, 636 S.E.2d 779 (2006).

On appeal from the defendant's aggravated assault, possession of a firearm during the commission of a crime, and first-degree criminal damage to property convictions, the court held that the testimony provided by two of the victims identifying the defendant as one of the perpetrators was sufficient to uphold the convictions as: (1) the testimony of a single witness was generally sufficient to establish a fact; and (2) under former O.C.G.A. § 24-9-80 (see now O.C.G.A. § 24-6-620), the credibility of a witness was a matter to be determined by the jury under proper instructions from the court. Reid v. State, 281 Ga. App. 640, 637 S.E.2d 62 (2006).

Because sufficient evidence was presented supporting the jury's determination that the defendant's act of shooting the victim was not an accident and was not justified, the victim testified to knowing defendant had a gun, and the presence of a gun normally placed a victim in reasonable apprehension of being injured violently, the defendant's convictions for aggravated assault and possession of a firearm during the commission of a crime were supported by the record. Dukes v. State, 285 Ga. App. 172, 645 S.E.2d 664 (2007).

Given that the circumstantial evidence presented against the defendant sufficiently showed that: (1) the victim shot one of the intruders who committed the burglary; (2) shortly after the burglary, the defendant was treated for a gunshot wound and arrived at the hospital in a vehicle matching the description of the automobile seen leaving the crime scene; (3) the DNA evidence on ski masks found at the scene matched that of the owner of the car and the other passenger, who was also the defendant's brother; and (4) according to the defendant's brother, the driver of the car admitted to shooting the victim, the defendant's convictions for aggravated assault, burglary, and possession of a firearm during the commission of a felony were affirmed on appeal. Sherman v. State, 284 Ga. App. 809, 644 S.E.2d 901 (2007).

Because: (1) the testimony of two wit-

nesses, as well as that of the defendant, sufficiently established the element of venue; and (2) the trial court gave complete instructions on the defendant's defense of justification and self-defense, and thus, a charge on mistake of fact was not warranted, there was no reason to reverse the defendant's convictions of aggravated assault and possession of a firearm during the commission of a felony. Gaines v. State, 289 Ga. App. 339, 656 S.E.2d 871 (2008), cert. denied, 2008 Ga. LEXIS 379 (Ga. 2008).

Sufficient evidence supported the defendant's convictions of aggravated assault, two counts of aggravated battery, and possessing a firearm during the commission of a felony; the defendant told the victim, who had walked into a common hallway in the defendant's apartment building, to leave, went inside, retrieved a gun, and shot the victim twice after the victim refused to leave, and then shot at the victim while the victim was fleeing. Johnson v. State, 289 Ga. App. 435, 657 S.E.2d 333 (2008).

Evidence was sufficient to sustain a defendant's convictions of two counts of aggravated assault and two counts of possession of a firearm during the commission of a crime in violation of O.C.G.A. §§ 16-5-21 and 16-11-106 because the defendant's admission that the defendant was holding a rifle throughout the crimes' commission, along with evidence of the defendant's flight, authorized the jury to conclude that the defendant participated in the crimes by acting as a lookout. Gant v. State, 291 Ga. App. 823, 662 S.E.2d 895 (2008).

There was sufficient evidence to support a defendant's convictions for aggravated assault and possession of a firearm based on the testimony of three separate witnesses, including the victim, that the defendant threateningly pointed a gun at the victim's head. Further, regarding the need to show the victim's reasonable apprehension of immediately receiving a violent injury, the state presented evidence from the victim that the victim feared the gun and that the fear resulted in the victim urinating on the victim's person and in the victim lying to an officer at the front door to protect the victim's children. Hardy v. State, 293 Ga. App. 265, 666 S.E.2d 730 (2008).

Sufficient evidence supported convictions of aggravated assault and possession of a firearm during commission of a felony under O.C.G.A. §§ 16-5-21 and 16-11-106 when competent evidence showed that the defendant put a gun to the victim's chest and pulled the trigger. Furthermore, a jury could conclude that this was not the result of an accident. Jones v. State, 293 Ga. App. 218, 666 S.E.2d 738 (2008).

Based on the evidence that the defendant drove and deliberately followed the victims and pulled in behind the victims' vehicle, intentionally encouraged the shooter by telling the shooter "you better not let these guys get away, go ahead and handle your business, do what you got to do," and fled with the shooter after the shooting, the jury was authorized to conclude that the defendant was a party to the crimes of aggravated assault and possession of a firearm during the commission of a crime. Talifero v. State, 319 Ga. App. 65, 734 S.E.2d 61 (2012).

Evidence was sufficient to enable a juvenile court to reject as unreasonable the hypothesis from the victim's testimony that a juvenile stood in a nearby park and did not participate in an assault as the third, unidentified assailant, pursuant to O.C.G.A. § 24-14-6, and to adjudicate guilt for aggravated assault and possession of a firearm while committing a felony, pursuant to O.C.G.A. §§ 16-5-21(b)(2) and 16-11-106(b)(1). In the Interest of C. S., 334 Ga. App. 153, 778 S.E.2d 396 (2015).

Acquittal of aggravated assault but conviction of possession. — Although a defendant was acquitted of aggravated assault, the defendant was properly convicted of possession of a knife with a blade at least three inches long during the commission of the offense of aggravated assault, in violation of O.C.G.A. § 16-11-106(b)(1), based on evidence that the defendant fought the victim, who died from a five-inch stab wound. The doctrine of inconsistent verdicts has been abolished. Daniely v. State, 309 Ga. App. 123, 709 S.E.2d 274 (2011).

Assault with deadly weapon, other crimes, and possession shown. — Evi-

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dence was sufficient to find defendant guilty of assault with a deadly weapon, possession of a firearm during the commission of a crime, and kidnapping; the victim's statement that the victim's sister was afraid of defendant because defendant had done the same thing to the victim was clearly admissible as part of the res gestae even if the statement incidentally placed defendant's character in evidence. McLendon v. State, 258 Ga. App. 133, 572 S.E.2d 763 (2002).

Burglary and possession shown. — Evidence was sufficient to support defendants' conviction for possession of a firearm during the commission of a crime where defendants in the commission of a spree of burglaries held various victims at gunpoint. Attaway v. State, 259 Ga. App. 822, 578 S.E.2d 529 (2003).

Rational trier of fact was authorized to find that both defendants burglarized the victims' residence; that, once inside, the defendants took money, clothing, and other personal property by use of a gun; that the first defendant also committed an aggravated assault on the female victim by striking her in the head with a handgun and was, therefore, in possession of a firearm during the commission of a crime; and that both defendants, along with their cohorts, had been in possession of the cocaine which was tossed out the vehicle the defendants were riding in and found along the roadway. Davis v. State, 264 Ga. App. 221, 590 S.E.2d 192 (2003).

There was sufficient evidence to support defendant's convictions of burglary in violation of O.C.G.A. § 16-7-1(a), aggravated assault in violation of O.C.G.A. § 16-5-21(a)(1), (2), and possession of a firearm during the commission of a crime in violation of O.C.G.A. § 16-11-106(b), since the evidence showed that three men forcibly entered the victims' apartment and demanded money, that all three men were in the car together on the way to the apartment and on the way to the hospital to drop off a bleeding codefendant, that all three men carried guns, that one of the victims was shot, and that defendant's statement that defendant was only involved to drop off the bleeding codefendant at the hospital was in contrast to the fact that defendant had blood on defendant's pants, shirt, boxer shorts, and that defendant ejected the bloody codefendant from the car in a hurried manner at the hospital. Brown v. State, 267 Ga. App. 642, 600 S.E.2d 731 (2004).

Circumstantial evidence was sufficient for the factfinder to determine beyond a reasonable doubt that the defendant juvenile committed burglary in violation of O.C.G.A. § 16-7-1(a) and possession of a weapon during the commission of a crime in violation of O.C.G.A. § 16-11-106(b)(2) because the defendant was in the vicinity of the victim's apartment shortly after the burglary, wearing a jacket that matched the victim's description of the jacket worn by the perpetrator, carrying a loaded pistol, and wearing shoes that matched the tread pattern and size of the muddy footprints found in the victim's apartment. In the Interest of J.D., 305 Ga. App. 519, 699 S.E.2d 827 (2010).

Inconsistent verdict rule inapplicable. — Defendant's possession of a firearm during the commission of a crime was affirmed, even though defendant was acquitted of an attempted armed robbery charge, as the rule against inconsistent verdicts had been abolished in Georgia and as defendant was a willing accomplice throughout the entire criminal enterprise and could have been convicted as an aider and abettor despite the fact that an accomplice did not give defendant the weapon until after the shooting was over. Williams v. State, 270 Ga. App. 424, 606 S.E.2d 871 (2004).

Because Georgia did not recognize the inconsistent verdict rule, the state properly assigned error to the trial court's grant of defendant's motion in arrest of judgment; the evidence was sufficient to conclude that defendant was guilty of possession of a firearm during the commission of a crime, a violation of O.C.G.A. § 16-11-106(b)(1). State v. Robinson, 275 Ga. App. 117, 619 S.E.2d 806 (2005).

Kidnapping, other crimes, and possession shown. — Because the victim's statement of sexual abuse was sufficient under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) to convict the defendant of kidnapping with bodily injury,

aggravated child molestation, rape, aggravated sodomy, aggravated assault, and possession of a knife during the commission of a crime, the victim's testimony did not have to be corroborated by physical evidence. Gartrell v. State, 272 Ga. App. 726, 613 S.E.2d 226 (2005).

Drug offenses and possession of weapon shown. — Despite the defendant's denial of any knowledge of the existence of drugs and other contraband in a motel room, in which the defendant was the sole occupant, evidence of the contraband found in close proximity to other evidence which the defendant admitted owning, when coupled with the fact that only one key to the room existed, which the defendant admitted to having, and that no one had brought anything into the room since the person the defendant alleged was the owner of the evidence had left, was sufficient to support the defendant's convictions under O.C.G.A. §§ 16-11-106, 16-13-2, 16-13-30, and 16-13-31. Hall v. State, 283 Ga. App. 266, 641 S.E.2d 264 (2007).

There was sufficient evidence of possession to support a defendant's convictions of trafficking in cocaine, possession of cocaine with the intent to distribute, possession of marijuana, and possession of a firearm during the commission of a crime since: the defendant sped off when police tried to stop the defendant for running a stop sign; narcotics and a gun were found in the passenger side of the car; the passenger's story that the passenger had flagged down the defendant for a ride and that the passenger was unaware of the drugs and the gun was corroborated by the passenger's girlfriend; the defendant's sister, who owned the car, testified that there was no contraband in the car before the defendant took the car; the defendant had $1,755 in cash on the defendant's person; and the defendant had prior drug offenses. Jackson v. State, 284 Ga. App. 619, 644 S.E.2d 491 (2007), cert. denied, No. S07C1169, 2007 Ga. LEXIS 521 (Ga. 2007).

There was sufficient evidence to support convictions of possession of marijuana with intent to distribute and possession of a handgun during the commission of a crime after an undercover officer met the defendant in the defendant's car, the defendant had a handgun beside the defendant, the officer showed the defendant the money that the officer had brought to buy ten pounds of marijuana, and the defendant showed the officer a sample of the marijuana and told the officer that the marijuana was in a nearby van; after the transaction was called off because the officer would not give the defendant the money before receiving the marijuana, police found ten pounds of marijuana in the van and the handgun in the defendant's car. Davis v. State, 285 Ga. App. 460, 646 S.E.2d 342 (2007).

Defendant's convictions for possessing 28 grams or more of cocaine, possessing cocaine with intent to distribute, and possession of a firearm during the commission of a felony were upheld on appeal as sufficient evidence was presented via the direct testimony of the defendant's live-in girlfriend, which when combined with the evidence showing their joint constructive possession of the drugs and gun tended to connect and identify the defendant with the crimes charged. Allen v. State, 286 Ga. App. 469, 649 S.E.2d 583 (2007).

As the defendant admitted at trial that the defendant was in possession of a gun and cocaine when the defendant was stopped by the police and that the defendant was 16 years old at the time, there was sufficient evidence for the jury to find the defendant guilty of possession of cocaine, possession of a firearm while in the commission of a felony, and possession of a pistol by a person under the age of 18. Olive v. State, 291 Ga. App. 538, 662 S.E.2d 308 (2008).

With regard to a defendant's convictions for possession of methamphetamine with intent to distribute, possession of a firearm during the commission of a drug offense, and carrying a concealed weapon, the trial court properly denied the defendant's motion to suppress the items seized from the defendant's vehicle and the defendant's person after a traffic stop as the defendant's failure to wear a seatbelt and to have insurance on the vehicle justified the traffic stop. Thereafter, after being released from the traffic stop and being asked to come back, the defendant consented to the search of the vehicle and of

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the defendant's person, which led to the seizure of the contraband. Hughes v. State, 293 Ga. App. 404, 667 S.E.2d 163 (2008).

Convictions of manufacture, distribution, and possession of methamphetamine with the intent to distribute under O.C.G.A. § 16-13-30(b), possession of ephedrine/pseudoephedrine under O.C.G.A. § 16-13-30.3(b)(1), and possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b)(4) were supported by the evidence. A panel van belonged to the defendant, had been modified as a methamphetamine lab, was located on the defendant's property, and was powered by an electrical cord running from the defendant's trailer; everything necessary to support the production of methamphetamine was present in the vicinity of the vehicle; the defendant's name and that of the defendant's spouse had been scrawled on an interior panel of the vehicle; the defendant offered to provide any methamphetamine that a house guest wanted; uncured methamphetamine and enough ephedrine was present at the scene to make 30 to 33 grams of methamphetamine; and the defendant admitted to giving methamphetamine to others and to owning the sawed-off shotgun recovered from the panel van. Boone v. State, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

Although a defendant argued that the evidence was insufficient to convict the defendant of possession of a firearm during the commission of a crime because the defendant was unaware that a passenger in the defendant's car was in possession of two handguns, evidence that the two handguns were within the defendant's reach and that the defendant knew that the passenger carried guns for protection while in the drug trade in which the defendant actively participated was sufficient for the jury to infer that the defendant was aware of the presence of the guns and jointly possessed the guns with the passenger and to support the defendant's conviction. Driscoll v. State, 295 Ga. App. 5, 670 S.E.2d 824 (2008).

With regard to a defendant's convictions for possession of marijuana with the intent to distribute, trafficking in 4-Methylenedioxymethamphetamine, commonly known as ecstasy, trafficking in cocaine, and possession of a firearm during the commission of a crime, there was sufficient evidence to support the defendant's conviction for possession of the contraband, which was found in a backpack, based on the strong odor of marijuana coming from the vehicle in which the defendant was a passenger, the defendant's suspicious and nervous behavior, the defendant's joint living arrangement with two other defendants, the defendant's possession of ammunition for another one of the defendant's weapons, and the fact that the defendant was, at times, within arm's reach of the backpack, which showed an intent and power to exercise joint control over the backpack and the drugs found therein; likewise, there was sufficient evidence to support the trafficking charges based on the amounts of the contraband found; and, there was sufficient evidence to support the firearm possession charge since the defendant was found in possession of a magazine that fit the gun located within arm's reach. However, considering that there were four people in the vehicle, the court found that the state's evidence was insufficient to exclude the reasonable hypothesis that the marijuana was intended for personal use; therefore, the conviction for the intent to distribute marijuana was reduced to possession. Vines v. State, 296 Ga. App. 543, 675 S.E.2d 260 (2009).

Sufficient evidence existed to convict a defendant of possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b)(5) because a search warrant executed at the defendant's residence revealed a large amount of cocaine and cash as well as two handguns; the defendant was also convicted of trafficking in cocaine. Weems v. State, 295 Ga. App. 680, 673 S.E.2d 50 (2009).

Evidence was sufficient to support the defendant's convictions for trafficking in cocaine, possession of a firearm during the commission of a felony, possession of a firearm by a convicted felon, and felony fleeing or attempting to elude based on the defendant's involvement in a police chase that included speeds in excess of

100 m.p.h. in a residential area and the defendant's attempt to flee on foot; a backpack that the defendant was carrying while running from the police and which was recovered from the roof of the house around which the defendant had disappeared had drugs and a pistol in the backpack. Hinton v. State, 297 Ga. App. 565, 677 S.E.2d 752 (2009).

Testimony that several firearms were seized from the vehicles involved in an attempt at trafficking marijuana, including a loaded handgun that was in plain view on a floorboard where the defendant's legs had been immediately before the defendant was ordered out of the vehicle, was sufficient to support a conviction for possession of a firearm during the commission of a felony. Green v. State, 298 Ga. App. 17, 679 S.E.2d 348 (2009).

Evidence of the quantum of marijuana seized in conjunction with the presence of the weapon and ammunition found in the bedroom the defendant ran to on being confronted by police, as well as the cell phones containing the defendant's photograph, the scholarship application in the defendant's name, the video security system, the police scanner, and the defendant's mother's pill bottle therein, linked the defendant to the marijuana and weapon. Copeland v. State, 327 Ga. App. 520, 759 S.E.2d 593 (2014).

Terroristic threats and possession of weapon shown. — When the victim testified that the defendant pulled out a black and silver handgun and threatened the victim with the gun, an officer's testimony that the officer recovered a loaded silver handgun minutes after the incident in the vehicle in which the defendant was riding sufficiently corroborated the victim's testimony under O.C.G.A. § 16-11-37(a). Because the victim's testimony was sufficiently corroborated, there was no merit to the defendant's argument that there was insufficient evidence to support a conviction for possession of a firearm during the commission of a crime, which was based on the act of making terroristic threats. Wilson v. State, 291 Ga. App. 263, 661 S.E.2d 634 (2008).

Aggravated sodomy and possession of weapon shown. — There was sufficient evidence to support defendant's conviction for possession of a firearm during the commission of a felony despite the victim not personally seeing the gun as the victim testified that the victim submitted to the aggravated sodomy because defendant said defendant had a gun and would shoot the victim and another if the victim did not comply; the victim believed defendant had a gun; and others saw the gun. As a result, sufficient circumstantial evidence supported a finding that defendant possessed a firearm during the commission of the aggravated sodomy. Jennings v. State, 292 Ga. App. 149, 664 S.E.2d 248 (2008).

Theft by receiving and possession of weapon shown. — While an assailant pointed a handgun to the victim's neck, the defendant and another assailant held and searched the victim and took the victim's cell phone and cash; the armed assailant, who had stolen the handgun, displayed the handgun to the others before the crimes were committed. Under O.C.G.A. § 16-2-20, the evidence was sufficient to convict defendant as an accomplice of theft by receiving and possession of a firearm during the commission of a crime. Simpson v. State, 293 Ga. App. 760, 668 S.E.2d 451 (2008).

Hijacking a motor vehicle and possession of weapon shown. — Defendant's possession of a vehicle within minutes of its hijacking, the defendant's attempted flight when police ordered the defendant out of the car, the recovery of a .40 caliber handgun in the car, and the victim's positive identification of the defendant authorized the jury to find the defendant guilty of hijacking a motor vehicle and of possession of a firearm during the commission of a felony. Wilcox v. State, 297 Ga. App. 201, 677 S.E.2d 142 (2009), cert. denied, No. S09C1285, 2009 Ga. LEXIS 342 (Ga. 2009).

Aggravated battery, other offenses, and possession shown. — Evidence that the defendant shot the victim at close range; that the victim, who knew the defendant well, identified the defendant from a photo line-up and at trial; and that a witness told police of driving the defendant to find the victim and of witnessing the shooting was sufficient to convict the defendant of aggravated battery, aggra-

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vated assault, and possession of a firearm during the commission of those crimes. Spencer v. State, 296 Ga. App. 828, 676 S.E.2d 274 (2009).

Sufficient evidence of possession of knife. — Evidence was sufficient to support a conviction of possession of a knife during the commission of a crime under O.C.G.A. § 16-11-106 because the record showed that defendant cut a deep gash across the victim's abdomen using a knife with a 3.5 inch blade, stabbed the victim two more times, and then chased the victim as the victim fled. Brinkley v. State, 301 Ga. App. 827, 689 S.E.2d 116 (2009).

Voluntary manslaughter, other offenses, and possession shown. — Rational trier of fact could have found beyond a reasonable doubt that the defendant committed voluntary manslaughter, O.C.G.A. § 16-5-2, possession of a firearm during the commission of a crime (voluntary manslaughter), O.C.G.A. § 16-11-106, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime (aggravated assault), O.C.G.A. § 16-11-106, because the defendant's explanation of the killing was inconsistent with and not explanatory of the other direct and circumstantial evidence, and, therefore, the jury was permitted to reject such explanation and convict on the remaining evidence; the defendant's son testified on direct that the defendant told the son that the defendant shot the victim once, that the victim ran, that the defendant pursued, and that although the victim begged for the victim's life, the defendant shot the victim again, and there also was forensic evidence indicating that the defendant fired three more rounds into the victim's body. Cantera v. State, 304 Ga. App. 289, 696 S.E.2d 354 (2010).

Because defendant admitted to police that defendant had planned the robbery that led to the victim's death, defendant was a willing participant in the robbery and shooting; consequently, the evidence was sufficient to find defendant guilty of felony murder, armed robbery, and possession of a firearm during the commission of a crime. Branchfield v. State, 287 Ga. 869, 700 S.E.2d 576 (2010).

Since the victim was cut and hit by a shotgun during a struggle with defendant in defendant's attempt to obtain money for drugs, the evidence was sufficient to sustain defendant's convictions for armed robbery, aggravated assault, and possession of a firearm during the commission of a crime under O.C.G.A. §§ 16-5-21(a)(2), 16-8-41(a), 16-11-106(b)(1). Johnson v. State, 305 Ga. App. 838, 700 S.E.2d 726 (2010).

Although under Georgia law, a defendant could not be convicted solely upon the uncorroborated testimony of an accomplice, former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the evidence corroborated some particulars of the accomplice's testimony implicating the codefendants in the charged crimes since all three of the victims from the three separate gas stations provided descriptions of their assailants that generally matched the codefendants and the accomplice, and all three victims also testified that their assailants brandished a handgun and a shotgun, which were indeed the weapons that were found at the scene where the stolen SUV crashed and where the accomplice was arrested. Accordingly, the evidence corroborating the accomplice's testimony was sufficient to authorize the jury's determination that the codefendants were guilty beyond a reasonable doubt as parties to armed robbery, O.C.G.A. § 16-8-41(a); hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b); aggravated assault, O.C.G.A. § 16-5-21(a)(1); theft by taking, O.C.G.A. § 16-8-2; theft by receiving, O.C.G.A. § 16-8-7(a); and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(1). Daniels v. State, 306 Ga. App. 577, 703 S.E.2d 41 (2010).

Trial court did not err in denying the defendant's motion for directed verdict of acquittal because the evidence was sufficient to authorize the defendant's convictions for attempted armed robbery, O.C.G.A. § 16-4-1, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(1), given the victim's eyewitness testimony that the defendant approached the eyewitness with a handgun while attempting to obtain money from the cash register of a store.

Nyane v. State, 306 Ga. App. 591, 703 S.E.2d 53 (2010), cert. denied, No. S11C0420, 2011 Ga. LEXIS 538 (Ga. 2011).

Evidence insufficient to support conviction. — Although the trial court was without authority to vacate defendant's conviction for possession of a firearm during the commission of a felony because the order was issued after the filing of the notice of appeal, the conviction was clearly not supported by the evidence and was, therefore, reversed. Jones v. State, 270 Ga. App. 233, 606 S.E.2d 288 (2004).

Because no eyewitnesses saw a third defendant participate in an armed robbery, a kidnapping, an aggravated assault, or possess a firearm during the commission of the crimes, and because the third defendant was not implicated by the other defendants, did not confess to the crimes, and did not flee the jurisdiction, the evidence was insufficient to support a conviction for the third defendant. Johnson v. State, 277 Ga. App. 499, 627 S.E.2d 116 (2006).

Because the state failed to present competent evidence showing that a firearm was on or within arm's reach of defendant's person, but instead, the only evidence of the gun's location was the hearsay testimony of two police officers, which was without probative value to establish any fact, even in the absence of objection, the defendant's conviction of possession of a firearm during the commission of a felony was reversed. Williams v. State, 279 Ga. App. 83, 630 S.E.2d 601 (2006).

Evidence that the defendant drove a codefendant away from the crime scene in a subdivision after the codefendant shot the victim and that a box of bullets was found in the defendant's car when the defendant was later arrested did not support the defendant's convictions of aggravated assault and of possession of a firearm during the commission of a felony. The defendant's possession of a box of bullets of the same caliber as those used in the murder weapon in no way proved the defendant's possession of the weapon during the commission of the assault; driving the codefendant away with knowledge that the codefendant had committed the crime did not, in and of itself, render the defendant guilty as a party to the crime under O.C.G.A. § 16-2-20; and to the extent that the evidence that the defendant's car had been parked at some point with the car's front end facing in the direction going out of the subdivision constituted circumstantial evidence of guilt, the evidence did not exclude every other reasonable hypothesis as required by former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6). Ratana v. State, 297 Ga. App. 747, 678 S.E.2d 193 (2009).

Convictions of aggravated battery, O.C.G.A. § 16-5-24, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106, were not supported by sufficient evidence because, although the defendant's conduct before the crime was suspicious, the circumstantial evidence against the defendant was insufficient under former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6); the state did not show that the defendant was anywhere near the scene at the time of the shooting, did not present evidence connecting a weapon used in the shooting to the defendant, and, although a witness testified that three days before the shooting, the witness saw the defendant's brother hand the defendant a gun, the witness could not identify the type of gun involved, and this testimony did not connect the defendant with the shooting. The state also failed to adduce evidence that the defendant intentionally aided, abetted, or encouraged the commission of the crimes of which the defendant was convicted. Gresham v. State, 298 Ga. App. 136, 679 S.E.2d 344 (2009).

There was insufficient evidence to support convictions for possession of a firearm during the commission of a felony. The firearm was wrapped in plastic and buried under cinder blocks in a backyard with nothing around it; there was no evidence that the defendant had it on the defendant's person or within arm's reach as required by O.C.G.A. § 16-11-106(b). Clyde v. State, 298 Ga. App. 283, 680 S.E.2d 146 (2009).

Evidence was insufficient to support the defendant's conviction for possessing a knife during the commission of a crime

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because the defendant was acquitted of entering an automobile with intent to commit theft, and thus, the conviction for possession of a knife during the commission of a crime could not be predicated on that charge; the defendant's possession of a knife during the commission of a crime conviction could not be based on a conviction of criminal damage to property in the second degree because that felony was not listed as a predicate crime under O.C.G.A. § 16-11-106(b). Johnson v. State, 302 Ga. App. 318, 690 S.E.2d 683 (2010).

Evidence was insufficient to convict the defendant of possession of a knife during the commission of a felony in violation of O.C.G.A. § 16-11-106(b)(1), based upon the length of the blade of the knife because the length of the knife's blade was less than three inches long. Brown v. State, 313 Ga. App. 907, 723 S.E.2d 115 (2012).

Because the evidence was insufficient to sustain the defendant's conviction for aggravated assault, the defendant's conviction for possession of a firearm in the commission of a felony based on the underlying felony of aggravated assault also had to be reversed. Touchstone v. State, 319 Ga. App. 477, 735 S.E.2d 805 (2012).

Evidence was insufficient to support the defendant's conviction for possession of a firearm during a felony because there was no evidence showing that the defendant had a gun on the defendant's person; the gun was retrieved from the bedroom where it was found next to an unidentified individual; testimonial evidence established that at some point afterwards, the defendant was found in the room (with another person in custody) and the crack cocaine was found next to the defendant; and, while the defendant did not appear to dispute the defendant's possession of the crack cocaine, there was no evidence showing that the defendant, as opposed to some other person, exercised dominion over the gun. Harvey v. State, 344 Ga. App. 7, 806 S.E.2d 302 (2017).

Possession by defendant's passenger sufficient. — In light of the trial court's findings that: (1) even if defendant was not physically present during the hijacking, given the evidence of defendant's agreement with defendant's passenger to steal a car, any act done in pursuance of that association by defendant's passenger would, in legal contemplation, be the act of defendant; and (2) that defendant could be convicted of hijacking a motor vehicle even if defendant had no knowledge that defendant's passenger was planning to use a gun to perpetrate the crime because defendant's passenger's use of the gun was naturally or necessarily done in furtherance of the conspiracy to steal a vehicle even though not part of the original agreement, the jury was entitled to conclude under O.C.G.A. § 16-11-106(b)(1) that defendant was a party to each of the four counts of possession of a firearm during the commission of a felony for which the underlying felonies were hijacking a motor vehicle, two counts of aggravated assault, and first-degree child cruelty. Johnson v. State, 299 Ga. App. 706, 683 S.E.2d 659 (2009).

Mistrial was properly denied despite the allegation that the defendant's character was put in evidence, given the overwhelming evidence of guilt, and the fact that the defendant's counsel declined to offer a curative instruction regarding the witness's statement; moreover, given the nature of the character statement, such was non-responsive to the state's questioning and unintentional. Ivey v. State, 284 Ga. App. 232, 644 S.E.2d 169 (2007).

Driving a getaway car sufficient for conviction. — Trial court had sufficient evidence to convict a defendant of armed robbery and possession of a firearm during the commission of a crime as a party to those crimes by aiding and abetting, pursuant to O.C.G.A. § 16-2-20, given evidence that the defendant helped plan the robberies of two game rooms, drove the getaway vehicle, and participated in the division of the proceeds. Norman v. State, 311 Ga. App. 721, 716 S.E.2d 805 (2011).

Jury Instructions

Joint charge of possession of firearm by convicted felon. — In a prosecution for possession of a firearm by a convicted felon, armed robbery, and pos-

session of a firearm during the commission of a crime, trial of the charges together was not required since defendant made no motion to sever and, in view of the limiting instructions given and the weight of the testimony of the victim and a corroborating witness, proof of a prior conviction did not place defendant's character in issue to such an extent as to affect the verdict on the armed robbery and firearm charges. Baker v. State, 214 Ga. App. 640, 448 S.E.2d 745 (1994).

Ineffective assistance of counsel related to instruction. — When the defendant's conviction for aggravated assault on a peace officer was vacated due to ineffective assistance of counsel relating to a jury instruction, and the assault charge was the predicate offense for a charge of possession of a firearm during the commission of a crime, it followed that the possession instruction was flawed as well, and if raised on appeal would have resulted in a reversal of that charge; counsel was therefore ineffective relating to the possession of a firearm conviction and the trial court erred in refusing to vacate the possession conviction as well. King v. Waters, 278 Ga. 122, 598 S.E.2d 476 (2004).

Charge on possession of a firearm was not in error, when, although the trial judge read from the title of O.C.G.A. § 16-11-106 referring to elements of the offense not in evidence, the remainder of the charge related only to possession of a firearm during the commission of a crime. Perkins v. State, 194 Ga. App. 189, 390 S.E.2d 273 (1990).

Trial court's omission from its charge on possession of a firearm the requirement that the firearm be on defendant's person or within the defendant's arm's reach was not erroneous where the omitted portion was not an issue under the evidence presented. Williams v. State, 214 Ga. App. 421, 447 S.E.2d 714 (1994).

In a prosecution for armed robbery, aggravated assault, and possession of a firearm during the commission of a felony, the trial court did not err in charging the entire language of O.C.G.A. § 16-11-106(b), pertaining to possession of a firearm during the commission of a felony because the jury was also given two instructions which clearly outlined the crime as charged in the indictment. Day v. State, 242 Ga. App. 781, 531 S.E.2d 357 (2000).

Because the appeals court refused to find a reasonable probability that the jury convicted the defendant of the offense of possession of a firearm during the commission of a crime in a manner not charged in the indictment, and the trial court did not err in charging nearly the entire code section on the offense, there was no basis to reverse the defendant's conviction. Beals v. State, 288 Ga. App. 815, 655 S.E.2d 687 (2007).

Proper jury instructions. — When the indictment charged the defendant with possession of a firearm during the commission of an aggravated assault, the court properly instructed the jury that a person violates the statute when the person possesses a firearm "during the commission of, or the attempt to commit any crime against or involving the person of another, and which crime is a felony" since the evidence adduced in the case did not show that it was possible for the jury to have convicted the defendant of committing the offense in a manner not charged in the indictment. Isaac v. State, 269 Ga. 875, 505 S.E.2d 480 (1998).

Trial court did not err in refusing to define the term "firearm" during jury instructions because the word has a common and ordinary usage. Law v. State, 249 Ga. App. 253, 547 S.E.2d 784 (2001).

Trial court did not commit reversible error in the court's instruction to the jury regarding the offense of possession of a weapon during the commission of a crime because, in contrast to the language of the indictment, the court charged the jury that such crime was committed if a person has on or within arms reach of the person's person a knife, having a blade of three or more inches in length, during the commission of any crime against or involving the person of another as the jury received the indictment and the trial court instructed the jury that the indictment and the plea formed the issue that the jury was to decide. Thus, there was no reasonable probability that the jury could have convicted defendant of the offense based upon the trial court's instructional

Jury Instructions (Cont'd)

deviation from the language of the indictment. Whitaker v. State, 283 Ga. 521, 661 S.E.2d 557 (2008).

Defense counsel was not ineffective for failing to object to an instruction that if the jury found the defendant was not guilty of armed robbery, the jury could not find the defendant guilty of possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b). As the commission of the underlying felony was an essential element of § 16-11-106(b), the instruction was a correct statement of the law. Soloman v. State, 294 Ga. App. 520, 669 S.E.2d 430 (2008).

Proper instructions. — Trial court did not err in failing to employ the exact language of O.C.G.A. § 16-11-106 when instructing the jury on a firearms charge. Buford v. State, 264 Ga. 479, 448 S.E.2d 215 (1994).

In a prosecution for armed robbery, possession of a firearm during the commission of a felony, and obstruction, the defendant was not entitled to a new trial based on allegations that trial counsel was ineffective as: (1) a jury charge on the testimony of an accomplice was not required; and (2) in light of trial counsel's cross-examination of the accomplice, the court's credibility charge, as well as the overwhelming evidence of the defendant's guilt, a leniency instruction was unnecessary. Hayes v. State, 281 Ga. App. 749, 637 S.E.2d 128 (2006).

Improper instructions required reversal. — Because the trial court never instructed the jury that the offense of involuntary manslaughter was a felony as opposed to a misdemeanor, the defendant's conviction for possession of a firearm during the commission of a felony had to be reversed. Moore v. State, 286 Ga. App. 313, 649 S.E.2d 337 (2007).

Because the jury instruction given by the trial court regarding a charge of possession of a knife during the commission of a crime comported with the language of O.C.G.A. § 16-11-106(b), and there was no reasonable probability that the jury could have convicted defendant based on the trial court's instructional deviation from the language of the indictment, no reversible error resulted. Mitchell v. State, 283 Ga. 341, 659 S.E.2d 356 (2008).

Trial court did not sua sponte err in failing to charge jury on identity because: (1) there was Georgia law requiring a trial judge to warn the jury against the possible dangers of mistaken identification of an accused as the person committing a crime; and (2) such was not required after the jury had already been charged as to the presumption of innocence, reasonable doubt, burden of proof, credibility of witnesses, and impeachment of witnesses. Lee v. State, 281 Ga. 776, 642 S.E.2d 835 (2007).

"Level of certainty". — In a prosecution on four counts of aggravated assault and possession of a firearm during the commission of a crime, given that the state did not rely upon eyewitness identification alone, but presented other evidence linking the defendant to the crimes charged, the trial court did not err in giving the "level of certainty" portion of an identity charge to the jury, which the defendant requested. Creamer v. State, 282 Ga. App. 411, 638 S.E.2d 832 (2006).

Failure to charge jury on justification and duty to retreat. — Defendant's convictions for voluntary manslaughter, aggravated assault, and two related counts of possession of a firearm in the commission of a crime required reversal because the trial court erred by not charging the jury on the principle of no duty to retreat since the defense of justification was raised by the evidence, via defendant's testimony that the victim tried to stab defendant, and the state placed the issue of retreat before the jury. As a result of defendant making out a prima facie case of justification, the trial court erred by concluding otherwise. Lewis v. State, 292 Ga. App. 257, 663 S.E.2d 721 (2008), cert. denied, No. S08C1869, 2008 Ga. LEXIS 885 (Ga. 2008).

Court erred in failing to instruct on accident. — Defendant's convictions for voluntary manslaughter, aggravated assault, and possession of a knife during the commission of a felony were reversed because the trial court erred in failing to charge the jury on the defense of accident as requested when that defense was raised by the evidence, and the Court of

Appeals could not find that it was highly probable that the failure to give the requested charge did not contribute to the verdict; at least slight evidence supported the theory that the defendant armed oneself with a knife in order to fend off the victim's attack with a pipe wrench and that although the defendant was prepared to intentionally stab the victim in self-defense, the defendant did not do so, but the victim lunged at the defendant and impaled oneself on the knife. Hill v. State, 300 Ga. App. 210, 684 S.E.2d 356 (2009).

Failure to request limiting instruction. — With regard to the defendant's trial for armed robbery and possession of a firearm, the trial court did not commit plain error in failing to give the jury limiting instructions for evidence presented against the co-defendant concerning charges that were unique to the co-defendant because the defendant failed to make such a request. McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290 (2014).

No merger of related offenses. — Because: (1) evidence presented against the second of two defendants, jointly charged, that the victim was beaten over the head with a pistol showed a completed aggravated assault prior to the armed robbery; and (2) possession of a firearm during the commission of an aggravated assault did not merge with armed robbery as there was an expressed legislative intent to impose double punishment for conduct which violated both O.C.G.A. § 16-11-106 and other felony statutes, the offenses did not merge. Bunkley v. State, 278 Ga. App. 450, 629 S.E.2d 112 (2006).

Punishment

Sentence not cruel and unusual punishment. — Defendant's sentences of 20 years in confinement for the aggravated assault on the deceased victim, followed by 20 years for the aggravated assault on the second victim (with five years in confinement and the remainder on probation), followed by an additional 15 years of probation for the charge of participation in criminal street gang activity and another five years' probation for the possession of a firearm during the commission of a felony, to run consecutively to the other sentences, were within the statutory range for those crimes, and did not constitute cruel and unusual punishment. Taylor v. State, 331 Ga. App. 577, 771 S.E.2d 224 (2015).

Double punishment intended. — There is express legislative intent to impose double punishment for conduct which violates both O.C.G.A. § 16-11-106 and other felony statutes. Wilson v. Zant, 249 Ga. 373, 290 S.E.2d 442, cert. denied, 459 U.S. 1092, 103 S. Ct. 580, 74 L. Ed. 2d 940 (1982), but see, Morgan v. State, 267 Ga. 203, 476 S.E.2d 747 (1996); Miller v. State, 250 Ga. 436, 298 S.E.2d 509 (1983); McGee v. State, 173 Ga. App. 604, 327 S.E.2d 566 (1985); Brown v. State, 191 Ga. App. 875, 383 S.E.2d 361 (1989).

It is not violative of double jeopardy to convict a person in a single prosecution of both possession of a firearm during the commission of a felony and the accompanying felony. Wiley v. State, 250 Ga. 343, 296 S.E.2d 714 (1982); McKissic v. State, 178 Ga. App. 23, 341 S.E.2d 903 (1986).

Convictions for possession of a firearm by a convicted felon and possession of a firearm during the commission of a felony did not merge, where one crime was not "included" in the other, and each involved proof of distinct essential elements. Scott v. State, 190 Ga. App. 492, 379 S.E.2d 199, cert. denied, 190 Ga. App. 899, 379 S.E.2d 199 (1989); Clark v. State, 206 Ga. App. 10, 424 S.E.2d 310 (1992).

Charges of possession of a firearm during commission of a felony and possession of a firearm by a convicted felon each had their own distinctive element and did not merge. Smith v. State, 205 Ga. App. 810, 424 S.E.2d 56 (1992).

Offense of possession of a firearm during commission of a crime does not merge with offense of voluntary manslaughter, and sentences for possession of a firearm and manslaughter could run consecutively. Clark v. State, 206 Ga. App. 10, 424 S.E.2d 310 (1992).

Defendant was properly sentenced for possession of a firearm during the commission of a crime, predicated on a burglary count, since the crime involved illegal entry into a building. Clark v. State, 279 Ga. 243, 611 S.E.2d 38 (2005).

Offense of armed robbery did not merge

Punishment (Cont'd)

with two counts of possession of a firearm during the commission of a crime as the expressed legislative intent was to impose double punishment for conduct which violated both O.C.G.A. § 16-11-106 and other felony statutes. Garibay v. State, 290 Ga. App. 385, 659 S.E.2d 775 (2008).

Merger not appropriate. — Trial court did not err in failing to merge the defendant's two convictions on possession of a firearm during the commission of a crime as the crime involved two victims and two separate weapons. Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Trial court did not err in failing to merge the defendant's sentences for aggravated assault and possession of a firearm during the commission of that crime because the crime of unlawful possession of a firearm during the commission of a crime was a crime distinct from the predicate felony; and the legislature intended to impose additional punishment against a person who used a firearm during the commission of certain crimes, including aggravated assault. Garner v. State, 342 Ga. App. 824, 805 S.E.2d 464 (2017).

Double jeopardy provision superseded. — Statutory double jeopardy provision, O.C.G.A. § 16-1-7(a), is superseded by O.C.G.A. § 16-11-106 in that offense of possession of a firearm during commission of a felony "shall be considered a separate offense." Miller v. State, 250 Ga. 436, 298 S.E.2d 509 (1983).

Doctrine of collateral estoppel would not, as a matter of law, preclude retrial on the substantive crime when a defendant has been acquitted of possession of a firearm during the commission of that crime. Sanchez v. State, 242 Ga. App. 686, 530 S.E.2d 775 (2000).

No merger into conviction for felony murder. — Conviction for possession of a firearm during the commission of a felony (O.C.G.A. § 16-11-106) does not merge with a conviction for felony murder. Hawkins v. State, 262 Ga. 193, 415 S.E.2d 636 (1992).

Double punishment included. — Counts of possession of a firearm during the commission of a crime and armed robbery did not merge. Baker v. State, 214 Ga. App. 640, 448 S.E.2d 745 (1994).

Failure to merge offense. — Trial court erred in failing to merge conviction for possession of a firearm during commission of a felony under O.C.G.A. § 16-11-106 with O.C.G.A. § 16-11-33, the statute governing the minimum period of confinement for persons convicted who had prior convictions, because the violation of O.C.G.A. § 16-11-106 was established by proof of less than all the facts necessary to establish the violation of O.C.G.A. § 16-11-133; therefore, the conviction for the lesser included offense was reversed and the case was remanded to the trial court for resentencing. Davis v. State, 253 Ga. App. 803, 560 S.E.2d 711 (2002).

Sentences imposed against a defendant for possession of a handgun during the commission of aggravated assault, possession of a handgun during the commission of kidnapping, and possession of a handgun during the commission of hijacking a motor vehicle required merger with the defendant's conviction for possession of a handgun during the commission of rape since there was only one single victim; as such, the defendant could only be convicted once under each of the five subsections of O.C.G.A. § 16-11-106(b). Jones v. State, 285 Ga. App. 114, 645 S.E.2d 602 (2007).

Trial court erred by sentencing a defendant to five years' imprisonment for possession of a firearm during commission of an aggravated assault, and a consecutive five-year sentence for possession of a firearm during the commission of armed robbery. As both the assault and the robbery involved the same victim and both occurred in the same criminal episode, the possession counts merged, and the conviction and sentence for one of those crimes had to be vacated. Abdullah v. State, 284 Ga. 399, 667 S.E.2d 584 (2008).

Defendant's sentence for armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b), was not void as a result of the trial court's failure to merge the convictions because the defendant's conviction on possession of

a firearm during the commission of a felony did not merge with either of the other convictions. McKenzie v. State, 302 Ga. App. 538, 691 S.E.2d 352 (2010).

Trial court erred in failing to merge, for purposes of sentencing, the defendant's convictions for possession of a firearm during the commission of a crime and possession of a firearm by a convicted felon with that for use of a firearm by a convicted felon during the commission of another felony, because the same act was used to establish each of the offenses and each crime did not require proof of a fact not required by the other. Jones v. State, 318 Ga. App. 105, 733 S.E.2d 407 (2012).

Trial court erred in entering a judgment of conviction and sentence on the possession of a firearm verdict predicated on aggravated assault because the underlying crimes of murder and aggravated assault were committed against one victim; thus, the possession charge predicated on aggravated assault merged with the possession charge predicated on murder. Smith v. State, 297 Ga. 268, 773 S.E.2d 269 (2015).

Although the trial court properly sentenced the second defendant for the weapons charges associated with the first victim's rape, the second victim's armed robbery, and the third victim's aggravated assault, the trial court erred when the court sentenced the second defendant for possession of a firearm during the armed robbery and aggravated assault of the first victim, and the aggravated assault of the second victim because a defendant could only be convicted once for possession of a firearm during the commission of a crime as to each of the individual victims of the crime spree. Thomas v. State, 300 Ga. 433, 796 S.E.2d 242 (2017).

Consecutive sentencing required. — See Busch v. State, 241 Ga. App. 761, 527 S.E.2d 604 (2000).

Trial counsel did not provide ineffective assistance of counsel due to a failure to investigate defendant's mental health history as: (1) defendant did not claim that defendant was insane at the time of the crimes, was incompetent to stand trial, or was otherwise suffering from delusional compulsion; (2) there was no evidence that defendant was guilty, but mentally ill; and (3) felony murder carried a mandatory life sentence, firearm possession required a consecutive five-year sentence, and the trial court was lenient in sentencing defendant to half of the time allowed by law for an aggravated assault, so there was no harm in the failure to introduce more detail about defendant's mental health history at sentencing. Harris v. State, 279 Ga. 304, 612 S.E.2d 789 (2005).

Consecutive sentencing expressly authorized. — Five-year sentence imposed upon defendant for possession of a firearm during the commission of the offense of kidnapping was permitted to run consecutively to the separate sentence for kidnapping and Georgia statutory law expressly authorized such a sentence. Cutkelvin v. State, 258 Ga. App. 691, 574 S.E.2d 883 (2002).

Trial court's imposition of sentences of imprisonment on defendant's conviction for possession of a firearm during the commission of a felony, in violation of O.C.G.A. § 16-11-106(b)(1), which were to run consecutively to all other sentences imposed in defendant's criminal matter, was within the trial court's discretion under O.C.G.A. § 17-10-10 as the trial court was required to run the sentence consecutively to the underlying felony to that offense, and it had discretion as to other sentences imposed. Owens v. State, 271 Ga. App. 365, 609 S.E.2d 670 (2005).

Consecutive sentence proper. — On remand, the trial court properly imposed a five-year consecutive sentence for possession of a knife during the commission of crimes. Although consecutive sentences for separate offenses were imposed at the same time and an earlier kidnapping sentence was invalidated, the kidnapping conviction was upheld and the defendant was resentenced. Brown v. State, 291 Ga. App. 518, 662 S.E.2d 297 (2008).

Nothing in the record affirmatively indicated that a trial court erroneously believed that the court had no discretion under O.C.G.A. § 17-10-1(a)(1) to suspend or probate a defendant's mandatory consecutive five-year sentence on a conviction for possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b); thus, the sentence was properly imposed consecutively to the de-

Punishment (Cont'd)

fendant's sentence for trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1). Weems v. State, 295 Ga. App. 680, 673 S.E.2d 50 (2009).

Defendant's sentence of 20 years to serve for armed robbery, 20 years probation for aggravated assault, and 5 years probation for possession of a firearm during the commission of a felony, each to run consecutively, did not constitute cruel and unusual punishment in violation of the Eighth Amendment because the trial court's sentence fell within the statutory range of punishment, O.C.G.A. §§ 16-5-21(b), 16-8-41(b), and 16-11-106(b). McKenzie v. State, 302 Ga. App. 538, 691 S.E.2d 352 (2010).

Consecutive sentencing not required. — Provision of O.C.G.A. § 16-11-106(b) that the five-year sentence must be imposed consecutively "to any other sentence which the person has received" means that a sentence for the possession offense be served consecutively only to the underlying felony for that offense. Busch v. State, 271 Ga. 591, 523 S.E.2d 21 (1999); Law v. State, 249 Ga. App. 253, 547 S.E.2d 784 (2001), reversing Busch v. State, 234 Ga. App. 766, 507 S.E.2d 868 (1998).

Trial court incorrectly ordered defendant's sentence for possession of a knife during the commission of a crime (five years) to run consecutively to defendant's sentence for kidnapping with bodily injury (life without parole). Johnson v. State, 247 Ga. App. 157, 543 S.E.2d 439 (2000).

Double life sentence erroneous. — Because sufficient evidence supported convictions for murder and possession of a knife during the commission of a crime, and the state met the state's burden in establishing an adequate chain of custody, two life sentences for the murder of one victim was improper as the conviction for felony murder was simply surplusage; thus, the separate life sentence on the alternative felony murder count had to be vacated. Paschal v. State, 280 Ga. 430, 628 S.E.2d 586 (2006).

Concurrent sentencing not required. — Trial court has discretion to run sentences concurrently or consecutively, and the trial court did not abuse that discretion in imposing five-year consecutive sentences for each of three firearm possession convictions; O.C.G.A. § 16-11-106 did not require the trial court to run the sentences on these offenses concurrently with the sentence on an underlying felony. Pennymon v. State, 261 Ga. App. 450, 582 S.E.2d 582 (2003).

Sentence exceeded statutory maximum. — Trial court's sentence of the defendant to life imprisonment for possession of a firearm during the commission of a felony was vacated because the sentence far exceeded the statutory maximum term-of-years sentence under O.C.G.A. § 16-11-106. Norris v. State, 289 Ga. 154, 709 S.E.2d 792 (2011).

Factual basis sufficient for guilty plea. — Sufficient factual basis was established for a defendant's guilty plea to armed robbery, kidnapping, and possession of a firearm during the commission of a crime when the prosecutor stated that the defendant and an accomplice entered the victims' apartment, forced the victims into rooms at gunpoint, tied the victims up, and stole some items; the prosecutor also noted that much of the crime had been recorded by a 9-1-1 operator; defense counsel stated that counsel had discussed the facts with the defendant; and the defendant conceded guilt. Therefore, it was not necessary that the indictment be read into the record. Leary v. State, 291 Ga. App. 754, 662 S.E.2d 733 (2008).

Motion to withdraw guilty plea. — Defendant's motion to withdraw the defendant's guilty plea was properly denied as withdrawal of the plea was not necessary to correct a manifest injustice since: (1) defense counsel was not ineffective; (2) the state showed that the defendant's plea was knowing, intelligent, and voluntary; (3) the trial court was entitled to discredit contradictory testimony given by the defendant at the motion to withdraw the plea hearing; and (4) the defendant's claim that the defendant had nothing to gain by entering a "blind" plea failed as even assuming, that an aggravated assault conviction would have merged with an armed robbery conviction and that five convictions of possession of a firearm dur-

ing the commission of a crime would have merged with each other for sentencing purposes, the defendant still would have faced an additional five years' to serve if the defendant had not pled guilty. Brown v. State, 280 Ga. App. 767, 634 S.E.2d 875 (2006).

Trial court did not err in denying the defendant's motion to withdraw the guilty plea to armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), cruelty to children in the first degree, O.C.G.A. § 16-5-70(b), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(1), because the state met the state's burden of showing that the defendant understood the constitutional rights the defendant was giving up by pleading guilty, that the defendant understood that since the plea was non-negotiated, the trial court would sentence the defendant to at least ten years imprisonment and could sentence the defendant to a maximum sentence of life in prison, and that the defendant knowingly and voluntarily entered the guilty plea in order to avoid a trial on the indicted charges. Carson v. State, 314 Ga. App. 225, 723 S.E.2d 516 (2012), overruled on other grounds, Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

Sentence improper. — Sentence imposed upon the defendant for possession of a firearm during the commission of a felony was improper because the sentence would require that before the defendant began the sentence for possession of a firearm during the commission of a felony, the defendant had to serve the sentence for the underlying felony of armed robbery and then the sentence for aggravated assault, which was not set forth as an underlying felony. Lewis v. State, 291 Ga. 273, 731 S.E.2d 51 (2012).

Trial court imposed a sentence that the law did not allow for unlawful possession of a firearm during the commission of a felony when the court sentenced the defendant to 15 years because O.C.G.A. § 16-11-106 only authorized five to ten years. Threatt v. State, 293 Ga. 549, 748 S.E.2d 400 (2013).

Portion of the trial court's sentencing order in which the court merged the unlawful possession of a firearm during the commission of a crime into the other crimes of which the defendant was convicted was vacated and the case was remanded for resentencing because unlawful possession of a firearm during the commission of a crime is a crime distinct from the predicate felony and the defendant should have been sentenced on that count. Scudder v. State, 298 Ga. 438, 782 S.E.2d 638 (2016).

Separate sentences for possession during aggravated assault and burglary proper. — Firearm possession counts predicated on aggravated assault and burglary were properly subject to separate sentences because O.C.G.A. § 16-11-106 permitted one firearm possession conviction as to each victim in a criminal transaction under paragraph (b)(1) as well as an additional conviction for firearm possession during the commission of the crimes enumerated in paragraphs (b)(2) through (b)(5), and burglary fell within paragraph (b)(2). Favors v. State, 296 Ga. 842, 770 S.E.2d 851 (2015).

Multiple firearms sentences for different crimes involving same victim. — In the defendant's trial for rape, murder, and other crimes against three separate victims, the trial court erred in sentencing the defendant on six weapons counts, pursuant to O.C.G.A. § 16-11-106(b)(1), because the rape, armed robbery, and aggravated assault carried out against the same victim, using the same handgun, permitted sentencing on only one weapons charge; also, the weapons sentence arising out of the aggravated assault of another victim was required to be vacated. Thomas v. State, 300 Ga. 433, 796 S.E.2d 242 (2017).

RESEARCH REFERENCES

ALR. — Validity of state statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Fact that gun was broken, dismantled,

or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

What constitutes "use" of firearm for purposes of 18 USCS § 924(c)(1), providing penalty for use of firearm during drug trafficking crime or crime of violence, 125 A.L.R. Fed. 545.

16-11-107. Harming a law enforcement animal.

(a) As used in this Code section, the term:

(1) "Accelerant detection dog" means a dog trained to detect hydrocarbon substances.

(2) "Bomb detection dog" means a dog trained to locate bombs or explosives by scent.

(2.1) "Dangerous weapon" shall have the same meaning as provided for in Code Section 16-11-121.

(2.2) "Firearm" means any handgun, rifle, shotgun, stun gun, taser, or dangerous weapon.

(3) "Firearms detection dog" means a dog trained to locate firearms by scent.

(3.1) "Knowingly" means having knowledge that an animal is a law enforcement animal.

(3.2) "Law enforcement animal" means a police dog, police horse, or any other animal trained to support a peace officer, fire department, or the state fire marshal in performance of law enforcement duties.

(4) "Narcotic detection dog" means a dog trained to locate narcotics by scent.

(5) "Narcotics" means any controlled substance as defined in paragraph (4) of Code Section 16-13-21 and shall include marijuana as defined by paragraph (16) of Code Section 16-13-21.

(6) "Patrol dog" means a dog trained to protect a peace officer and to apprehend or hold without excessive force a person in violation of the criminal statutes of this state.

(6.1) "Performance of its duties" means performing law enforcement, fire department, or state fire marshal duties as trained.

(7) "Police dog" means a bomb detection dog, a firearms detection dog, a narcotic detection dog, a patrol dog, an accelerant detection dog, or a tracking dog used by a law enforcement agency. Such term also means a search and rescue dog.

(8) "Police horse" means a horse trained to transport, carry, or be ridden by a law enforcement officer and used by a law enforcement agency.

(8.1) "Search and rescue dog" means any dog that is owned or the services of which are employed by a fire department or the state fire marshal for the principal purpose of aiding in the detection of missing persons, including but not limited to persons who are lost, who are trapped under debris as a result of a natural or manmade disaster, or who are drowning victims.

(9) "Tracking dog" means a dog trained to track and find a missing person, escaped inmate, or fleeing felon.

(b) A person commits the offense of harming a law enforcement animal in the fourth degree when he or she knowingly and intentionally causes physical harm to such law enforcement animal while such law enforcement animal is in performance of its duties or because of such law enforcement animal's performance of its duties. Any person convicted of a violation of this subsection shall be guilty of a misdemeanor of a high and aggravated nature and, upon conviction thereof, shall be punished by imprisonment not to exceed 12 months, a fine not to exceed $5,000.00, or both.

(c) A person commits the offense of harming a law enforcement animal in the third degree when he or she knowingly and intentionally and with a deadly weapon causes, or with any object, device, instrument, or body part which, when used offensively against such law enforcement animal, is likely to or actually does cause, serious physical injury to such law enforcement animal while such law enforcement animal is in performance of its duties or because of such law enforcement animal's performance of its duties. Any person convicted of a violation of this subsection shall be guilty of a misdemeanor of a high and aggravated nature and, upon conviction thereof, shall be punished by imprisonment for not less than six nor more than 12 months, a fine not to exceed $5,000.00, or both.

(d) A person commits the offense of harming a law enforcement animal in the second degree when he or she knowingly and intentionally shoots a law enforcement animal with a firearm or causes debilitating physical injury to a law enforcement animal while such law enforcement animal is in performance of its duties or because of such law enforcement animal's performance of its duties. Any person convicted of a violation of this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years, a fine not to exceed $25,000.00, or both.

(e) A person commits the offense of harming a law enforcement animal in the first degree when he or she knowingly and intentionally causes the death of a law enforcement animal while such law enforcement animal is in performance of its duties or because of such law

enforcement animal's performance of its duties. Any person convicted of a violation of this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than 18 months nor more than five years, a fine not to exceed $50,000.00, or both.

(f) In addition to any other penalty provided for under this Code section, any person convicted of a violation under this Code section shall pay restitution to the law enforcement agency, fire department, or the state fire marshal which is the owner of, or which owned, such law enforcement animal in the amount of associated veterinary expenses incurred in the treatment of such law enforcement animal pursuant to Article 1 of Chapter 14 of Title 17; provided, however, that if such law enforcement animal died or is no longer able to engage in performance of its duties as a result of a violation of this Code section, the amount paid in restitution shall additionally include the amount of the actual replacement value of the law enforcement animal, which shall include the value of an animal to replace the law enforcement animal and all costs associated with training such animal and its handler or handlers.

(g) Nothing in this Code section shall prohibit the killing or euthanasia of a law enforcement animal for humane purposes.

(h) Nothing in this Code section shall prohibit the defense of a person against a law enforcement animal that attacks such person without or in spite of commands given by its handler.

(i) The Division of Forensic Sciences of the Georgia Bureau of Investigation shall perform forensic pathology services upon any law enforcement animal whose death occurred while in performance of its duties or because of such law enforcement animal's performance of its duties. (Code 1981, § 16-11-107, enacted by Ga. L. 1983, p. 528, § 1; Ga. L. 1996, p. 370, § 1; Ga. L. 1996, p. 778, § 1; Ga. L. 1998, p. 657, § 1.2; Ga. L. 2015, p. 203, § 3-3/SB 72.)

Cross references. — Cruelty to dogs generally, § 4-8-5.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, paragraph (a)(7), as added by Ga. L. 1996, p. 778, § 1, was redesignated as paragraph (a)(8), and existing paragraph (a)(7) was redesignated as paragraph (a)(9).

Editor's notes. — Ga. L. 1998, p. 657, § 1.1, not codified by the General Assembly, provides that Section 1.2 of that Act shall be known and may be cited as the "Sadie Act".

Ga. L. 2015, p. 203, § 3-1/SB 72, not codified by the General Assembly, provides that: "This part of this Act shall be known and may be cited as 'Tanja's Law.'"

Law reviews. — For annual survey on criminal law, see 68 Mercer L. Rev. 93 (2016).

JUDICIAL DECISIONS

Evidence sufficient for conviction. — Evidence was sufficient to convict the defendant of knowingly and intentionally causing serious physical injury to the po-

lice dog because the defendant was in flight from the police when the defendant hid in a crawl space; the officer ordered the defendant to let go of the dog; and the dog lost consciousness as a result of the defendant's application of a chokehold on the animal. Bynes v. State, 336 Ga. App. 223, 784 S.E.2d 71 (2016).

Jury instructions. — Defendant was not entitled to a jury instruction on justification as the defendant was not justified in using force in self-defense as to the charge of harming the police dog even if the defendant had an involuntary reaction to the dog's bite. Bynes v. State, 336 Ga. App. 223, 784 S.E.2d 71 (2016).

Resentencing required for conviction. — Because there was no evidence that the jury considered or determined whether the defendant had knowingly caused debilitating injury to the police dog, which was a felony that carried a maximum sentence of five years, but, rather, that the defendant was indicted for causing serious injury to the dog, which was defined as a misdemeanor, that portion of the defendant's sentence imposed for causing debilitating injury to a police dog was vacated, and the case was remanded to the trial court for resentencing for causing serious physical injury to a police dog. Bynes v. State, 336 Ga. App. 223, 784 S.E.2d 71 (2016).

16-11-107.1. Harassment of assistance dog by humans or other dogs; penalty.

(a) As used in this Code section, the term:

(1) "Assistance dog" means a dog that is or has been trained by a licensed or certified person, organization, or agency to perform physical tasks for a physically challenged person. Assistance dogs include guide or leader dogs that guide individuals who are legally blind; hearing dogs that alert individuals who are deaf or hard of hearing to specific sounds; and service dogs for individuals with disabilities other than blindness or deafness, which are trained to perform a variety of physical tasks, including, but not limited to, pulling a wheelchair, lending balance support, picking up dropped objects, or providing assistance in a medical crisis.

(2) "Harass" means to engage in any conduct directed toward an assistance dog that is knowingly likely to impede or interfere with the assistance dog's performance of its duties or that places the blind, deaf, or physically limited person being served or assisted by the dog in danger of injury.

(3) "Notice" means an oral or otherwise communicated warning proscribing the behavior of another person and a request that the person stop the particular behavior.

(b) Any person who knowingly and intentionally harasses or attempts to harass an assistance dog, knowing the dog to be an assistance dog, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than 90 days or a fine not to exceed $500.00, or both.

(c) Any person who has received notice that his or her behavior is interfering with the use of an assistance dog who continues to know-

ingly and intentionally harass an assistance dog, knowing the dog to be an assistance dog, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than 90 days or a fine not to exceed $500.00, or both, provided that any person who is convicted of a second or subsequent violation of this subsection shall be punished as for a misdemeanor of a high and aggravated nature.

(d) Any person who knowingly and intentionally allows his or her dog to harass an assistance dog, knowing the dog to be an assistance dog, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than 90 days or a fine not to exceed $500.00, or both, provided that any person who is convicted of a second or subsequent violation of this subsection shall be punished as for a misdemeanor of a high and aggravated nature.

(e) Any person who knowingly and intentionally allows his or her dog to cause death or physical harm to an assistance dog by rendering a part of the assistance dog's body useless or by seriously disfiguring the assistance dog, knowing the dog to be an assistance dog, shall be punished as for a misdemeanor of a high and aggravated nature. (Code 1981, § 16-11-107.1, enacted by Ga. L. 2004, p. 936, § 1.)

Cross references. — Cruelty to animals, § 16-12-4. Right to equal public accommodations and right to be accompanied by guide dog or service dog, § 30-4-2.

Law reviews. — For comment, "The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization," see 63 Emory L.J. 1163 (2014).

16-11-108. Misuse of firearm or archery tackle while hunting.

(a) Any person who while hunting wildlife uses a firearm or archery tackle in a manner to endanger the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm to or endanger the safety of another person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation is guilty of a misdemeanor; provided, however, if such conduct results in serious bodily harm to another person, the person engaging in such conduct shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $5,000.00 or by imprisonment for not less than one nor more than ten years, or both.

(b) Whenever a person is charged with violating subsection (a) of this Code section, the arresting law enforcement officer shall take the hunting license of the person so charged. The hunting license shall be attached to the court's copy of the citation, warrant, accusation, or indictment and shall be forwarded to the court having jurisdiction of the offense. A copy of the citation, warrant, accusation, or indictment

shall be forwarded, within 15 days of its issuance, to the Game and Fish Division of the Department of Natural Resources.

(c) In order to obtain a temporary hunting license, a person charged with violating subsection (a) of this Code section must present to the director of the Game and Fish Division of the Department of Natural Resources a certificate of satisfactory completion, after the date of the incident for which the person was charged and regardless of the person's age or date of birth, of a hunter education course prescribed by the Board of Natural Resources. A temporary hunting license issued under such circumstances shall be valid until the next March 31 or until suspended or revoked under any provision of this title or of Title 27. The director of the Game and Fish Division of the Department of Natural Resources may renew the temporary hunting license during the pendency of charges.

(d)(1) If the person is convicted of violating subsection (a) of this Code section, the court shall, within 15 days of such conviction, forward the person's hunting license and a copy of the record of the disposition of the case to the Game and Fish Division of the Department of Natural Resources. At this time, the court shall also require the person to surrender any temporary hunting licenses issued pursuant to the provisions of subsection (c) of this Code section.

(2) If the person is not convicted of violating subsection (a) of this Code section, the court shall return the hunting license to the person. (Code 1981, § 16-11-108, enacted by Ga. L. 1989, p. 292, § 1.)

Cross references. — Required hunter education courses, § 27-2-5.

JUDICIAL DECISIONS

Offense as predicate to felony-murder conviction. — Offense of misuse of a firearm while hunting can serve as the predicate felony to a felony murder conviction. Chapman v. State, 266 Ga. 356, 467 S.E.2d 497 (1996).

Evidence of motive and intent. — Trial court's admission of evidence of writing on defendant's bedroom wall for the purpose of showing defendant's motive for killing defendant's brother in a case where defendant shot and killed the brother while the two were out hunting and claimed it was an accident was at most harmless error since the offense on which defendant was convicted, felony murder by misusing a firearm while hunting, and its underlying predicate offense of consciously disregarding a substantial and unjustifiable risk, did not require a motive or intent. Furthermore, the offense of felony murder by misuse of a firearm could be used to serve as the predicate offense for a felony murder conviction. Hames v. State, 278 Ga. 182, 598 S.E.2d 459 (2004).

Evidence sufficient to sustain conviction. — Sufficient evidence supported convictions of aggravated assault, tampering with evidence, and felony misuse of a firearm while hunting, and negated the defense of accident after the victim who was shot by defendant while hunting waved to signal defendant before the gun was fired and since the defendant was hunting while on medication that could have caused mental and physical impairment; the jury also could have considered defendant's actions after the shooting in

removing the victim's orange vest, hiding two guns, failing to aid the victim, and failing to alert paramedics of the victim's location. Wilson v. State, 279 Ga. App. 136, 630 S.E.2d 640 (2006).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — Violation of the misdemeanor provisions of O.C.G.A. § 16-11-108 includes as an element the misuse of firearms or archery tackle; fingerprinting persons charged with this offense is mandatory, since it necessarily involves the use of firearms or dangerous weapons. 1989 Op. Att'y Gen. 89-52.

RESEARCH REFERENCES

Am. Jur. Trials. — Hunting Accident Litigation, 27 Am. Jur. Trials 261.

16-11-109. Activities prohibited to person charged with violation of subsection (a) of Code Section 16-11-108; penalty for violation of Code section; surrender of hunting license.

(a) It shall be unlawful during the pendency of such charges and any period of license revocation and ineligibility pursuant to Code Section 16-11-110 for any person charged with or convicted of a violation of subsection (a) of Code Section 16-11-108 to either:

(1) Hunt without a license in violation of Code Section 27-2-1; or

(2) Possess a Georgia hunting license other than a temporary hunting license issued by the director of the Game and Fish Division of the Department of Natural Resources pursuant to the provisions of subsection (c) of Code Section 16-11-108.

(b) Any person who violates subsection (a) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $5,000.00 or by imprisonment for not less than one nor more than five years, or both.

(c) Upon conviction of a violation of subsection (a) of this Code section, the court shall, within 15 days of such conviction, forward any hunting license found in the possession of the convicted person and a copy of the record of the disposition of the case to the Game and Fish Division of the Department of Natural Resources. (Code 1981, § 16-11-109, enacted by Ga. L. 1989, p. 292, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — Violation of O.C.G.A. § 16-11-109 is a felony, and persons charged with a violation must be fingerprinted pursuant to O.C.G.A. § 35-3-33(1)(A)(i). 1989 Op. Att'y Gen. 89-52.

16-11-110. Revocation of hunting license for violation of subsection (a) of Code Section 16-11-108 or subsection (a) of Code Section 16-11-109.

(a) Any hunting license of any person convicted of violating subsection (a) of Code Section 16-11-108 or subsection (a) of Code Section 16-11-109 shall by operation of law be revoked.

(b) Any person convicted of violating subsection (a) of Code Section 16-11-108 or subsection (a) of Code Section 16-11-109 shall be ineligible for a hunting license for a period of five years from the date of conviction.

(c) If a person's hunting license is revoked by operation of law as provided in subsection (a) of this Code section, the fact that the person's hunting license was not surrendered to the law enforcement officer at the time the person was charged with violating subsection (a) of Code Section 16-11-108 or the fact that the person's hunting license was not retained by the court and forwarded to the Game and Fish Division of the Department of Natural Resources as provided in subsection (d) of Code Section 16-11-108 or in subsection (c) of Code Section 16-11-109 shall not affect such revocation. (Code 1981, § 16-11-110, enacted by Ga. L. 1989, p. 292, § 1.)

16-11-111. "Anhydrous ammonia" defined; crime for possession.

(a)(1) As used in this Code section, the term "anhydrous ammonia" means any substance identified to contain the compound ammonia which is capable of being utilized in the production of methamphetamine or any other controlled substance.

(2) A person commits the crime of unlawful possession of anhydrous ammonia if the person:

(A) Purchases, possesses, transfers, or distributes any amount of anhydrous ammonia knowing that the anhydrous ammonia will be used unlawfully to manufacture a controlled substance;

(B) Possesses, maintains, or transports any quantity of anhydrous ammonia in a container or receptacle other than a tank truck, tank trailer, rail tank car, bulk storage tank, field (nurse) tank, field applicator, or any container approved for anhydrous ammonia by the Department of Agriculture or the United States Department of Transportation; or

(C) Tampers with equipment manufactured to hold, apply, or transport anhydrous ammonia without the express consent of the owner of the equipment.

(3) A person who violates subparagraph (B) of paragraph (2) of this subsection shall be subject to civil penalties in accordance with Code Section 40-1-23.

(b) Any person who violates this Code section shall, upon conviction thereof, be punished by imprisonment for not less than one year nor more than ten years and by a fine not to exceed $100,000.00. (Code 1981, § 16-11-111, enacted by Ga. L. 2003, p. 177, § 2; Ga. L. 2011, p. 479, § 1/HB 112.)

Cross references. — Transportation of hazardous materials, § 40-1-20 et seq.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2003, subparagraph (a)(3)(A) was redesignated as paragraph (a)(3) and subparagraph (a)(3)(B) was redesignated as subsection (b).

16-11-112. Vehicles with false or secret compartments.

(a) As used in this Code section, the term:

(1)(A) "False or secret compartment" means any enclosure which is integrated into or attached to a vehicle and the purpose of the compartment is to conceal, hide, or prevent discovery by law enforcement officers of:

(i) A person concealed for an unlawful purpose;

(ii) Controlled substances possessed in violation of Article 2 of Chapter 13 of this title; or

(iii) Other contraband.

(B) Examples of "false or secret compartment" may include, but are not limited to:

(i) False, altered, or modified fuel tanks;

(ii) Original factory equipment on a vehicle that has been modified; or

(iii) Any compartment, space, or box that is added or attached to existing compartments, spaces, or boxes of the vehicle.

(2) "Vehicle" includes, but is not limited to, cars, trucks, buses, motorcycles, bicycles, aircraft, helicopters, boats, ships, yachts, and other vessels.

(b) It may be inferred that the accused intended to use a false or secret compartment if a person knowingly has a false or secret compartment which:

(1) Is concealing a person for an unlawful purpose;

(2) Is concealing a controlled substance in violation of Article 2 of Chapter 13 of this title;

(3) Is concealing other contraband;

(4) Shows evidence of the previous concealment of a person for an unlawful purpose;

(5) Shows evidence of the previous concealment of controlled substances in violation of Article 2 of Chapter 13 of this title; or

(6) Shows evidence of the previous concealment of other contraband.

(c)(1) It is unlawful for any person to knowingly own or operate any vehicle containing a false or secret compartment.

(2) It is unlawful for any person to knowingly install, create, build, or fabricate in any vehicle a false or secret compartment.

(3) It is unlawful for any person to knowingly sell, trade, or otherwise dispose of a vehicle which is in violation of this Code section.

(d) Any person who violates this Code section shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than two years, by a fine not to exceed $10,000.00, or both.

(e) Upon the arrest of a person who owns or is operating a vehicle which is in violation of this Code section, if the vehicle is not otherwise subject to forfeiture under other provisions of law, or not determined to be needed to be held as evidence, the law enforcement officer shall seize the license plate and registration for such vehicle and shall issue a citation for violation of this Code section and a temporary license plate for the vehicle. The temporary license plate shall be on a form as prescribed by the state revenue commissioner. The temporary license plate shall be valid for 30 days or until the owner of the vehicle provides verification that such vehicle has been repaired so as to eliminate any violation of this Code section, whichever occurs first. Such vehicle shall be subject to inspection by law enforcement and if it is determined that such vehicle has been repaired, the license plate and registration shall be returned to the owner at such time. (Code 1981, § 16-11-112, enacted by Ga. L. 2006, p. 157, § 1/HB 1193.)

Administrative rules and regulations. — False or secret compartment, Official Compilation of the Rules and Regulations of the State of Georgia, Motor Vehicle Division, Title and Registration Record Provisions, § 560-10-30-.34.

16-11-113. Offense of transferring firearm to individual other than actual buyer; penalty.

(a) Any person who knowingly attempts to solicit, persuade, encourage, or entice any dealer to transfer or otherwise convey a firearm to an individual who is not the actual buyer, to an individual who is on

probation as a felony first offender pursuant to Article 3 of Chapter 8 of Title 42, to an individual who is on probation and sentenced for a felony under subsection (a) or (c) of Code Section 16-13-2, or to an individual who has been convicted of a felony by a court of this state or any other state, as well as any other person who willfully and intentionally aids or abets such person, shall be guilty of a felony and upon conviction shall be punished by imprisonment for not less than one year nor more than five years; provided, however, that upon a second or subsequent conviction, by imprisonment for not less than five nor more than ten years.

(b)(1) Any person who knowingly and intentionally provides a firearm to any other person who is on probation as a felony first offender pursuant to Article 3 of Chapter 8 of Title 42 or to any person who has been convicted of a felony by a court of this state or any other state shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than five years; provided, however, that upon a second or subsequent conviction, such person shall be punished by imprisonment for not less than five nor more than ten years.

(2) Nothing in this subsection shall be construed as requiring a provider of a firearm to affirmatively confirm that a person to whom a firearm is provided is not a felony first offender or a person who has been convicted of a felony.

(3) This subsection shall not apply to any person providing a firearm to any other person who has been:

(A) Pardoned for the felony by the President of the United States, the State Board of Pardons and Paroles, or the person or agency empowered to grant pardons under the constitutions or laws of any other state of the United States or of a foreign nation and, by the terms of the pardon, has expressly been authorized to receive, possess, or transport a firearm; or

(B) Otherwise granted relief from the disabilities of Code Section 16-11-131 pursuant to subsections (c) and (d) of such Code section.

(c) This Code section shall not apply to a federal law enforcement officer or a peace officer, as defined in Code Section 16-1-3, in the performance of his or her official duties or other person under such officer's direct supervision. (Code 1981, § 16-11-113, enacted by Ga. L. 2008, p. 1199, § 2/HB 89; Ga. L. 2018, p. 540, § 1/HB 657; Ga. L. 2018, p. 550, § 4-3/SB 407.)

The 2018 amendments. — The first 2018 amendment, effective July 1, 2018, designated the existing provisions as subsections (a) and (c); added "and, upon

conviction thereof, shall be punished by imprisonment for not less than one year nor more than five years" at the end of subsection (a); and added subsection (b). The second 2018 amendment, effective July 1, 2018, added subsection designations; in subsection (a), inserted "knowingly", substituted "to an individual who is not" for "other than to", inserted ", to an individual who is on probation as a felony first offender pursuant to Article 3 of Chapter 8 of Title 42, to an individual who is on probation and sentenced for a felony under subsection (a) or (c) of Code Section 16-13-2, or to an individual who has been convicted of a felony by a court of this state or any other state", and added "and upon conviction shall be punished by imprisonment for not less than one year nor more than five years; provided, however, that upon a second or subsequent conviction, by imprisonment for not less than five nor more than ten years" at the end.

Cross references. — Firearms dealers, T. 43, C. 16.

Editor's notes. — Ga. L. 2008, p. 1199, § 1/HB 89, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Business Security and Employee Privacy Act.'"

Law reviews. — For article, "Georgia's 'Bring Your Gun to Work' Law May Not Have the Firepower to Trouble Georgia Employers After All," see 14 (No. 7) Ga. St. B.J. 12 (2009).

Part 2

Possession of Dangerous Weapons

Cross references. — Legal weapons for hunting wildlife generally, § 27-3-4.

JUDICIAL DECISIONS

Firearms and Weapons Act does not violate Georgia Constitution. — Georgia Firearms and Weapons Act (see now O.C.G.A. Pt. 2, Ch. 11, T. 16) does not violate Ga. Const. 1976, Art. I, Sec. I, Para. V (see now Ga. Const. 1983, Art. I, Sec. I, Para. V), which provides for right of people to keep and bear arms. Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978).

Georgia Firearms and Weapons Act (see now O.C.G.A. Pt. 2, Ch. 11, T. 16) constitutes a legitimate exercise of police power. Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978).

RESEARCH REFERENCES

ALR. — Firearm used as a bludgeon as a deadly weapon, 8 A.L.R. 1319.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

16-11-120. Short title.

This part shall be known and may be cited as the "Georgia Firearms and Weapons Act." (Ga. L. 1968, p. 983, § 1.)

Editor's notes. — Pursuant to Ga. L. 1968, p. 983, § 7, this part is cumulative and supplemental to laws of this state enacted prior to this part and, in the event of a conflict, this part shall govern and take precedence.

JUDICIAL DECISIONS

Firearms and Weapons Act does not violate Georgia Constitution. — Georgia Firearms and Weapons Act, (this part) does not violate Ga. Const. 1976, Art. I, Sec. I, Para. V (see now Ga. Const. 1983, Art. I, Sec. I, Para. VIII), which provides for right of people to keep and bear arms. Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978).

Georgia Firearms and Weapons Act constitutes a legitimate exercise of police power and can be sustained as a legitimate exercise of police power of the state. Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978).

Evidence sufficient for conviction. — See Davis v. State, 168 Ga. App. 272, 308 S.E.2d 602 (1983).

Cited in Simmons v. State, 246 Ga. 390, 271 S.E.2d 468 (1980); Warner v. State, 155 Ga. App. 495, 271 S.E.2d 636 (1980); Myrick v. State, 155 Ga. App. 496, 271 S.E.2d 637 (1980); Ezzard v. State, 155 Ga. App. 594, 271 S.E.2d 728 (1980); Blue v. State, 212 Ga. App. 847, 433 S.E.2d 635 (1994).

RESEARCH REFERENCES

ALR. — Double jeopardy: various acts of weapons violations as separate or continuing offense, 80 A.L.R.4th 631.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

Cigarette lighter as deadly or dangerous weapon, 22 A.L.R.6th 533.

16-11-121. Definitions.

As used in this part, the term:

(1) "Dangerous weapon" means any weapon commonly known as a "rocket launcher," "bazooka," or "recoilless rifle" which fires explosive or nonexplosive rockets designed to injure or kill personnel or destroy heavy armor, or similar weapon used for such purpose. The term shall also mean a weapon commonly known as a "mortar" which fires high explosive from a metallic cylinder and which is commonly used by the armed forces as an antipersonnel weapon or similar weapon used for such purpose. The term shall also mean a weapon commonly known as a "hand grenade" or other similar weapon which is designed to explode and injure personnel or similar weapon used for such purpose.

(2) "Machine gun" means any weapon which shoots or is designed to shoot, automatically, more than six shots, without manual reloading, by a single function of the trigger.

(3) "Person" means any individual, partnership, company, association, or corporation.

(4) "Sawed-off rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder; and designed or redesigned, made or remade, to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifle bore for each single pull of the trigger; and which has a barrel or

barrels of less than 16 inches in length or has an overall length of less than 26 inches.

(5) "Sawed-off shotgun" means a shotgun or any weapon made from a shotgun whether by alteration, modification, or otherwise having one or more barrels less than 18 inches in length or if such weapon as modified has an overall length of less than 26 inches.

(6) "Shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder; and designed or redesigned, and made or remade, to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(7) "Silencer" means any device for silencing or diminishing the report of any portable weapon such as a rifle, carbine, pistol, revolver, machine gun, shotgun, fowling piece, or other device from which a shot, bullet, or projectile may be discharged by an explosive. (Ga. L. 1968, p. 983, § 4; Ga. L. 1974, p. 449, § 1.)

JUDICIAL DECISIONS

It is not arbitrary or unreasonable to prohibit keeping and carrying of sawed-off shotguns, which are of a size such as can easily be concealed and which are adapted to and commonly used for criminal purposes. Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978).

Sawed-off shotgun. — When a shotgun had the shotgun's barrel sawed off to 18 1⁄2 inches and did not have a full stock, causing the shotgun's total length to be less than 26 inches, it fell within statutory classification of sawed-off shotgun. Gilmore v. State, 157 Ga. App. 376, 277 S.E.2d 749 (1981).

In a prosecution for possession of a sawed-off shotgun, police detective's use of a yardstick to measure the barrel of a shotgun at less than 13 inches was sufficient to establish the length of the weapon. Thompson v. State, 214 Ga. App. 889, 449 S.E.2d 364 (1994).

Defendant's conviction for unlawful possession of a sawed-off shotgun was supported by sufficient evidence based on the state producing expert testimony at trial establishing that the firearm at issue was originally designed to be fired from the shoulder but had been modified into a pistol-like configuration. Lewis v. State, 292 Ga. App. 257, 663 S.E.2d 721 (2008), cert. denied, No. S08C1869, 2008 Ga. LEXIS 885 (Ga. 2008).

Cited in Barnwell v. State, 127 Ga. App. 335, 193 S.E.2d 203 (1972); Myrick v. State, 155 Ga. App. 496, 271 S.E.2d 637 (1980); Blankenship v. State, 223 Ga. App. 264, 477 S.E.2d 397 (1996); Adams v. State, 245 Ga. App. 607, 538 S.E.2d 508 (2000).

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Gun firing under six bullets by single function of trigger not machine gun. — Since a machine gun that fires less than six bullets by a single function of the trigger is not, under Georgia law, a machine gun, federal registration of such a weapon has no significance under Georgia law. 1974 Op. Att'y Gen. No. U74-91.

16-11-122. Possession of sawed-off shotgun or rifle, machine gun, silencer, or dangerous weapon prohibited.

No person shall have in his possession any sawed-off shotgun, sawed-off rifle, machine gun, dangerous weapon, or silencer except as provided in Code Section 16-11-124. (Ga. L. 1968, p. 983, § 2.)

JUDICIAL DECISIONS

It is not arbitrary or unreasonable to prohibit keeping and carrying of sawed-off shotguns, which are of a size such as can easily be concealed and which are adapted to and commonly used for criminal purposes. Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978).

When a convicted felon is in possession of a sawed-off shotgun, two separate and distinct crimes are being committed because a prohibited person is in possession of a prohibited weapon. One crime is not "included" in the other and the crimes do not merge. Bivins v. State, 166 Ga. App. 580, 305 S.E.2d 29 (1983); Brown v. State, 168 Ga. App. 537, 309 S.E.2d 683 (1983).

Reasonableness of detention. — Because a police officer noticed that a shotgun in defendant's vehicle had been sawed off, the officer acted reasonably in further detaining defendant to determine whether defendant had, in fact, violated O.C.G.A. § 16-11-122. Castleberry v. State, 275 Ga. App. 37, 619 S.E.2d 747 (2005).

Constructive possession shown. — Additional evidence other than a defendant's ownership of the premises demonstrated the defendant's constructive possession of a sawed-off shotgun. The shotgun was found in an office containing the defendant's personal items; entry into the office had been made more difficult by installation of a steel padlocked door, which was locked when officers arrived to conduct the search; the defendant admitted to installing surveillance equipment; and although the defendant disputed the testimony, an agent testified that the defendant admitted that the guns found inside the defendant's house and in the office were the defendant's guns. Bailey v. State, 294 Ga. App. 437, 669 S.E.2d 453 (2008).

Evidence sufficient to support conviction. — Evidence that the shotgun barrel was measured according to policy and procedure to make the determination on the length of the gun was sufficient to authorize the jury's finding that defendant was guilty, beyond a reasonable doubt, of unlawful possession of a sawed-off shotgun with a barrel less than 18 inches in length in violation of O.C.G.A. § 16-11-122. Wiley v. State, 204 Ga. App. 881, 420 S.E.2d 783, cert. denied, 204 Ga. App. 922, 420 S.E.2d 783 (1992).

Defendant's conviction for unlawful possession of a sawed-off shotgun was supported by sufficient evidence based on the state producing expert testimony at trial establishing that the firearm at issue was originally designed to be fired from the shoulder but had been modified into a pistol-like configuration. Lewis v. State, 292 Ga. App. 257, 663 S.E.2d 721 (2008), cert. denied, No. S08C1869, 2008 Ga. LEXIS 885 (Ga. 2008).

Evidence supported the defendant's conviction of possession of a sawed-off shotgun, O.C.G.A. § 16-11-122, as the state presented direct evidence of the defendant's admission that the contraband belonged to the defendant; the jury was authorized to reject the defendant's parent's claim of ownership and conclude that the defendant had sole constructive possession of the contraband. Wheeler v. State, 307 Ga. App. 585, 705 S.E.2d 686 (2011), overruled on other grounds, 322 Ga. App. 811 (2013).

Equal access instruction. — Because it appeared that equal access was the sole defense to a charge of possession of a sawed-off shotgun, the trial court should have given an instruction on that defense sua sponte once the court instructed the jury on the presumption of possession based on ownership of the premises. Bai-

ley v. State, 294 Ga. App. 437, 669 S.E.2d 453 (2008).

Cited in Barnwell v. State, 127 Ga. App. 335, 193 S.E.2d 203 (1972); Askew v. State, 141 Ga. App. 238, 233 S.E.2d 57 (1977); Gunn v. State, 163 Ga. App. 906, 296 S.E.2d 221 (1982); Johnson v. State, 209 Ga. App. 632, 434 S.E.2d 169 (1993); Daniels v. State, 222 Ga. App. 29, 473 S.E.2d 239 (1996); Adams v. State, 245 Ga. App. 607, 538 S.E.2d 508 (2000); State v. Watson, 249 Ga. App. 256, 547 S.E.2d 789 (2001); Cox v. State, 300 Ga. App. 109, 684 S.E.2d 147 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Weapons and Firearms, §§ 1, 2.

C.J.S. — 94 C.J.S., Weapons, § 24 et seq.

ALR. — Validity and construction of regulations governing carrying, possession, or use of tear gas or similar chemical weapons, 30 A.L.R.3d 1416.

Scope and effect of exception, in statute forbidding carrying of weapons, as to persons on own premises or at place of business, 57 A.L.R.3d 938.

Application of statute or regulation dealing with registration or carrying of weapons to transient nonresident, 68 A.L.R.3d 1253.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

16-11-123. Unlawful possession of firearms or weapons.

A person commits the offense of unlawful possession of firearms or weapons when he or she knowingly has in his or her possession any sawed-off shotgun, sawed-off rifle, machine gun, dangerous weapon, or silencer, and, upon conviction thereof, he or she shall be punished by imprisonment for a period of five years. (Ga. L. 1968, p. 983, § 3; Ga. L. 2000, p. 1630, § 2.)

Law reviews. — For note on 2000 amendment of this Code section, see 17 Ga. St. U.L. Rev. 97 (2000).

JUDICIAL DECISIONS

Inconsistent verdicts. — There was no need to reverse defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41 after the jury acquitted defendant of possession of a firearm in violation of O.C.G.A. § 16-11-123 as Georgia abolished the inconsistent verdict rule with respect to criminal cases. Oliver v. State, 270 Ga. App. 429, 606 S.E.2d 874 (2004).

Cited in Barnwell v. State, 127 Ga. App. 335, 193 S.E.2d 203 (1972); Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978); Simmons v. State, 246 Ga. 390, 271 S.E.2d 468 (1980); Myrick v. State, 155 Ga. App. 496, 271 S.E.2d 637 (1980); Keener v. State, 215 Ga. App. 117, 449 S.E.2d 669 (1994); Blankenship v. State, 223 Ga. App. 264, 477 S.E.2d 397 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Weapons and Firearms, § 12 et seq.

C.J.S. — 94 C.J.S., Weapons, § 26 et seq.

ALR. — Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

Construction and application of United States Supreme Court holdings in District

of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) and McDonald v. City of Chicago, Ill., 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) respecting Second Amendment right to keep and bear arms, to state or local laws regulating firearms or other weapons, 64 A.L.R.6th 131.

16-11-124. Exemptions from application of part.

This part shall not apply to:

(1) A peace officer of any duly authorized police agency of this state or of any political subdivision thereof, or a law enforcement officer of any department or agency of the United States who is regularly employed and paid by the United States, this state, or any such political subdivision, or an employee of the Department of Corrections of this state who is authorized in writing by the commissioner of corrections to transfer or possess such firearms while in the official performance of his duties;

(2) A member of the National Guard or of the armed forces of the United States to wit: the army, navy, marine corps, air force, or coast guard who, while serving therein, possesses such firearm in the line of duty;

(3) Any sawed-off shotgun, sawed-off rifle, machine gun, dangerous weapon, or silencer which has been modified or changed to the extent that it is inoperative. Examples of the requisite modification include weapons with their barrel or barrels filled with lead, hand grenades filled with sand, or other nonexplosive materials;

(4) Possession of a sawed-off shotgun, sawed-off rifle, machine gun, dangerous weapon, or silencer by a person who is authorized to possess the same because he has registered the sawed-off shotgun, sawed-off rifle, machine gun, dangerous weapon, or silencer in accordance with the dictates of the National Firearms Act, 68A Stat. 725 (26 U.S.C. Sections 5841-5862); and

(5) A security officer employed by a federally licensed nuclear power facility or a licensee of such facility, including a contract security officer, who is trained and qualified under a security plan approved by the United States Nuclear Regulatory Commission or other federal agency authorized to regulate nuclear facility security; provided, however, that this exemption shall apply only while such security officer is acting in connection with his or her official duties on the premises of such nuclear power facility or on properties outside the facility property pursuant to a written agreement entered into with the local law enforcement agency having jurisdiction over the facility. The exemption under this paragraph does not include the possession of silencers. (Ga. L. 1968, p. 983, § 5; Ga. L. 1985, p. 283, § 1; Ga. L. 2006, p. 812, § 1/SB 532.)

JUDICIAL DECISIONS

Inoperative weapon. — Shotgun was best evidence as to whether the shotgun was operative or inoperative. Myrick v. State, 155 Ga. App. 496, 271 S.E.2d 637 (1980); State v. Watson, 249 Ga. App. 256, 547 S.E.2d 789 (2001).

Cited in Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978); Simmons v. State, 246 Ga. 390, 271 S.E.2d 468 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Weapons and Firearms, § 22.

C.J.S. — 94 C.J.S., Weapons, § 56.

ALR. — Scope and effect of exception, in statute forbidding carrying of weapons, as to persons on own premises or at place of business, 57 A.L.R.3d 938.

Validity, construction, and application of provisions of National Firearms Act (26 USCS § 5845(f) and Omnibus Crime Control and Safe Streets Act (18 USCS § 921(A)(4)) defining "destructive device", 126 A.L.R. Fed. 597.

16-11-125. Burden of proof as to exemptions.

In any complaint, accusation, or indictment and in any action or proceeding brought for the enforcement of this part it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this part, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant. (Ga. L. 1968, p. 983, § 6.)

JUDICIAL DECISIONS

Constitutionality. — Provision in Ga. L. 1968, p. 983, § 6 (see now O.C.G.A. § 16-11-125) that "burden of proof of any exception, excuse, proviso or exemption shall be upon the defendant," does not provide whether this burden of proof is one of producing evidence or one of persuasion (and if one of persuasion the degree thereof), and itself is not unconstitutional. Simmons v. State, 246 Ga. 390, 271 S.E.2d 468 (1980), cert. denied, 449 U.S. 1125, 101 S. Ct. 942, 67 L. Ed. 2d 111 (1981).

Cited in Carson v. State, 241 Ga. 622, 247 S.E.2d 68 (1978); Myrick v. State, 155 Ga. App. 496, 271 S.E.2d 637 (1980).

RESEARCH REFERENCES

ALR. — Instruction applying rule of reasonable doubt specifically to particular matter or defense as curing instruction placing burden of proof upon defendant in that regard, 120 A.L.R. 591.

Burden of averment and proof as to exception in criminal statute on which the prosecution is based, 153 A.L.R. 1218.

PART 3

CARRYING AND POSSESSION OF FIREARMS

Cross references. — Interstate purchases of rifles and shotguns, § 10-1-100 et seq. Legal weapons for hunting wildlife generally, § 27-3-4.

Law reviews. — For article, "Misdemeanor Sentencing in Georgia," see 7 Ga. St. B.J. 8 (2001). For article, "Georgia's 'Bring Your Gun to Work' Law May Not Have the Firepower to Trouble Georgia Employers After All," see 14 (No. 7) Ga. St. B.J. 12 (2009).

For note on 2000 amendments of O.C.G.A. §§ 16-11-126, 16-11-127.1, 16-11-131, and 16-11-132, see 17 Ga. St. U.L. Rev. 97 (2000).

JUDICIAL DECISIONS

Evidence insufficient for adjudication. — State failed to present sufficient evidence to demonstrate that the firearm that fell from the juvenile's pocket met the requirements of the firearm offenses of possession of a handgun by a person under the age of 18, and possession and carrying of a handgun or a long gun by persons prohibited by law from such possession because the state never introduced into evidence either photographs of the firearm recovered during the July 18 incident or the firearm itself; and the officer referred to it only as a firearm, weapon, or gun, and never identified the recovered weapon as a handgun or described the length of its barrel; thus, the appellate court reversed the juvenile's adjudications of delinquency as to those offenses. In the Interest of A. A., 334 Ga. App. 37, 778 S.E.2d 28 (2015).

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Privileges under this part extend only to individuals demonstrating domiciliary intent. — General Assembly did not intend to issue handgun licenses to every individual who passes through this state for a short period of time, but rather has extended this privilege to those individuals in this state who have demonstrated domiciliary intent and are known to be responsible citizens in their respective county. 1976 Op. Att'y Gen. No. U76-71.

Trooper cadets are subject to licensing requirements. — Since trooper cadets are not peace officers within meaning of former Code 1933, § 26-2407 (see O.C.G.A. § 16-11-130), relating to exemptions from provisions regulating carrying of weapons, trooper cadets are subject to licensing requirements. 1974 Op. Att'y Gen. No. 74-135.

Peace officer candidates are subject to the mandatory licensing requirements of O.C.G.A. §§ 16-11-126 through 16-11-129. 1996 Op. Att'y Gen. No. 96-22.

License fee is not waived for American diplomats or consuls. — In absence of any exemptions appearing in either a treaty between the United States and another government, the Georgia statute, or existence of a present arrangement entitling American diplomats and consuls to such an exemption, payment of license fee is not to be waived. 1976 Op. Att'y Gen. No. U76-69.

RESEARCH REFERENCES

ALR. — Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81

A.L.R.4th 745.

16-11-125.1. Definitions.

As used in this part, the term:

(1) "Handgun" means a firearm of any description, loaded or unloaded, from which any shot, bullet, or other missile can be discharged by an action of an explosive where the length of the barrel, not including any revolving, detachable, or magazine breech, does not exceed 12 inches; provided, however, that the term "handgun" shall not include a gun which discharges a single shot of 0.46 centimeter or less in diameter.

(2) "Knife" means a cutting instrument designed for the purpose of offense and defense consisting of a blade that is greater than 12 inches in length which is fastened to a handle.

(3) "License holder" means a person who holds a valid weapons carry license.

(4) "Long gun" means a firearm with a barrel length of at least 18 inches and overall length of at least 26 inches designed or made and intended to be fired from the shoulder and designed or made to use the energy of the explosive in a fixed:

(A) Shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger or from which any shot, bullet, or other missile can be discharged; or

(B) Metallic cartridge to fire only a single projectile through a rifle bore for each single pull of the trigger;

provided, however, that the term "long gun" shall not include a gun which discharges a single shot of 0.46 centimeter or less in diameter.

(5) "Weapon" means a knife or handgun.

(6) "Weapons carry license" or "license" means a license issued pursuant to Code Section 16-11-129. (Code 1981, § 16-11-125.1, enacted by Ga. L. 2010, p. 963, § 1-1/SB 308; Ga. L. 2017, p. 555, § 3/HB 292; Ga. L. 2018, p. 1112, § 16/SB 365.)

The 2017 amendment, effective May 8, 2017, substituted "12 inches" for "five inches" in paragraph (2).

The 2018 amendment, effective May 8, 2018, part of an Act to revise, modernize, and correct the Code, substituted "0.46 centimeter or less" for ".46 centimeters or less" near the end of paragraph (1) and in the undesignated language at the end of subparagraph (4)(B).

Editor's notes. — Ga. L. 2010, p. 963, § 3-1/SB 308, not codified by the General Assembly, provides, in part, that this Code section shall apply to all offenses commit-

ted on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Ga. L. 2017, p. 555, § 1/HB 292, not codified by the General Assembly, provides that: "The General Assembly finds that:

"(1) The ownership of firearms is a clear and explicit right protected by the United States Constitution and the Constitution of this state;

"(2) Access to financial services provides for the functioning of a firearms industry and, thus, the constitutionally protected right of firearm ownership; and

"(3) The provisions of this Act are intended to implement the constitutional protections provided for under the law."

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011). For article on the veto of proposed legislation allowing the legal possession of a concealed firearm for individuals with a Georgia Weapons Carry License on property owned or leased by a technical school, college, or university, see 33 Ga. St. U.L. Rev. 21 (2016).

JUDICIAL DECISIONS

Evidence insufficient to prove weapon was handgun or long gun. — After the motion to suppress hearing was converted to an adjudicatory hearing, the state retained the burden of proof to present evidence to support each element of the weapons possession offenses of possession of a handgun by a person under the age of 18, and possession and carrying of a handgun or a long gun by persons prohibited by law from such possession, but the state failed to carry the state's burden of proof to establish the elements of the weapons possession offenses by failing to show that the weapon met the definition of a handgun or long gun; furthermore, the state's failure to raise an objection to the procedure and the state's acquiesce to it did not constitute induced error or relieve the state of the state's burden of proof. In the Interest of A. A., 334 Ga. App. 37, 778 S.E.2d 28 (2015).

16-11-126. Having or carrying handguns, long guns, or other weapons; license requirement; exceptions for homes, motor vehicles, private property, and other locations and conditions.

(a) Any person who is not prohibited by law from possessing a handgun or long gun may have or carry on his or her person a weapon or long gun on his or her property or inside his or her home, motor vehicle, or place of business without a valid weapons carry license.

(b) Any person who is not prohibited by law from possessing a handgun or long gun may have or carry on his or her person a long gun without a valid weapons carry license, provided that if the long gun is loaded, it shall only be carried in an open and fully exposed manner.

(c) Any person who is not prohibited by law from possessing a handgun or long gun may have or carry any handgun provided that it is enclosed in a case and unloaded.

(d) Any person who is not prohibited by law from possessing a handgun or long gun who is eligible for a weapons carry license may transport a handgun or long gun in any private passenger motor vehicle; provided, however, that private property owners or persons in

legal control of private property through a lease, rental agreement, licensing agreement, contract, or any other agreement to control access to such private property shall have the right to exclude or eject a person who is in possession of a weapon or long gun on their private property in accordance with paragraph (3) of subsection (b) of Code Section 16-7-21, except as provided in Code Section 16-11-135.

(e)(1)(A) Any person licensed to carry a weapon in any other state whose laws recognize and give effect to a license issued pursuant to this part shall be authorized to carry a weapon in this state, but only while the licensee is not a resident of this state; provided, however, that:

(i) Such licensee licensed to carry a weapon in any other state shall carry the weapon in compliance with the laws of this state; and

(ii) No other state shall be required to recognize and give effect to a license issued pursuant to this part that is held by a person who is younger than 21 years of age.

(B) The Attorney General shall create and maintain on the Department of Law's website a list of states whose laws recognize and give effect to a license issued pursuant to this part.

(2) Any person who is not a weapons carry license holder in this state and who is licensed to carry a weapon in any other state whose laws recognize and give effect to a license issued pursuant to this part shall be authorized to carry a weapon in this state for 90 days after he or she becomes a resident of this state; provided, however, that such person shall carry the weapon in compliance with the laws of this state, shall as soon as practicable submit a weapons carry license application as provided for under Code Section 16-11-129, and shall remain licensed in such other state for the duration of time that he or she is a resident of this state but not a weapons carry license holder in this state.

(f)(1) Any person with a valid hunting or fishing license on his or her person, or any person not required by law to have a hunting or fishing license, who is engaged in legal hunting, fishing, or sport shooting when the person has the permission of the owner of the land on which the activities are being conducted may have or carry on his or her person a weapon or long gun without a valid weapons carry license while hunting, fishing, or engaging in sport shooting.

(2) Any person with a valid hunting or fishing license on his or her person, or any person not required by law to have a hunting or fishing license, who is otherwise engaged in legal hunting, fishing, or sport shooting on recreational or wildlife management areas owned by this

state may have or carry on his or her person a knife without a valid weapons carry license while engaging in such hunting, fishing, or sport shooting.

(g) Notwithstanding Code Sections 12-3-10, 27-3-1.1, 27-3-6, and 16-12-122 through 16-12-127, any person with a valid weapons carry license may carry a weapon in all parks, historic sites, or recreational areas, as such term is defined in Code Section 12-3-10, including all publicly owned buildings located in such parks, historic sites, and recreational areas, in wildlife management areas, and on public transportation; provided, however, that a person shall not carry a handgun into a place where it is prohibited by federal law.

(h)(1) No person shall carry a weapon without a valid weapons carry license unless he or she meets one of the exceptions to having such license as provided in subsections (a) through (g) of this Code section.

(2) A person commits the offense of carrying a weapon without a license when he or she violates the provisions of paragraph (1) of this subsection.

(i) Upon conviction of the offense of carrying a weapon without a valid weapons carry license, a person shall be punished as follows:

(1) For the first offense, he or she shall be guilty of a misdemeanor; and

(2) For the second offense within five years, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained, and for any subsequent offense, he or she shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than two years and not more than five years.

(j) Nothing in this Code section shall in any way operate or be construed to affect, repeal, or limit the exemptions provided for under Code Section 16-11-130. (Laws 1837, Cobb's 1851 Digest, pp. 848, 849; Ga. L. 1851-52, p. 269, §§ 1-3; Code 1863, § 4413; Ga. L. 1865-66, p. 233, §§ 1, 2; Code 1868, § 4454; Code 1873, § 4527; Ga. L. 1882-83, p. 48, § 1; Code 1882, § 4527; Ga. L. 1898, p. 60, § 1; Penal Code 1895, § 341; Penal Code 1910, § 347; Code 1933, § 26-5101; Code 1933, § 26-2901, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 1430, § 1; Ga. L. 1982, p. 3, § 16; Ga. L. 1992, p. 6, § 16; Ga. L. 1996, p. 108, § 1; Ga. L. 1998, p. 1153, § 1; Ga. L. 2000, p. 1630, § 3; Ga. L. 2007, p. 47, § 16/SB 103; Ga. L. 2008, p. 533, § 3/SB 366; Ga. L. 2008, p. 1199, § 3/HB 89; Ga. L. 2009, p. 8, § 16/SB 46; Ga. L. 2010, p. 963, § 1-2/SB 308; Ga. L. 2014, p. 599, § 1-4/HB 60; Ga. L. 2015, p. 805, § 2/HB 492; Ga. L. 2017, p. 8, § 1/HB 406; Ga. L. 2017, p. 555, § 4/HB 292.)

The 2017 amendments. — The first 2017 amendment, effective April 5, 2017, rewrote subsection (e); and added subsection (e.1). The second 2017 amendment, effective May 8, 2017, rewrote subsection (e); designated the existing provisions of subsection (f) as paragraph (f)(1); substituted "weapon" for "handgun" near the end of paragraph (f)(1) and added paragraph (f)(2).

Cross references. — Exemption from section for private detectives and private security agents who hold firearms permits issued by Georgia Board of Private Detective and Security Agencies, § 43-38-10.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2010, "a" was inserted preceding "weapon" in the introductory language of subsection (i).

Pursuant to Code Section 28-9-5, in 2017, the addition of subsection (e.1) of this Code section by Ga. L. 2017, p. 8, § 1/HB 406, was treated as impliedly repealed and superseded by Ga. L. 2017, p. 555, § 4/HB 292, due to irreconcilable conflict.

Editor's notes. — Ga. L. 2008, p. 1199, § 1/HB 89, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Business Security and Employee Privacy Act.'"

Ga. L. 2010, p. 963, § 3-1/SB 308, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Ga. L. 2017, p. 555, § 1/HB 292, not codified by the General Assembly, provides that: "The General Assembly finds that:

"(1) The ownership of firearms is a clear and explicit right protected by the United States Constitution and the Constitution of this state;

"(2) Access to financial services provides for the functioning of a firearms industry and, thus, the constitutionally protected right of firearm ownership; and

"(3) The provisions of this Act are intended to implement the constitutional protections provided for under the law."

Ga. L. 2017, p. 8, § 1/HB 406, which amended this Code section, purported to amend subsection (e), but also added subsection (e.1).

Law reviews. — For article on recidivism and convictions based on nolo contendere pleas, see 13 Ga. L. Rev. 723 (1979). For article, "No Second Chances: Immigration Consequences of Criminal Charges," see 13 Ga. St. B.J. 26 (2007). For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011). For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

For review of 1996 offenses against public order and safety legislation, see 13 Ga. St. U.L. Rev. 123 (1996).

JUDICIAL DECISIONS

Analysis

General Consideration
Prima Facie Case

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 26-2903 are included in the annotations for this Code section.

Constitutionality. — Wording of O.C.G.A. § 16-11-126, particularly defining as a concealed weapon "any … knife designed for the purpose of offense and defense," is not facially unconstitutional, and, since there was no evidence in the record of what kind of knife defendant had in defendant's possession, the statute would not be declared void for vagueness. Simmons v. State, 262 Ga. 674, 424 S.E.2d 274 (1993).

Defendant's failure to point to a specific

General Consideration (Cont'd)

provision of the Constitution that O.C.G.A. § 16-11-126(d) allegedly violated was not fatal to defendant's claim that § 16-11-126(d) was unconstitutional due to vagueness, and the trial court erred by finding that defendant had not properly raised the issue of whether § 16-11-126(d) was constitutional. Lindsey v. State, 259 Ga. App. 389, 577 S.E.2d 78 (2003).

Constitutionality of Ga. L. 1910, p. 134, § 1. — See Strickland v. State, 137 Ga. 1, 72 S.E. 260 (1911); Strickland v. State, 9 Ga. App. 855, 72 S.E. 436 (1911); Nero v. State, 10 Ga. App. 23, 72 S.E. 510 (1911); James v. State, 10 Ga. App. 13, 72 S.E. 600, 36 L.R.A. (n.s.) 115, 1913B Ann. Cas. 323 (1911); Armond v. State, 18 Ga. App. 140, 88 S.E. 990 (1916) (decided under former Code 1933, § 26-2903).

Purpose of Ga. L. 1910, p. 134 was to prevent evil of carrying pistols on person while going from place to place outside of house or place of business. Amos v. State, 13 Ga. App. 140, 78 S.E. 866 (1913) (decided under former Code 1933, § 26-2903).

Ga. L. 1910, p. 134 should receive a reasonable construction in accord with purpose of its enactment. Jackson v. State, 12 Ga. App. 427, 77 S.E. 371 (1913); Cosper v. State, 13 Ga. App. 301, 79 S.E. 94 (1913); Rogers v. State, 19 Ga. App. 751, 92 S.E. 230 (1917); Whitehead v. State, 46 Ga. App. 42, 166 S.E. 448 (1932) (decided under former Code 1933, § 26-2903).

O.C.G.A. §§ 16-11-126(b)(2) and 16-11-128(b)(2) (now repealed) are recidivist statutes. In order to trigger their aggravation of punishment provisions it is necessary to show prior convictions. It is not sufficient merely to show the commission of previous offenses, the existence of previous charges, or the occurrence of previous events. Favors v. State, 182 Ga. App. 179, 355 S.E.2d 109 (1987).

No merger. — An offense under O.C.G.A. § 16-11-126 does not merge with an offense under O.C.G.A. § 16-11-127.1 because neither crime is fully inclusive of the other. Sinkfield v. State, 266 Ga. 726, 470 S.E.2d 649 (1996).

Burden of proof. — Defendant charged with carrying a concealed weapon has the burden of proving that defendant had a valid permit authorizing the defendant to carry a handgun in a motor vehicle. London v. State, 235 Ga. App. 30, 508 S.E.2d 247 (1998).

Carrying a pistol without a license and carrying a concealed weapon are separate offenses, although growing out of same transaction. Asberry v. State, 142 Ga. App. 51, 234 S.E.2d 847 (1977); Jordan v. State, 166 Ga. App. 417, 304 S.E.2d 522 (1983).

Defendant not entitled to immunity as defendant possessed weapon unlawfully. — Trial court did not err in denying the defendant's pre-trial motion for immunity because, in 2011, immunity was not available if in the use of deadly force, the defendant utilized a weapon the carrying or possession of which was unlawful by the defendant under Part 2 or 3 of Article 4 of Chapter 11 of Title 16 of the Georgia Code; while the gun used to kill the victim was lawfully registered to the defendant, the defendant had never obtained a weapons carry license, and carrying a weapon was prohibited outside the defendant's own property, motor vehicle, or place of business without a valid license. Amos v. State, 298 Ga. 804, 783 S.E.2d 900 (2016).

When "carrying" occurs when in custody of officer after arrest, former Penal Code 1910, § 347 (see now O.C.G.A. § 16-11-126) was applicable. James v. State, 153 Ga. 556, 112 S.E. 899 (1922).

Defendant not entitled to immunity as defendant possessed weapon unlawfully. — Trial counsel was not ineffective for failing to assert a challenge to the weapons carry license statute insofar as it was applied to deprive the defendant of the defendant's statutory right to immunity because neither the U.S. Supreme Court nor the Georgia Supreme Court had yet determined that requiring a license to carry a concealed firearm outside the home for self-defense was an impermissible infringement on a citizen's Second Amendment rights; and, to the extent the defendant asserted that Second Amendment jurisprudence was headed in that

direction, there was no requirement for trial counsel to prognosticate on future law in order to render effective representation. Amos v. State, 298 Ga. 804, 783 S.E.2d 900 (2016).

Carrying weapon without license is not included within crime of aggravated assault with deadly weapon. Thomas v. State, 128 Ga. App. 538, 197 S.E.2d 452 (1973) (decided under former Code 1933, § 26-2903).

Contents of indictment. — Violation of Ga. L. 1910, p. 134 and of section prohibiting carrying of concealed weapons, former Penal Code 1910, § 347 (see O.C.G.A. § 16-11-126), may be charged in same indictment. Butler v. State, 18 Ga. App. 201, 89 S.E. 178 (1916) (decided under former Code 1933, § 26-2903).

Charge did not omit nexus between violence and gang activity. — With regard to the defendant's convictions for aggravated assault and gang-related crimes, the trial court did not commit plain error with regard to the court's jury instructions because the trial court correctly stated the law by using the statutory language in the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-4(a), in the court's charge to the jury, so the charge did not omit a nexus between the violence, and it was not possible for the jury to convict the defendant without finding that nexus. Skinner v. State, 318 Ga. App. 217, 733 S.E.2d 506 (2012).

Charge on felony involuntary manslaughter in a prosecution for voluntary manslaughter was not justified by defendant's carrying of a concealed weapon; the concealment, while unlawful, did not cause the death, defendant's firing of the gun did so. Carlton v. State, 224 Ga. App. 315, 480 S.E.2d 336 (1997).

It is immaterial that weapon is broken or useless. Williams v. State, 61 Ga. 417, 34 Am. R. 102 (1878); Crawford v. State, 94 Ga. 772, 21 S.E. 992 (1894).

Purpose for which weapon is carried is entirely immaterial. — If carried about the person for any purpose, it must be fully exposed to view. Edwards v. State, 126 Ga. 89, 54 S.E. 809 (1906).

Carrying weapon for repair. — That weapon is being carried to a shop for repairs does not negate requirement of carrying in full view. Crawford v. State, 94 Ga. 772, 21 S.E. 992 (1894).

When being delivered after having been repaired, weapon must be in full view. Goldsmith v. State, 99 Ga. 253, 25 S.E. 624 (1896).

Pistol visible to some but not others is not "fully exposed to view". — Carrying a pistol in pocket of defendant's pants, handle of pistol being visible to some witnesses through split in defendant's shirt but not seen by others, does not meet requirement that weapon be carried "in an open manner and fully exposed to view." Marshall v. State, 129 Ga. App. 733, 200 S.E.2d 902 (1973).

When no portion of the weapon is directly visible, it cannot be said that the weapon is being carried in an open manner and fully exposed to view, and this is true even though the arresting officer recognizes the bulge as a weapon. Gainer v. State, 175 Ga. App. 759, 334 S.E.2d 385 (1985).

Open and exposed requirement not met. — It was not reversible error to fail to charge the remaining "open manner and fully exposed to view" language of O.C.G.A. § 16-11-126 where neither the circumstance admitted by the defendant at trial, that normally approximately an inch of the gun handle might have been visible below defendant's jacket line, nor the fact that the officer was able to initially view the weapon through an opening in defendant's jacket, met the "open" and "exposed" requirements of the statute. Anderson v. State, 203 Ga. App. 118, 416 S.E.2d 309, cert. denied, 203 Ga. App. 905, 416 S.E.2d 309 (1992).

While O.C.G.A. § 16-11-126(d) permits transporting a loaded firearm in any private passenger motor vehicle in an open manner and fully exposed to view or in the glove compartment, console, or similar compartment of the vehicle, a gun half-hidden in the seat is not "fully exposed" and therefore constitutes an illegal concealed weapon. Ross v. State, 255 Ga. App. 462, 566 S.E.2d 47 (2002).

Acquiring pistol in emergency for self-defense does not violate section. — When one suddenly, upon an emergency, acquires manual possession of a

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pistol for purpose of defending oneself, one's family, or one's property, one is not guilty of carrying a pistol without a license in violation of this section. Harris v. State, 15 Ga. App. 315, 85 S.E. 813 (1914); Caldwell v. State, 58 Ga. App. 408, 198 S.E. 793 (1938); Pickett v. State, 123 Ga. App. 1, 179 S.E.2d 303 (1970) (decided under former Code 1933, § 26-2903).

One cannot carry a pistol about one's person for meeting any emergency that may arise, or an emergency which one unlawfully intends to create by one's own act, without first procuring a license, and if such carrying is done outside of one's home or place of business, one is guilty of a violation of former Code 1933, § 26-5103 (now repealed). Caldwell v. State, 58 Ga. App. 408, 198 S.E. 793 (1938) (decided under former Code 1933, § 26-2903).

Minor under 18 years cannot carry pistol either with or without license. Glenn v. State, 10 Ga. App. 128, 72 S.E. 927 (1911) (decided under former Code 1933, § 26-2903).

Privilege of carrying weapon not restricted to county issuing license. — When license was purchased in one county while accused was in that county and pistol was carried openly in another county, there is no violation of Ga. L. 1910, p. 134. Rogers v. State, 19 Ga. App. 751, 92 S.E. 230 (1917) (decided under former Code 1933, § 26-2903).

Carrying concealed weapon in another's residence. — Defendant's carrying of a concealed weapon into another's residence was unlawful. Snell v. State, 306 Ga. App. 651, 703 S.E.2d 93 (2010).

When no part of body touches pistol, it is not "about" one's person. Hayes v. State, 28 Ga. App. 67, 110 S.E. 320 (1922) (decided under former Code 1933, § 26-2903).

Ownership of pistol is immaterial except to illustrate guilt or innocence of accused. Gates v. State, 12 Ga. App. 706, 78 S.E. 270 (1913) (decided under former Code 1933, § 26-2903).

Parking area adjacent to rental property owned by defendant was not defendant's "place of business" for purposes of O.C.G.A. § 16-11-126. Ely v. State, 222 Ga. App. 651, 475 S.E.2d 647 (1996).

Taxi driver carrying .22 caliber pistol in back pocket without permit violated section. — Conviction under O.C.G.A. § 16-11-126 was warranted after the defendant was carrying a .22 caliber pistol in the defendant's back pocket without a permit, despite the fact that the defendant was driving a taxi which constituted defendant's place of business. Poole v. State, 159 Ga. App. 792, 285 S.E.2d 205 (1981).

Premises rented to tenant are not "place of business" of landlord. Reagon v. State, 16 Ga. App. 369, 85 S.E. 353 (1915) (decided under former Code 1933, § 26-2903).

Merely seeing defendant with pistol in hand. — Mere showing that upon different occasions defendant was seen with pistol in defendant's hand (these being occasions when defendant was in act of robbing another) does not authorize finding that defendant carried concealed weapon. McHenry v. State, 58 Ga. App. 410, 198 S.E. 818 (1938).

Farm laborer is exempt while carrying pistol upon farm where employed. Miller v. State, 12 Ga. App. 479, 77 S.E. 653 (1913) (decided under former Code 1933, § 26-2903).

One may carry a pistol home from place of purchase without first obtaining a license; so also as to pistol found in road which finder carries home for safekeeping until called for by owner. Cosper v. State, 13 Ga. App. 301, 79 S.E. 94 (1913) (decided under former Code 1933, § 26-2903).

Possession of weapon for purpose of examining it with view of buying. — Former Ga. L. 1910, p. 134, § 1 did not apply when person, while examining weapon with view toward purchasing the weapon, was called away about 20 feet for a conversation. Jackson v. State, 12 Ga. App. 427, 77 S.E. 371 (1913) (decided under former Code 1933, § 26-2903).

Carrying pistol to return it to owner who left it at defendant's home requires license. Cheney v. State, 10 Ga. App. 451, 73 S.E. 617 (1912) (decided under former Code 1933, § 26-2903).

Carrying pistol to store, without license, for purpose of pawning the pistol violated Ga. L. 1910, p. 134, § 1. Usry v. State, 17 Ga. App. 268, 86 S.E. 417 (1915) (decided under former Code 1933, § 26-2903).

Carrying pistol in vehicle of another. — Fact that the defendant was carrying the pistol in a motor vehicle which was not defendant's own did not negate the need for a license. Hubbard v. State, 210 Ga. App. 141, 435 S.E.2d 709 (1993) (decided under former Code 1933, § 26-2903).

Carrying pistol on road violates Ga. L. 1910, p. 134 (now repealed) even though the defendant owns land on both sides of the road. Foy v. State, 33 Ga. App. 676, 127 S.E. 619 (1925) (decided under former Code 1933, § 26-2903).

Gun license applicant's retention of weapon. — Given a gun license applicant's criminal history and the fact that the applicant retained the right to possess a handgun in the applicant's own home, vehicle, or business under O.C.G.A. § 16-11-126, intermediate scrutiny was applied to the applicant's claim that O.C.G.A. § 16-11-129, regulating public carrying, was unconstitutional as applied to the applicant. Hertz v. Bennett, 294 Ga. 62, 751 S.E.2d 90 (2013).

Weapon found in bag next to defendant is sufficient evidence of carrying a concealed weapon on or about defendant's person to justify conviction. Anderson v. State, 221 Ga. App. 176, 470 S.E.2d 778 (1996).

Knife in sock was sufficient evidence. — Knife in a defendant's sock while the defendant was in a holding cell was sufficient to support carrying a concealed weapon under O.C.G.A. § 16-11-126(a). McCarty v. State, 269 Ga. App. 299, 603 S.E.2d 666 (2004).

Scalpel as concealed weapon. — Whether a "scalpel" met the definition of a concealed weapon was a question for the finder of fact. Dorsey v. State, 212 Ga. App. 830, 442 S.E.2d 922 (1994).

Letter opener as concealed weapon. — Whether a sharp and knife-like letter opener met the definition of a weapon under O.C.G.A. § 16-11-126 was a jury question. Bryant v. State, 286 Ga. App. 493, 649 S.E.2d 597 (2007).

Weapon not "fully exposed." — Gun protruding from under the driver's seat of a vehicle was not "fully exposed" within the meaning of O.C.G.A. § 16-11-126; accordingly, the evidence was sufficient for conviction of a violation of that section. Parrish v. State, 228 Ga. App. 177, 491 S.E.2d 433 (1997).

Evidence of bad character. — Gun ownership, and carrying such a weapon, do not by themselves impute bad character. Gomillion v. State, 236 Ga. App. 14, 512 S.E.2d 640 (1999); Henderson v. State, 272 Ga. 621, 532 S.E.2d 398 (2000).

Counsel ineffective for failing to move to suppress a weapon found after a warrantless arrest. — Defendant's counsel's performance was defective for failing to file a motion to suppress a handgun found by police in the defendant's rear waistband because the defendant was in handcuffs, face down on the floor, and could have reasonably believed that the defendant was under arrest. The arrest was made without a warrant or probable cause. Suluki v. State, 302 Ga. App. 735, 691 S.E.2d 626 (2010).

It is for jury to determine whether knife exhibited meets definition laid down in former Code 1933, § 26-5101 (see now O.C.G.A. § 16-11-126). Oliver v. State, 106 Ga. App. 493, 127 S.E.2d 325 (1962).

Refusal to charge O.C.G.A. § 16-11-126(c) not erroneous. — See Ledesma v. State, 251 Ga. 487, 306 S.E.2d 629 (1983), cert. denied, 464 U.S. 1069, 104 S. Ct. 975, 79 L. Ed. 2d 213 (1984); Forehand v. State, 188 Ga. App. 527, 373 S.E.2d 382 (1988).

Fingerprint card improperly admitted. — Trial court erred in admitting into evidence over objection a fingerprint card taken following a felony arrest of defendant for violation of, inter alia, O.C.G.A. § 16-11-126, since the violation of that section was an other crime not shown to be connected with the one on trial, served no useful or relevant purpose, placed defendant's character in evidence, and was prejudicial to defendant. Strawder v. State, 207 Ga. App. 365, 427 S.E.2d 792 (1993).

Indictment need not allege that weapon was manufactured and sold

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for purpose of offense and defense. Nixon v. State, 121 Ga. 144, 48 S.E. 966 (1904).

Sentence based on defendant's plea of nolo contendere constituted a conviction for carrying a concealed weapon within the meaning of O.C.G.A. § 17-5-51, requiring forfeiture of a weapon used in the commission of a crime. State v. Pitts, 199 Ga. App. 493, 405 S.E.2d 115 (1991).

Sentence of 111 years proper. — When the defendant was convicted of aggravated assault, burglary, theft by taking, and carrying a concealed weapon, the trial court properly imposed a 111-year sentence of imprisonment, which was within the statutory limits and which was the maximum possible. The presumption of vindictiveness was absent when a trial court imposed a greater penalty after trial than the court would have after a guilty plea; furthermore, the trial court explained that the court imposed the sentence because the defendant's actions were life-threatening, because the jury convicted the defendant of entering the dwelling with intent to commit murder, because the defendant's actions against one victim, the defendant's parent, had escalated from the defendant's previous misdemeanor crimes against the parent, and because the defendant displayed no remorse. Townes v. State, 298 Ga. App. 185, 679 S.E.2d 772 (2009).

Evidence sufficient for conviction. — See Jackson v. State, 186 Ga. App. 847, 368 S.E.2d 771, cert. denied, 186 Ga. App. 918, 368 S.E.2d 771 (1988); In re A.B., 193 Ga. App. 651, 388 S.E.2d 750 (1989).

Evidence was sufficient to support conviction for carrying a concealed weapon because the trial court, in a bench trial, credited an officer's testimony that the gun concealed in defendant's vehicle was loaded. Wright v. State, 272 Ga. App. 423, 612 S.E.2d 576 (2005).

Convictions of armed robbery, possession of a firearm during a crime, and carrying a concealed weapon were supported by sufficient evidence including guns, money, and a knife stolen from a robbery victim found in a car in which the defendant was a passenger, the fact that the defendant, when arrested, was wearing a sweatshirt identified by the victims as the sweatshirt worn by one of the perpetrators, and the testimony of another of the perpetrators, who stated that the defendant was one of the participants in the robbery. Callahan v. State, 280 Ga. App. 323, 634 S.E.2d 102 (2006).

Because sufficient evidence was presented consisting of the victim's identification of the defendant as the perpetrator of a burglary, who threatened the victim with a sharp, knife-like letter opener, forcing the victim into a closet, and stealing the victim's camera upon fleeing, sufficient evidence supported the defendant's burglary, armed robbery, aggravated assault, and kidnapping convictions; further, when the letter opener was found in a search incident to the defendant's arrest, and the defendant signed a false name on a waiver of Miranda rights form, sufficient evidence supported convictions for carrying a concealed weapon and forgery. Bryant v. State, 286 Ga. App. 493, 649 S.E.2d 597 (2007).

Adjudication of delinquency for giving a false name to a law enforcement officer, carrying a concealed weapon, and possession of a pistol by a person under the age of 18 was proper when juvenile defendant who was driving a relative's vehicle had free run of the relative's property while the relative was deployed overseas; also, defendant was in the vehicle the morning of and night before a traffic stop, defendant directed the other juvenile where to drive, neither gun was registered to the relative, defendant seemed to know about the guns' existence, and defendant gave a deputy false information about the defendant's identity. In the Interest of C.M., 290 Ga. App. 788, 661 S.E.2d 598 (2008).

Under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the victim's testimony that the defendant pulled a knife out of the defendant's pocket with the defendant's right hand and lunged at the victim was sufficient in itself to support convictions for aggravated assault and carrying a concealed weapon under O.C.G.A. §§ 16-5-21 and 16-11-126. Testimony that the defendant had arthritis in the right hand at most created a conflict in

the evidence as there was also testimony that the defendant, a carpenter, used both hands in the defendant's trade. Carder v. State, 291 Ga. App. 265, 661 S.E.2d 632 (2008).

With regard to a defendant's convictions for possession of methamphetamine with intent to distribute, possession of a firearm during the commission of a drug offense, and carrying a concealed weapon, the trial court properly denied the defendant's motion to suppress the items seized from the defendant's vehicle and the defendant's person after a traffic stop as the defendant's failure to wear a seatbelt and to have insurance on the vehicle justified the traffic stop. Thereafter, after being released from the traffic stop and being asked to come back, the defendant consented to the search of the vehicle and of the defendant's person, which led to the seizure of the contraband. Hughes v. State, 293 Ga. App. 404, 667 S.E.2d 163 (2008).

Evidence was sufficient to support the defendant's conviction for carrying a concealed weapon because when the defendant was searched upon the defendant's arrest the defendant was found to be carrying a knife. Johnson v. State, 302 Ga. App. 318, 690 S.E.2d 683 (2010).

Defendant's convictions for kidnapping, hijacking a motor vehicle, armed robbery, possession of a firearm during the commission of a felony, carrying a concealed weapon, and possession of a weapon on school property were authorized because pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the victim's testimony alone established the essential elements of the offenses. Lester v. State, 309 Ga. App. 1, 710 S.E.2d 161 (2011).

Jury was authorized to find the defendant guilty of voluntary manslaughter, O.C.G.A. § 16-5-2(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), carrying a concealed weapon, O.C.G.A. § 16-11-126(b), and possession of a firearm by a convicted felon, O.C.G.A. § 16-11-131(b), because during an argument with the victims, the defendant shot the victims and threatened to kill the victims. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Evidence insufficient to prove weapon was handgun or long gun. — After the motion to suppress hearing was converted to an adjudicatory hearing, the state retained the burden of proof to present evidence to support each element of the weapons possession offenses of possession of a handgun by a person under the age of 18, and possession and carrying of a handgun or a long gun by persons prohibited by law from such possession, but the state failed to carry the state's burden of proof to establish the elements of the weapons possession offenses by failing to show that the weapon met the definition of a handgun or long gun; furthermore, the state's failure to raise an objection to the procedure and the state's acquiesce to it did not constitute induced error or relieve the state of the state's burden of proof. In the Interest of A. A., 334 Ga. App. 37, 778 S.E.2d 28 (2015).

Evidence insufficient for adjudication. — State failed to present sufficient evidence to demonstrate that the firearm that fell from the juvenile's pocket met the requirements of the firearm offenses of possession of a handgun by a person under the age of 18, and possession and carrying of a handgun or a long gun by persons prohibited by law from such possession because the state never introduced into evidence either photographs of the firearm recovered during the July 18 incident or the firearm itself; and the officer referred to it only as a firearm, weapon, or gun, and never identified the recovered weapon as a handgun or described the length of its barrel; thus, the appellate court reversed the juvenile's adjudications of delinquency as to those offenses. In the Interest of A. A., 334 Ga. App. 37, 778 S.E.2d 28 (2015).

Cited in Paulhill v. State, 229 Ga. 415, 191 S.E.2d 842 (1972); Ezzard v. State, 229 Ga. 465, 192 S.E.2d 374 (1972); Johnson v. State, 230 Ga. 196, 196 S.E.2d 385 (1973); Reeves v. State, 128 Ga. App. 750, 197 S.E.2d 843 (1973); Jackson v. State, 230 Ga. 640, 198 S.E.2d 666 (1973); Mayo v. State, 132 Ga. App. 217, 207 S.E.2d 697 (1974); Harvey v. State, 233 Ga. 41, 209 S.E.2d 587 (1974); Freeman v. State, 233 Ga. 678, 212 S.E.2d 847 (1975); Carter v.

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State, 136 Ga. App. 197, 220 S.E.2d 749 (1975); Fleming v. State, 138 Ga. App. 97, 225 S.E.2d 711 (1976); Lowe v. State, 239 Ga. 783, 239 S.E.2d 1 (1977); Holtzendorf v. State, 146 Ga. App. 823, 247 S.E.2d 599 (1978); J.E.T. v. State, 151 Ga. App. 836, 261 S.E.2d 752 (1979); Simmons v. State, 246 Ga. 390, 271 S.E.2d 468 (1980); McCroy v. State, 155 Ga. App. 777, 272 S.E.2d 747 (1980); Robertson v. State, 161 Ga. App. 715, 288 S.E.2d 362 (1982); Edwards v. State, 165 Ga. App. 527, 301 S.E.2d 693 (1983); Daniel v. State, 170 Ga. App. 795, 318 S.E.2d 218 (1984); Dimick v. State, 178 Ga. App. 60, 341 S.E.2d 914 (1986); State v. Fricks, 188 Ga. App. 869, 374 S.E.2d 749 (1988); Smith v. State, 247 Ga. App. 676, 545 S.E.2d 89 (2001); Adefemi v. Ashcroft, 358 F.3d 828 (11th Cir. 2004); Moore v. Cranford, 285 Ga. App. 666, 647 S.E.2d 295 (2007); Tiller v. State, 286 Ga. App. 230, 648 S.E.2d 738 (2007); McBee v. State, 296 Ga. App. 42, 673 S.E.2d 569 (2009); Souder v. State, 301 Ga. App. 348, 687 S.E.2d 594 (2009); El-Fatin v. State, 332 Ga. App. 252, 771 S.E.2d 902 (2015); Georgiacarry.Org, Inc. v. Atlanta Botanical Garden, Inc., 299 Ga. 26, 785 S.E.2d 874 (2016).

Prima Facie Case

Prima facie case of violation of section. — State makes a prima facie case by proving that accused carried or manually possessed pistol out of home or place of business. The burden of proving license or exemption is upon accused, and the state does not have to affirmatively negative license. Blocker v. State, 12 Ga. App. 81, 76 S.E. 784 (1912); Williams v. State, 12 Ga. App. 84, 76 S.E. 785 (1912); Sims v. State, 12 Ga. App. 363, 77 S.E. 188 (1913); Russell v. State, 12 Ga. App. 557, 77 S.E. 829 (1913); Harris v. State, 14 Ga. App. 521, 81 S.E. 587 (1914); Harden v. State, 17 Ga. App. 322, 86 S.E. 736 (1915); Hardison v. State, 18 Ga. App. 692, 90 S.E. 374 (1916); Green v. State, 23 Ga. App. 519, 98 S.E. 553 (1919).

Prima facie case is made when it is proved defendant had pistol in hand though another grabbed the pistol when the pistol was discharged, no proof being had as to who brought pistol to place where defendant's statement as to examining pistol for purpose of purchase was rebutted. Alexander v. State, 25 Ga. App. 388, 103 S.E. 684 (1920) (decided under former Code 1933, § 26-2903).

State makes out a prima facie case when it proves that accused carried a pistol on the accused's person, or had manual possession of a pistol, not at the accused's home or place of business, and burden is upon accused to show, in answer to this evidence, that the accused's had a license. Miller v. State, 50 Ga. App. 30, 177 S.E. 82 (1934); McHenry v. State, 58 Ga. App. 410, 198 S.E. 818 (1938) (decided under former Code 1933, § 26-2903).

When upon trial, the state makes out a prima facie case of guilt on proof that the accused had in the accused's manual possession a pistol outside of the accused's home or place of business, it is then incumbent on the accused to establish a lawful possession. Reed v. State, 195 Ga. 842, 25 S.E.2d 692 (1943).

Prima facie case is established by proof that defendant carried pistol in public place, and burden of showing that defendant had a license is upon defendant. Days v. State, 134 Ga. App. 585, 215 S.E.2d 520 (1975); Jordan v. State, 166 Ga. App. 417, 304 S.E.2d 522 (1983) (decided under former Code 1933, § 26-2903).

OPINIONS OF THE ATTORNEY GENERAL

There is no restriction against carrying an unloaded shotgun in a vehicle through this state. 1970 Op. Att'y Gen. No. U70-30.

Pre-July 1, 1976 conviction as basis for rendering post-July 1, 1976 violation a felony. — Conviction obtained prior to July 1, 1976 for carrying of a concealed weapon may be used for a subsequent violation occurring after July 1, 1976, so as to treat that violation as a felony under (b)(2). 1976 Op. Att'y Gen. No. U76-29.

Conflict of laws. — Proposed ordi-

nance regulating the manner and location in which a firearm may be lawfully placed in a home, building, trailer, or boat was in conflict with general laws of the state and, accordingly, the city council was without power to enact it because it would be ultra vires. 1998 Op. Att'y Gen. No. U98-6.

Off-duty police officers may carry a concealed weapon only if the officers are authorized to do so by state or federal law, regulation, or order. 1987 Op. Att'y Gen. No. U87-28.

Special deputy sheriff is not authorized, by virtue of that office, to carry a firearm. 1970 Op. Att'y Gen. No. U70-204.

Constables do not possess general police powers, and may carry pistols only if licensed. 1978 Op. Att'y Gen. No. U78-30.

Persons registered with Private Security Agencies. — Person licensed or registered with the Georgia State Board of Private Detective and Private Security Agencies may carry a concealed weapon, if properly licensed by probate judge of county of the person's residence, notwithstanding fact that board has not issued licensee or registrant a permit to carry a weapon in a concealed manner. 1976 Op. Att'y Gen. No. 76-68.

Carrying concealed weapon without license in automobile. — It is a violation of the statute if the vehicle is not the person's own automobile and if the person does not have a weapons license. On the other hand it is not a violation of the statute if the vehicle is the person's own automobile, whether the person has a license or not. It does not matter in either case whether the pistol is concealed or not; the offense is failure to have a license. 1973 Op. Att'y Gen. No. 73-66.

States granting recognition to Georgia residents with firearms permits. — Idaho, Michigan, Mississippi, New Hampshire, and Texas grant recognition to Georgia residents with firearms permits; thus, pursuant to O.C.G.A. § 16-11-126(e), residents of those states are entitled to recognition of their state's firearms license or permit and may carry handguns in Georgia. 1997 Op. Att'y Gen. No. 97-27.

Former Code 1933, § 26-2901 (see now O.C.G.A. § 16-11-126) was violated when a pistol was concealed in automobile so as to be fully accessible with little or no movement; this prohibition was applicable regardless of who owned the automobile and regardless of whether the person had a license to carry the pistol; this prohibition was not limited to pistols and revolvers but was directed at any weapon as defined by that section. 1973 Op. Att'y Gen. No. 73-66.

Juvenile court investigators. — Investigators employed by the solicitor's office of the juvenile court may not be authorized by the solicitor to carry weapons and may not exercise the powers of a peace officer unless they are certified as peace officers pursuant to O.C.G.A. Ch. 8, T. 35. 1990 Op. Att'y Gen. No. U90-22.

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Weapons and Firearms, § 12 et seq.

C.J.S. — 94 C.J.S., Weapons, § 24 et seq.

ALR. — Instruction applying rule of reasonable doubt specifically to particular matter or defense as curing instruction placing burden of proof upon defendant in that regard, 120 A.L.R. 591.

Burden of averment and proof as to exception in criminal statute on which the prosecution is based, 153 A.L.R. 1218.

Offense of carrying concealed weapon as affected by manner of carrying or place of concealment, 43 A.L.R.2d 492.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine, 50 A.L.R.3d 397.

Who is entitled to carry concealed weapons, 51 A.L.R.3d 504.

Scope and effect of exception, in statute forbidding carrying of weapons, as to persons on his own premises or at his place of business, 57 A.L.R.3d 938.

Statutory presumption of possession of weapon by occupants of place or vehicle where it was found, 87 A.L.R.3d 949.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

What constitutes "dangerous weapon" under statutes prohibiting the carrying of dangerous weapons in motor vehicle, 2 A.L.R.4th 1342.

What constitutes a "bludgeon," "blackjack," or "billy" within meaning of criminal possession statute, 11 A.L.R.4th 1272.

Validity of state statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

Constitutionality of state statutes and local ordinances regulating concealed weapons, 33 A.L.R.6th 407.

What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 A.L.R. Fed. 347.

Judicial review of state or local administrative order approving, denying, or revoking permit or license to carry, possess, or own firearm, 91 A.L.R.6th 435.

16-11-127. Carrying weapons in unauthorized locations.

(a) As used in this Code section, the term:

(1) "Courthouse" means a building occupied by judicial courts and containing rooms in which judicial proceedings are held.

(2) "Government building" means:

(A) The building in which a government entity is housed;

(B) The building where a government entity meets in its official capacity; provided, however, that if such building is not a publicly owned building, such building shall be considered a government building for the purposes of this Code section only during the time such government entity is meeting at such building; or

(C) The portion of any building that is not a publicly owned building that is occupied by a government entity.

(3) "Government entity" means an office, agency, authority, department, commission, board, body, division, instrumentality, or institution of the state or any county, municipal corporation, consolidated government, or local board of education within this state.

(4) "Parking facility" means real property owned or leased by a government entity, courthouse, jail, prison, or place of worship that has been designated by such government entity, courthouse, jail, prison, or place of worship for the parking of motor vehicles at a government building or at such courthouse, jail, prison, or place of worship.

(b) Except as provided in Code Section 16-11-127.1 and subsection (d) or (e) of this Code section, a person shall be guilty of carrying a weapon or long gun in an unauthorized location and punished as for a misdemeanor when he or she carries a weapon or long gun while:

(1) In a government building as a nonlicense holder;

(2) In a courthouse;

(3) In a jail or prison;

(4) In a place of worship, unless the governing body or authority of the place of worship permits the carrying of weapons or long guns by license holders;

(5) In a state mental health facility as defined in Code Section 37-1-1 which admits individuals on an involuntary basis for treatment of mental illness, developmental disability, or addictive disease; provided, however, that carrying a weapon or long gun in such location in a manner in compliance with paragraph (3) of subsection (d) of this Code section shall not constitute a violation of this subsection;

(6) On the premises of a nuclear power facility, except as provided in Code Section 16-11-127.2, and the punishment provisions of Code Section 16-11-127.2 shall supersede the punishment provisions of this Code section; or

(7) Within 150 feet of any polling place when elections are being conducted and such polling place is being used as a polling place as provided for in paragraph (27) of Code Section 21-2-2, except as provided in subsection (i) of Code Section 21-2-413.

(c) A license holder or person recognized under subsection (e) of Code Section 16-11-126 shall be authorized to carry a weapon as provided in Code Section 16-11-135 and in every location in this state not listed in subsection (b) or prohibited by subsection (e) of this Code section; provided, however, that private property owners or persons in legal control of private property through a lease, rental agreement, licensing agreement, contract, or any other agreement to control access to such private property shall have the right to exclude or eject a person who is in possession of a weapon or long gun on their private property in accordance with paragraph (3) of subsection (b) of Code Section 16-7-21, except as provided in Code Section 16-11-135. A violation of subsection (b) of this Code section shall not create or give rise to a civil action for damages.

(d) Subsection (b) of this Code section shall not apply:

(1) To the use of weapons or long guns as exhibits in a legal proceeding, provided such weapons or long guns are secured and handled as directed by the personnel providing courtroom security or the judge hearing the case;

(2) To a license holder who approaches security or management personnel upon arrival at a location described in subsection (b) of this Code section and notifies such security or management personnel of

the presence of the weapon or long gun and explicitly follows the security or management personnel's direction for removing, securing, storing, or temporarily surrendering such weapon or long gun; and

(3) To a weapon or long gun possessed by a license holder which is under the possessor's control in a motor vehicle or is in a locked compartment of a motor vehicle or one which is in a locked container in or a locked firearms rack which is on a motor vehicle and such vehicle is parked in a parking facility.

(e)(1) A license holder shall be authorized to carry a weapon in a government building when the government building is open for business and where ingress into such building is not restricted or screened by security personnel. A license holder who enters or attempts to enter a government building carrying a weapon where ingress is restricted or screened by security personnel shall be guilty of a misdemeanor if at least one member of such security personnel is certified as a peace officer pursuant to Chapter 8 of Title 35; provided, however, that a license holder who immediately exits such building or immediately leaves such location upon notification of his or her failure to clear security due to the carrying of a weapon shall not be guilty of violating this subsection or paragraph (1) of subsection (b) of this Code section. A person who is not a license holder and who attempts to enter a government building carrying a weapon shall be guilty of a misdemeanor.

(2) Any license holder who violates subsection (b) of this Code section in a place of worship shall not be arrested but shall be fined not more than $100.00. Any person who is not a license holder who violates subsection (b) of this Code section in a place of worship shall be punished as for a misdemeanor.

(f) Nothing in this Code section shall in any way operate or be construed to affect, repeal, or limit the exemptions provided for under Code Section 16-11-130. (Ga. L. 1870, p. 421, §§ 1, 2; Ga. L. 1878-79, p. 64, § 1; Code 1882, § 4528; Penal Code 1895, § 342; Ga. L. 1909, p. 90, § 1; Penal Code 1910, § 348; Code 1933, § 26-5102; Code 1933, § 26-2902, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 1430, § 2; Ga. L. 1986, p. 673, § 1; Ga. L. 1987, p. 358, § 1; Ga. L. 1992, p. 1315, § 1; Ga. L. 1996, p. 748, § 11; Ga. L. 1997, p. 514, § 1; Ga. L. 2003, p. 423, § 1; Ga. L. 2008, p. 1199, § 4/HB 89; Ga. L. 2010, p. 963, § 1-3/SB 308; Ga. L. 2014, p. 432, § 2-5/HB 826; Ga. L. 2014, p. 599, § 1-5/HB 60; Ga. L. 2015, p. 805, § 3/HB 492.)

Cross references. — Exemption from section for private detectives and private security agents who hold firearms permits issued by Georgia Board of Private Detective and Security Agencies, § 43-38-10.

Editor's notes. — Ga. L. 1992, p. 1315, § 3, not codified by the General Assembly, provides: "All schools shall post in public view the provisions as contained in Code Section 16-11-127.1 (a) and (b)."

Ga. L. 2008, p. 1199, § 1/HB 89, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Business Security and Employee Privacy Act.'"

Ga. L. 2010, p. 963, § 3-1/SB 308, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For article surveying developments in Georgia constitutional law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 51 (1981). For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011). For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

JUDICIAL DECISIONS

Former Code 1933, § 26-2902 (see now O.C.G.A. § 16-11-127) was not unconstitutionally vague. Byrdsong v. State, 245 Ga. 336, 265 S.E.2d 15 (1980); Jordan v. State, 166 Ga. App. 417, 304 S.E.2d 522 (1983).

There was no conflict between former Code 1933, §§ 26-2902 and 26-2904 (see now O.C.G.A. §§ 16-11-127 and 16-11-129). Byrdsong v. State, 245 Ga. 336, 265 S.E.2d 15 (1980).

Statutory construction of "notwithstanding" under former provisions of subsection (e) of this section. — In a case in which a gun rights organization and a Georgia state representative sought declaratory and injunctive relief because they asserted that Georgia House Bill (HB) 89 permitted any person who possessed a valid Georgia firearms license to carry a firearm in the non-sterile areas of the Hartsfield-Jackson Atlanta International Airport, they argued unsuccessfully that the "notwithstanding" language of HB 89, codified at O.C.G.A. § 16-11-127, which authorized Georgia firearms license (GFL) holders to carry firearms in public transportation notwithstanding O.C.G.A. §§ 16-12-122 through 16-12-127, which is the Transportation Passenger Safety Act (TPSA), would be superfluous unless it was intended to make clear that a GFL holder could carry a firearm in an airport. They misleadingly focused only on O.C.G.A. § 16-12-127, but the "notwithstanding" language in HB 89 referred to all of the TPSA, and O.C.G.A. § 16-12-123(b), another section of the TPSA, prohibited boarding any bus or rail vehicle with a firearm; since public transportation included bus and rail vehicles such as those operated by Metropolitan Atlanta Rapid Transit Authority, the "notwithstanding" language was needed to make clear that GFL holders could carry firearms onto such vehicles notwithstanding the TPSA. GeorgiaCarry.Org, Inc. v. City of Atlanta, 602 F. Supp. 2d 1281 (N.D. Ga. 2008), aff'd, 318 Fed. Appx. 851 (11th Cir. 2009).

Application of federal law. — In a case in which a gun rights organization and a Georgia state representative sought declaratory and injunctive relief because they asserted that Georgia House Bill (HB) 89 permitted any person who possessed a valid Georgia firearms license to carry a firearm in the non-sterile areas of the Hartsfield-Jackson Atlanta International Airport, they argued unsuccessfully that if HB 89, codified as O.C.G.A. § 16-11-127 did not apply to airports, then the exception for carrying firearms into a place prohibited by federal law was superfluous. The federal law exception applied to all of the places listed in HB 89, including parks, historic sites, and recreational and wildlife management areas, as well as public transportation. GeorgiaCarry.Org, Inc. v. City of Atlanta, 602 F. Supp. 2d 1281 (N.D. Ga. 2008), aff'd, 318 Fed. Appx. 851 (11th Cir. 2009).

Right to exclude individuals carrying weapons. — Plain and unambiguous language of O.C.G.A. § 16-11-127(c) grants persons in legal control of private

property through a lease the right to exclude individuals carrying weapons. GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc., No. A17A1639, 2018 Ga. App. LEXIS 190 (Mar. 14, 2018).

Application to airports. — In a case in which a gun rights organization and a Georgia state representative sought declaratory and injunctive relief because they asserted that Georgia House Bill (HB) 89 permitted any person who possessed a valid Georgia firearms license to carry a firearm in the non-sterile areas of the Hartsfield-Jackson Atlanta International Airport, giving the terms of the statute their ordinary signification, the public transportation provision of HB 89, as codified at O.C.G.A. § 16-11-127, did not apply to airports. HB 89 did not mention airports, nor did the bill define public transportation, and the ordinary signification of public transportation did not include airports. GeorgiaCarry.Org, Inc. v. City of Atlanta, 602 F. Supp. 2d 1281 (N.D. Ga. 2008), aff'd, 318 Fed. Appx. 851 (11th Cir. 2009).

That the defendant allegedly committed a separate offense by entering the airport security screening checkpoint while knowingly possessing a weapon did not invalidate the first charged offense for having a weapon in a government building as O.C.G.A. § 16-11-127 criminalized the carrying of a weapon by a nonlicense holder through the airport's doorway while O.C.G.A. § 16-11-130.2 prohibited the defendant from entering the restricted area of the airport with the weapon. Malphurs v. State, 336 Ga. App. 867, 785 S.E.2d 414 (2016).

Application to places of worship. — When plaintiffs, a gun advocacy group and one of the group's members, and a church and the pastor, sought a declaratory judgment that O.C.G.A. § 16-11-127(b)(4), regulating possession of weapons in a place of worship, violated their First Amendment right to the free exercise of religion, because § 16-11-127(d)(2) only required leaving guns in vehicles or notifying security or management and following directions for securing guns under § 16-11-127(d)(2) and (3), it was not an unmistakable pressure to forego religious precepts or pressure religious conduct to trigger scrutiny under the First Amendment's Free Exercise Clause and the claim against defendants, the State of Georgia, the Governor, a county, and a county manager failed. GeorgiaCarry.Org, Inc. v. Georgia, 764 F. Supp. 2d 1306 (M.D. Ga. 2011), aff'd, 687 F.3d 1244 (11th Cir. Ga. 2012).

When plaintiffs, a gun advocacy group and one of the group's members, and a church and the pastor, sought a declaratory judgment that O.C.G.A. § 16-11-127(b)(4), regulating possession of weapons in a place of worship, violated their Second Amendment right to bear arms, the court noted that the United States Supreme Court, in District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783 (2008), held that the Second Amendment protected a right to possess and carry weapons for self defense but did not elaborate on what all the "sensitive" places were to which a regulation could prohibit carrying a weapon, and absent clearer guidance, the safer approach was to assume that possession at a place of worship was within the Second Amendment guarantee and apply intermediate scrutiny, and since prohibiting firearms in a place of worship bore a substantial relationship to the important goal of protecting religious freedom by protecting attendees from the fear or threat of intimidation or armed attack, § 16-11-127(b)(4) passed intermediate scrutiny and the claim against defendants, the State of Georgia, the Governor, a county, and a county manager failed. GeorgiaCarry.Org, Inc. v. Georgia, 764 F. Supp. 2d 1306 (M.D. Ga. 2011), aff'd, 687 F.3d 1244 (11th Cir. Ga. 2012).

That plaintiff gun owners "would like" to carry a gun to be able to act in "self-defense" was a personal preference, motivated by a secular purpose, and there was no First Amendment protection for personal preferences or secular beliefs, thus, a First Amendment Free Exercise claim challenging Georgia's "Carry Law," O.C.G.A. § 16-11-127(b), which banned carrying guns in a place of worship, failed. GeorgiaCarry.Org, Inc v. Georgia, 687 F.3d 1244 (11th Cir. 2012).

Holiday barbecue with many people constitutes public gathering within

meaning of former Penal Code 1895, § 342 (see now O.C.G.A. § 16-11-127). Wynne v. State, 123 Ga. 566, 51 S.E. 636 (1905).

Parking area on grounds of public gathering. — Offense of carrying a firearm at a public gathering may occur in a parking area on the grounds of and in close proximity to a public gathering. Hubbard v. State, 210 Ga. App. 141, 435 S.E.2d 709 (1993).

Acquiring deadly weapon after arrival at public gathering is not indictable under former Penal Code 1895, § 342 (see now O.C.G.A. § 16-11-127). Modesette v. State, 115 Ga. 582, 41 S.E. 992 (1902); Culberson v. State, 119 Ga. 805, 47 S.E. 175 (1904).

Leaving public gathering, obtaining deadly weapon and then returning. — If a person carries a deadly weapon to a place near a public gathering so that it will be accessible, and while gathering is in progress goes to place of deposit and obtains actual possession of weapon and carries it to the gathering, that person is guilty of the offense. Wynne v. State, 123 Ga. 566, 51 S.E. 636 (1905); Farmer v. State, 112 Ga. App. 438, 145 S.E.2d 594 (1965).

Declaratory judgment action on carrying in garden. — Trial court erred by dismissing the appellants' declaratory judgment action on the basis that it improperly called for the interpretation and application of a criminal statute because they were not seeking an advisory opinion but sought a determination of whether licensed individuals may carry a weapon on the grounds of the garden at issue in accordance with O.C.G.A. § 16-11-127(c), which was a proper subject for declaratory relief. Georgiacarry.Org, Inc. v. Atlanta Botanical Garden, Inc., 299 Ga. 26, 785 S.E.2d 874 (2016).

Application to garden that leased property from city. — Grant of summary judgment to a garden was affirmed because the private organization, which leased property from a city, was lawfully permitted under O.C.G.A. § 16-11-127(c) to prohibit individuals from carrying guns onto the organization's property. GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc., No. A17A1639, 2018 Ga. App. LEXIS 190 (Mar. 14, 2018).

Having a license to carry a pistol is no justification under former Penal Code 1910, § 348 (see now O.C.G.A. § 16-11-127). Sockwell v. State, 27 Ga. App. 576, 109 S.E. 531 (1921).

It need not be alleged that accused was not a member of class excepted by former Penal Code 1895, § 342 (see now O.C.G.A. § 16-11-127). Kitchens v. State, 116 Ga. 847, 43 S.E. 256 (1903).

Focus is not on "place" but on "gathering" of people. — O.C.G.A. § 16-11-127 should apply when people are gathered or will be gathered for a particular function and not when a weapon is carried lawfully to a public place where people may gather. The focus is not on the "place" but on the "gathering" of people. State v. Burns, 200 Ga. App. 16, 406 S.E.2d 547 (1991).

Evidence sufficient for conviction. — Evidence amply supported the jury's verdict of guilty under O.C.G.A. § 16-11-127 since the evidence showed that defendant possessed a loaded weapon, a .22 caliber derringer, on the grounds of an auto auction and that many people were present in the parking lot when the gun was removed from defendant's person. Jordan v. State, 166 Ga. App. 417, 304 S.E.2d 522 (1983).

Defendant was properly convicted of carrying a deadly weapon after the defendant pulled a gun on security personnel at a tavern after security took defendant's keys because of defendant's intoxicated condition, notwithstanding defendant's contention that defendant acted in self-defense. Richardson v. State, 233 Ga. App. 890, 505 S.E.2d 57 (1998).

Cited in Smith v. State, 122 Ga. App. 768, 178 S.E.2d 751 (1970); Harvey v. State, 233 Ga. 41, 209 S.E.2d 587 (1974); Simmons v. State, 246 Ga. 390, 271 S.E.2d 468 (1980); Sizemore Sec. Int'l, Inc. v. Lee, 161 Ga. App. 332, 287 S.E.2d 782 (1982); Jenga v. State, 166 Ga. App. 26, 303 S.E.2d 170 (1983).

OPINIONS OF THE ATTORNEY GENERAL

Constables do not possess general police powers, and may carry pistols only if licensed. 1978 Op. Att'y Gen. No. U78-30.

Publicly owned or operated building is one which houses governmental functions, and which is either owned by the government or the government's agency, or is leased with taxpayer money for use by government or one of the government's agencies. 1976 Op. Att'y Gen. No. U76-33.

Carrying pistol or revolver at shopping mall. — Person who has properly obtained a license to carry a pistol or revolver under O.C.G.A. § 16-11-129 may legally carry a pistol or revolver at a shopping mall without violating O.C.G.A. § 16-11-127. 1984 Op. Att'y Gen. No. U84-37.

Application to carry handgun need not be recorded. — Former Code 1933, §§ 26-2902 and 26-2904 (see now O.C.G.A. §§ 16-11-127 and 16-11-129) did not require recording of any portion of an application to carry a handgun. 1976 Op. Att'y Gen. No. U76-33.

There is no restriction against carrying an unloaded shotgun in a vehicle through this state. 1970 Op. Att'y Gen. No. U70-30.

State Board of Education security guard on duty at public facilities. — Under former Code 1933, § 26-2902 (see now O.C.G.A. § 16-11-127), it was a misdemeanor for an individual to carry a firearm to any public gathering; therefore, a security guard cannot be authorized by the State Board of Education to bear arms while performing security duties at public facilities. 1978 Op. Att'y Gen. No. 78-3.

Application to gathering for particular function, not public place. — O.C.G.A. § 16-11-127 applies when people are gathered or will gather for a particular function, but does not apply simply because a weapon is otherwise lawfully carried to a public place where people may be present. 1996 Op. Att'y Gen. No. U96-22.

Fingerprinting required. — Any misdemeanor offenses arising under subsection (b) of O.C.G.A. § 16-11-127 are offenses for which those charged are to be fingerprinted. 2010 Op. Att'y Gen. No. 10-6.

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Weapons and Firearms, § 30.

C.J.S. — 94 C.J.S., Weapons, § 37 et seq.

ALR. — Cane as a deadly weapon, 30 A.L.R. 815.

Tear gas gun as dangerous or deadly weapon within statute inhibiting the carrying of dangerous weapons, 92 A.L.R. 1098.

Scope and effect of exception, in statute forbidding carrying of weapons, as to persons on own premises or at place of business, 57 A.L.R.3d 938.

Statutory presumption of possession of weapon by occupants of place or vehicle where it was found, 87 A.L.R.3d 949.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

Validity of state statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 A.L.R. Fed. 347.

Construction and application of United States Supreme Court holdings in District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) and McDonald v. City of Chicago, Ill., 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) respecting Second Amendment right to keep and bear arms, to state or local laws regulating firearms or other weapons, 64 A.L.R.6th 131.

16-11-127.1. Carrying weapons within school safety zones, at school functions, or on a bus or other transportation furnished by a school.

(a) As used in this Code section, the term:

(1) "Bus or other transportation furnished by a school" means a bus or other transportation furnished by a public or private elementary or secondary school.

(2) "School function" means a school function or related activity that occurs outside of a school safety zone and is for a public or private elementary or secondary school.

(3) "School safety zone" means in or on any real property or building owned by or leased to:

(A) Any public or private elementary school, secondary school, or local board of education and used for elementary or secondary education; and

(B) Any public or private technical school, vocational school, college, university, or other institution of postsecondary education.

(4) "Weapon" means and includes any pistol, revolver, or any weapon designed or intended to propel a missile of any kind, or any dirk, bowie knife, switchblade knife, ballistic knife, any other knife having a blade of two or more inches, straight-edge razor, razor blade, spring stick, knuckles, whether made from metal, thermoplastic, wood, or other similar material, blackjack, any bat, club, or other bludgeon-type weapon, or any flailing instrument consisting of two or more rigid parts connected in such a manner as to allow them to swing freely, which may be known as a nun chahka, nun chuck, nunchaku, shuriken, or fighting chain, or any disc, of whatever configuration, having at least two points or pointed blades which is designed to be thrown or propelled and which may be known as a throwing star or oriental dart, or any weapon of like kind, and any stun gun or taser as defined in subsection (a) of Code Section 16-11-106. This paragraph excludes any of these instruments used for classroom work authorized by the teacher.

(b)(1) Except as otherwise provided in subsection (c) of this Code section, it shall be unlawful for any person to carry to or to possess or have under such person's control while within a school safety zone, at a school function, or on a bus or other transportation furnished by a school any weapon or explosive compound, other than fireworks or consumer fireworks the possession of which is regulated by Chapter 10 of Title 25.

(2) Except as provided for in paragraph (20) of subsection (c) of this Code section, any license holder who violates this subsection shall be

guilty of a misdemeanor. Any person who is not a license holder who violates this subsection shall be guilty of a felony and, upon conviction thereof, be punished by a fine of not more than $10,000.00, by imprisonment for not less than two nor more than ten years, or both.

(3) Any person convicted of a violation of this subsection involving a dangerous weapon or machine gun, as such terms are defined in Code Section 16-11-121, shall be punished by a fine of not more than $10,000.00 or by imprisonment for a period of not less than five nor more than ten years, or both.

(4) A child who violates this subsection may be subject to the provisions of Code Section 15-11-601.

(c) The provisions of this Code section shall not apply to:

(1) Baseball bats, hockey sticks, or other sports equipment possessed by competitors for legitimate athletic purposes;

(2) Participants in organized sport shooting events or firearm training courses;

(3) Persons participating in military training programs conducted by or on behalf of the armed forces of the United States or the Georgia Department of Defense;

(4) Persons participating in law enforcement training conducted by a police academy certified by the Georgia Peace Officer Standards and Training Council or by a law enforcement agency of the state or the United States or any political subdivision thereof;

(5) The following persons, when acting in the performance of their official duties or when en route to or from their official duties:

(A) A peace officer as defined by Code Section 35-8-2;

(B) A law enforcement officer of the United States government;

(C) A prosecuting attorney of this state or of the United States;

(D) An employee of the Department of Corrections or a correctional facility operated by a political subdivision of this state or the United States who is authorized by the head of such department or correctional agency or facility to carry a firearm;

(E) An employee of the Department of Community Supervision who is authorized by the commissioner of community supervision to carry a firearm;

(F) A person employed as a campus police officer or school security officer who is authorized to carry a weapon in accordance with Chapter 8 of Title 20; and

(G) Medical examiners, coroners, and their investigators who are employed by the state or any political subdivision thereof;

provided, however, that this Code section shall not apply to any extent to persons who are provided for under Code Section 16-11-130;

(6) A person who has been authorized in writing by a duly authorized official of a public or private elementary or secondary school or a public or private technical school, vocational school, college, university, or other institution of postsecondary education or a local board of education as provided in Code Section 16-11-130.1 to have in such person's possession or use within a school safety zone, at a school function, or on a bus or other transportation furnished by a school a weapon which would otherwise be prohibited by this Code section. Such authorization shall specify the weapon or weapons which have been authorized and the time period during which the authorization is valid;

(7) A person who is licensed in accordance with Code Section 16-11-129 or issued a permit pursuant to Code Section 43-38-10, when such person carries or picks up a student within a school safety zone, at a school function, or on a bus or other transportation furnished by a school or a person who is licensed in accordance with Code Section 16-11-129 or issued a permit pursuant to Code Section 43-38-10 when he or she has any weapon legally kept within a vehicle when such vehicle is parked within a school safety zone or is in transit through a designated school safety zone;

(8) A weapon possessed by a license holder which is under the possessor's control in a motor vehicle or which is in a locked compartment of a motor vehicle or one which is in a locked container in or a locked firearms rack which is on a motor vehicle which is being used by an adult over 21 years of age to bring to or pick up a student within a school safety zone, at a school function, or on a bus or other transportation furnished by a school, or when such vehicle is used to transport someone to an activity being conducted within a school safety zone which has been authorized by a duly authorized official or local board of education as provided by paragraph (6) of this subsection; provided, however, that this exception shall not apply to a student attending a public or private elementary or secondary school;

(9) Persons employed in fulfilling defense contracts with the government of the United States or agencies thereof when possession of the weapon is necessary for manufacture, transport, installation, and testing under the requirements of such contract;

(10) Those employees of the State Board of Pardons and Paroles when specifically designated and authorized in writing by the members of the State Board of Pardons and Paroles to carry a weapon;

(11) The Attorney General and those members of his or her staff whom he or she specifically authorizes in writing to carry a weapon;

(12) Community supervision officers employed by and under the authority of the Department of Community Supervision when specifically designated and authorized in writing by the commissioner of community supervision;

(13) Public safety directors of municipal corporations;

(14) State and federal trial and appellate judges;

(15) United States attorneys and assistant United States attorneys;

(16) Clerks of the superior courts;

(17) Teachers and other personnel who are otherwise authorized to possess or carry weapons, provided that any such weapon is in a locked compartment of a motor vehicle or one which is in a locked container in or a locked firearms rack which is on a motor vehicle;

(18) Constables of any county of this state;

(19) Any person who is 18 years of age or older or currently enrolled in classes on the campus in question and carrying, possessing, or having under such person's control an electroshock weapon while in or on any building or real property owned by or leased to such public technical school, vocational school, college or university or other public institution of postsecondary education; provided, however, that, if such person makes use of such electroshock weapon, such use shall be in defense of self or others. The exemption under this paragraph shall apply only to such person in regard to such electroshock weapon. As used in this paragraph, the term "electroshock weapon" means any commercially available device that is powered by electrical charging units and designed exclusively to be capable of incapacitating a person by electrical charge, including, but not limited to, a stun gun or taser as defined in subsection (a) of Code Section 16-11-106; or

(20)(A) Any weapons carry license holder when he or she is in any building or on real property owned by or leased to any public technical school, vocational school, college, or university, or other public institution of postsecondary education; provided, however, that such exception shall:

(i) Not apply to buildings or property used for athletic sporting events or student housing, including, but not limited to, fraternity and sorority houses;

(ii) Not apply to any preschool or childcare space located within such buildings or real property;

(iii) Not apply to any room or space being used for classes related to a college and career academy or other specialized school as provided for under Code Section 20-4-37;

(iv) Not apply to any room or space being used for classes in which high school students are enrolled through a dual enrollment program, including, but not limited to, classes related to the "Move on When Ready Act" as provided for under Code Section 20-2-161.3;

(v) Not apply to faculty, staff, or administrative offices or rooms where disciplinary proceedings are conducted;

(vi) Only apply to the carrying of handguns which a licensee is licensed to carry pursuant to subsection (e) of Code Section 16-11-126 and pursuant to Code Section 16-11-129; and

(vii) Only apply to the carrying of handguns which are concealed.

(B) Any weapons carry license holder who carries a handgun in a manner or in a building, property, room, or space in violation of this paragraph shall be guilty of a misdemeanor; provided, however, that for a conviction of a first offense, such weapons carry license holder shall be punished by a fine of $25.00 and not be sentenced to serve any term of confinement.

(C) As used in this paragraph, the term:

(i) "Concealed" means carried in such a fashion that does not actively solicit the attention of others and is not prominently, openly, and intentionally displayed except for purposes of defense of self or others. Such term shall include, but not be limited to, carrying on one's person while such handgun is substantially, but not necessarily completely, covered by an article of clothing which is worn by such person, carrying within a bag of a nondescript nature which is being carried about by such person, or carrying in any other fashion as to not be clearly discernible by the passive observation of others.

(ii) "Preschool or childcare space" means any room or continuous collection of rooms or any enclosed outdoor facilities which are separated from other spaces by an electronic mechanism or human-staffed point of controlled access and designated for the provision of preschool or childcare services, including, but not limited to, preschool or childcare services licensed or regulated under Article 1 of Chapter 1A of Title 20.

(d)(1) This Code section shall not prohibit any person who resides or works in a business or is in the ordinary course transacting lawful

business or any person who is a visitor of such resident located within a school safety zone from carrying, possessing, or having under such person's control a weapon within a school safety zone; provided, however, that it shall be unlawful for any such person to carry, possess, or have under such person's control while at a school building or school function or on school property or a bus or other transportation furnished by a school any weapon or explosive compound, other than fireworks the possession of which is regulated by Chapter 10 of Title 25.

(2) Any person who violates this subsection shall be subject to the penalties specified in subsection (b) of this Code section.

(e) It shall be no defense to a prosecution for a violation of this Code section that:

(1) School was or was not in session at the time of the offense;

(2) The real property was being used for other purposes besides school purposes at the time of the offense; or

(3) The offense took place on a bus or other transportation furnished by a school.

(f) In a prosecution under this Code section, a map produced or reproduced by any municipal or county agency or department for the purpose of depicting the location and boundaries of the area of the real property of a school board or a private or public elementary or secondary school that is used for school purposes or the area of any public or private technical school, vocational school, college, university, or other institution of postsecondary education, or a true copy of the map, shall, if certified as a true copy by the custodian of the record, be admissible and shall constitute prima-facie evidence of the location and boundaries of the area, if the governing body of the municipality or county has approved the map as an official record of the location and boundaries of the area. A map approved under this Code section may be revised from time to time by the governing body of the municipality or county. The original of every map approved or revised under this subsection or a true copy of such original map shall be filed with the municipality or county and shall be maintained as an official record of the municipality or county. This subsection shall not preclude the prosecution from introducing or relying upon any other evidence or testimony to establish any element of this offense. This subsection shall not preclude the use or admissibility of a map or diagram other than the one which has been approved by the municipality or county.

(g) A county school board may adopt regulations requiring the posting of signs designating the areas of school boards and private or public elementary and secondary schools as "Weapon-free and Violence-free School Safety Zones."

(h) Nothing in this Code section shall in any way operate or be construed to affect, repeal, or limit the exemptions provided for under Code Section 16-11-130. (Code 1981, § 16-11-127.1, enacted by Ga. L. 1992, p. 1315, § 2; Ga. L. 1994, p. 543, § 1; Ga. L. 1994, p. 547, § 1; Ga. L. 1994, p. 1012, § 4; Ga. L. 1995, p. 10, § 16; Ga. L. 1999, p. 362, § 1; Ga. L. 2000, p. 20, § 6; Ga. L. 2000, p. 1630, § 4; Ga. L. 2003, p. 140, § 16; Ga. L. 2008, p. 533, § 3/SB 366; Ga. L. 2008, p. 1199, § 5/HB 89; Ga. L. 2009, p. 8, § 16/SB 46; Ga. L. 2010, p. 463, § 2/SB 299; Ga. L. 2010, p. 963, § 1-4/SB 308; Ga. L. 2013, p. 294, § 4-10/HB 242; Ga. L. 2014, p. 432, § 1-1/HB 826; Ga. L. 2014, p. 599, § 1-6/HB 60; Ga. L. 2015, p. 5, § 16/HB 90; Ga. L. 2015, p. 274, § 1/HB 110; Ga. L. 2015, p. 422, § 5-27/HB 310; Ga. L. 2015, p. 805, § 4/HB 492; Ga. L. 2016, p. 848, § 1/HB 792; Ga. L. 2017, p. 341, § 1/HB 280; Ga. L. 2017, p. 555, § 5/HB 292.)

The 2016 amendment, effective July 1, 2016, in subsection (c), deleted "or" at the end of paragraph (c)(17), substituted "; or" for a period at the end of paragraph (c)(18), and added paragraph (c)(19).

The 2017 amendments. — The first 2017 amendment, effective July 1, 2017, substituted "Except as provided for in paragraph (20) of subsection (c) of this Code section, any" for "Any" at the beginning of paragraph (b)(2); deleted "or" at the end of paragraph (c)(18); substituted "; or" for the period at the end of paragraph (c)(19); and added paragraph (c)(20). The second 2017 amendment, effective May 8, 2017, added the proviso at the end of paragraph (c)(5).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2014, the amendment of this Code section by Ga. L. 2014, p. 432, § 1-1/HB826, was treated as impliedly repealed and superseded by Ga. L. 2014, p. 599, § 1-6/HB 60, due to irreconcilable conflict.

Editor's notes. — Ga. L. 1992, p. 1315, § 3, not codified by the General Assembly, provides: "All schools shall post in public view the provisions as contained in Code Section 16-11-127.1 (a) and (b)."

Ga. L. 1994, p. 1012, § 1, not codified by the General Assembly, provides that the Act shall be known and may be cited as the "School Safety and Juvenile Justice Reform Act of 1994".

Ga. L. 1994, p. 1012, § 2, not codified by the General Assembly, sets forth legislative findings and determinations for the "School Safety and Juvenile Justice Reform Act of 1994".

Ga. L. 1994, p. 1012, § 29, not codified by the General Assembly, provides for severability.

Ga. L. 2008, p. 1199, § 1/HB 89, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Business Security and Employee Privacy Act.'"

Ga. L. 2010, p. 963, § 3-1/SB 308, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Ga. L. 2017, p. 555, § 1/HB 292, not codified by the General Assembly, provides that: "The General Assembly finds that:

"(1) The ownership of firearms is a clear and explicit right protected by the United States Constitution and the Constitution of this state;

"(2) Access to financial services provides for the functioning of a firearms industry and, thus, the constitutionally protected right of firearm ownership; and

"(3) The provisions of this Act are intended to implement the constitutional protections provided for under the law."

Administrative rules and regulations. — Student discipline, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Department of Education, § 160-4-8-.15.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011). For article, "State v. Jackson and the Explosion of Liability for Felony Murder," see 62 Mercer L. Rev. 1335 (2011). For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014). For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 37 (2017).

JUDICIAL DECISIONS

Controlling law. — Trial court properly granted the defendant's motion to dismiss the complaint, seeking a judgment declaring that it was not a crime for a person with a weapons carry license to carry a firearm within a school safety zone, because the language of the house bill at issue, codified in O.C.G.A. § 16-11-127.1, was controlling law and prohibited such conduct. GeorgiaCarry.Org, Inc. v. Code Revision Commission, 299 Ga. 896, 793 S.E.2d 35 (2016).

No merger. — An offense under O.C.G.A. § 16-11-127.1 does not merge with an offense under O.C.G.A. § 16-11-126 because neither crime is fully inclusive of the other. Sinkfield v. State, 266 Ga. 726, 470 S.E.2d 649 (1996).

Retractable razor blade or utility knife with a blade less than three inches long was a "weapon" for purposes of O.C.G.A. § 16-11-127.1. In re L.N.M., 222 Ga. App. 589, 474 S.E.2d 762 (1996).

An "art knife" with a blade less than three inches long was not a "weapon" within the meaning of O.C.G.A. § 16-11-127.1. In re R.B.W., 269 Ga. 452, 500 S.E.2d 573 (1998).

Single-edged razor blade is not a "weapon" within the meaning of O.C.G.A. § 16-11-127.1. In re R.F.T., 228 Ga. App. 719, 492 S.E.2d 590 (1997).

Violation as basis for termination of employment. — When the plaintiff admitted to keeping a gun in plaintiff's car every day, plaintiff admitted to violating the law making possession of a weapon on school property a felony, and this behavior alone provided ground for termination under plaintiff's employment contract, which provided for annulment of the contract for the violation of any law. Odem v. Pace Academy, 235 Ga. App. 648, 510 S.E.2d 326 (1998).

Stabbing exceeded the bounds of self-defense. — Evidence supported the trial court's conclusion beyond a reasonable doubt that the juvenile's stabbing of the victim exceeded the bounds of self-defense and the juvenile committed aggravated battery. In the Interest of A.M., 248 Ga. App. 241, 545 S.E.2d 688 (2001).

Juvenile defendant was not authorized to stab the victim under O.C.G.A. § 16-3-21(a) after the defendant was attacked by the victim from behind with the victim's fists, and could see that the victim did not have a weapon; defendant's belief that defendant's own life was in danger was a mere unreasonable apprehension or suspicion of harm, which was insufficient to justify the use of deadly force, and defendant was properly adjudicated a de-

linquent for aggravated assault under O.C.G.A. § 16-5-21(a)(2) and for carrying a weapon onto a school bus under O.C.G.A. § 16-11-127.1(b). In the Interest of Q.M.L., 257 Ga. App. 22, 570 S.E.2d 92 (2002).

Construction with O.C.G.A. § 15-11-63. — Evidence established that the juvenile committed the designated felony act of carrying a weapon on school property because, under O.C.G.A. § 15-11-63(a)(2)(B)(iv), the carrying or possession of a weapon in violation of O.C.G.A. § 16-11-127.1(b) is a designated felony act if done by any child. In the Interest of A.M., 248 Ga. App. 241, 545 S.E.2d 688 (2001).

Felony murder. — Because the defendant's possession of a weapon on school property was dangerous under the circumstances, the evidence was sufficient to support the defendant's conviction for felony murder. Mosley v. State, 272 Ga. 881, 536 S.E.2d 150 (2000).

Evidence sufficient for conviction. — Defendant's convictions for kidnapping, hijacking a motor vehicle, armed robbery, possession of a firearm during the commission of a felony, carrying a concealed weapon, and possession of a weapon on school property were authorized because pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the victim's testimony alone established the essential elements of the offenses. Lester v. State, 309 Ga. App. 1, 710 S.E.2d 161 (2011).

Sufficient evidence supported the defendant's conviction of possessing a knife in a school zone based on the defendant's testimony that the crime occurred on a university campus and the victim's testimony that the knife had probably a three inch blade. Boccia v. State, 335 Ga. App. 687, 782 S.E.2d 792 (2016).

Findings in disposition order must be in writing. — Trial court erred by ordering a juvenile into restrictive custody under O.C.G.A. § 15-11-63 after failing to make specific written findings of fact in the court's disposition order and, instead, relying on boilerplate text that the court had considered the necessary factors following the juvenile's delinquency adjudication for violating O.C.G.A. § 16-11-127.1(b)(1) for possession of a weapon in a school zone. In the Interest of J.X.B., 317 Ga. App. 492, 731 S.E.2d 381 (2012).

Personal injury suit improperly dismissed. — In a personal injury suit brought by a worker injured while loading a cannon, the trial court erred in granting the school's motion to dismiss on official immunity grounds because the worker sufficiently alleged that the school officials may have had the cannon within their individual control since the school owned the cannon and that the officials knew of and encouraged the cannon's use at football games in violation of O.C.G.A. § 16-11-127.1, prohibiting weapons on school grounds. Boatright v. Copeland, 336 Ga. App. 107, 783 S.E.2d 695 (2016).

Suit challenging carrying weapon in school safety zone properly dismissed. — Trial court properly dismissed the plaintiff's suit challenging the enforcement of O.C.G.A. § 16-11-127.1(b)(1), making it a crime to carry a firearm in a school safety zone, by the school that the plaintiff's child attended because the school had sovereign immunity against state law claims and the threat of arrest if the plaintiff brought a weapon in the school safety zone did not constitute a Fourth Amendment violation to be remedied by the suit. Evans v. Gwinnett County Public Schools, 337 Ga. App. 690, 788 S.E.2d 577 (2016).

Cited in Livery v. State, 233 Ga. App. 882, 506 S.E.2d 165 (1998).

OPINIONS OF THE ATTORNEY GENERAL

"Schools." — Prohibition against carrying weapons at schools includes colleges and universities. 1993 Op. Att'y Gen. No. U93-4.

16-11-127.2. Weapons on premises of nuclear power facility.

(a) Except as provided in subsection (c) of this Code section, it shall be unlawful for any person to carry, possess, or have under such person's control while on the premises of a nuclear power facility a weapon or long gun. Any person who violates this subsection shall be guilty of a misdemeanor.

(b) Any person who violates subsection (a) of this Code section with the intent to do bodily harm on the premises of a nuclear power facility shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $10,000.00, by imprisonment for not less than two nor more than 20 years, or both.

(c) This Code section shall not apply to a security officer authorized to carry dangerous weapons pursuant to Code Section 16-11-124 who is acting in connection with his or her official duties on the premises of a federally licensed nuclear power facility; nor shall this Code section apply to persons designated in paragraph (2), (3), (4), or (8) of subsection (c) of Code Section 16-11-127.1.

(d) Nothing in this Code section shall in any way operate or be construed to affect, repeal, or limit the exemptions provided for under Code Section 16-11-130. (Code 1981, § 16-11-127.2, enacted by Ga. L. 2006, p. 812, § 2/SB 532; Ga. L. 2007, p. 47, § 16/SB 103; Ga. L. 2010, p. 963, § 1-5/SB 308; Ga. L. 2014, p. 432, § 2-6/HB 826; Ga. L. 2015, p. 805, § 5/HB 492.)

Editor's notes. — Ga. L. 2010, p. 963, § 3-1/SB 308, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — Those charged with offenses under O.C.G.A. § 16-11-127.2 are to be fingerprinted. 2007 Op. Att'y Gen. No. 2007-1.

16-11-128. Carrying pistol without license.

Reserved. Repealed by Ga. L. 2010, p. 963, § 1-6/SB 308, effective June 4, 2010.

Editor's notes. — This Code section was based on Ga. L. 1910, p. 134, §§ 1, 4; Code 1933, § 26-5103; Code 1933, § 26-2903, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 1430, § 3; Ga. L. 1996, p. 108, § 2; Ga. L. 2007, p. 47, § 16/SB 103.

Ga. L. 2010, p. 963, § 3-1/SB 308, not

codified by the General Assembly, provides, in part, that the repeal of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

16-11-129. Weapons carry license; gun safety information; temporary renewal permit; mandamus; verification of license.

(a) **Application for weapons carry license or renewal license; term.** The judge of the probate court of each county shall, on application under oath, on payment of a fee of $30.00, and on investigation of applicant pursuant to subsections (b) and (d) of this Code section, issue a weapons carry license or renewal license valid for a period of five years to any person whose domicile is in that county or who is on active duty with the United States armed forces and who is not a domiciliary of this state but who either resides in that county or on a military reservation located in whole or in part in that county at the time of such application. Such license or renewal license shall authorize that person to carry any weapon in any county of this state notwithstanding any change in that person's county of residence or state of domicile. Applicants shall submit the application for a weapons carry license or renewal license to the judge of the probate court on forms prescribed and furnished free of charge to persons wishing to apply for the license or renewal license. An application shall be considered to be for a renewal license if the applicant has a weapons carry license or renewal license with 90 or fewer days remaining before the expiration of such weapons carry license or renewal license or 30 or fewer days since the expiration of such weapons carry license or renewal license regardless of the county of issuance of the applicant's expired or expiring weapons carry license or renewal license. An applicant who is not a United States citizen shall provide sufficient personal identifying data, including without limitation his or her place of birth and United States issued alien or admission number, as the Georgia Bureau of Investigation may prescribe by rule or regulation. An applicant who is in nonimmigrant status shall provide proof of his or her qualifications for an exception to the federal firearm prohibition pursuant to 18 U.S.C. Section 922(y). Forms shall be designed to elicit information from the applicant pertinent to his or her eligibility under this Code section, including citizenship, but shall not require data which is nonpertinent or irrelevant, such as serial numbers or other identification capable of being used as a de facto registration of firearms owned by the applicant. The Department of Public Safety shall furnish application forms and license forms required by this Code section. The forms shall be furnished to each judge of each probate court within this state at no cost.

(a.1) **Gun safety information.**

(1) Upon receipt of an application for a weapons carry license or renewal license, the judge of the probate court may provide applicants printed information on gun safety that is produced by any person or organization that, in the discretion of the judge of the probate court, offers practical advice for gun safety. The source of such printed information shall be prominently displayed on such printed information.

(2) The Department of Natural Resources shall maintain on its principal, public website information, or a hyperlink to information, which provides resources for information on hunter education and classes and courses in this state that render instruction in gun safety. No person shall be required to take such classes or courses for purposes of this Code section where such information shall be provided solely for the convenience of the citizens of this state.

(3) Neither the judge of the probate court nor the Department of Natural Resources shall be liable to any person for personal injuries or damage to property arising from conformance to this subsection.

(b) **Licensing exceptions.**

(1) As used in this subsection, the term:

(A) "Armed forces" means active duty or a reserve component of the United States Army, United States Navy, United States Marine Corps, United States Coast Guard, United States Air Force, United States National Guard, Georgia Army National Guard, or Georgia Air National Guard.

(B) "Controlled substance" means any drug, substance, or immediate precursor included in the definition of controlled substances in paragraph (4) of Code Section 16-13-21.

(C) "Convicted" means an adjudication of guilt. Such term shall not include an order of discharge and exoneration pursuant to Article 3 of Chapter 8 of Title 42.

(D) "Dangerous drug" means any drug defined as such in Code Section 16-13-71.

(2) No weapons carry license shall be issued to:

(A) Any person younger than 21 years of age unless he or she:

(i) Is at least 18 years of age;

(ii) Provides proof that he or she has completed basic training in the armed forces of the United States; and

(iii) Provides proof that he or she is actively serving in the armed forces of the United States or has been honorably discharged from such service;

(B) Any person who has been convicted of a felony by a court of this state or any other state; by a court of the United States, including its territories, possessions, and dominions; or by a court of any foreign nation and has not been pardoned for such felony by the President of the United States, the State Board of Pardons and Paroles, or the person or agency empowered to grant pardons under the constitution or laws of such state or nation;

(C) Any person against whom proceedings are pending for any felony;

(D) Any person who is a fugitive from justice;

(E) Any person who is prohibited from possessing or shipping a firearm in interstate commerce pursuant to subsections (g) and (n) of 18 U.S.C. Section 922;

(F) Any person who has been convicted of an offense arising out of the unlawful manufacture or distribution of a controlled substance or other dangerous drug;

(G) Any person who has had his or her weapons carry license revoked pursuant to subsection (e) of this Code section within three years of the date of his or her application;

(H) Any person who has been convicted of any of the following:

(i) Carrying a weapon without a weapons carry license in violation of Code Section 16-11-126; or

(ii) Carrying a weapon or long gun in an unauthorized location in violation of Code Section 16-11-127

and has not been free of all restraint or supervision in connection therewith and free of any other conviction for at least five years immediately preceding the date of the application;

(I) Any person who has been convicted of any misdemeanor involving the use or possession of a controlled substance and has not been free of all restraint or supervision in connection therewith or free of:

(i) A second conviction of any misdemeanor involving the use or possession of a controlled substance; or

(ii) Any conviction under subparagraphs (E) through (G) of this paragraph

for at least five years immediately preceding the date of the application;

(J) Except as provided for in subsection (b.1) of this Code section, any person who has been hospitalized as an inpatient in

any mental hospital or alcohol or drug treatment center within the five years immediately preceding the application. The judge of the probate court may require any applicant to sign a waiver authorizing any mental hospital or treatment center to inform the judge whether or not the applicant has been an inpatient in any such facility in the last five years and authorizing the superintendent of such facility to make to the judge a recommendation regarding whether the applicant is a threat to the safety of others and whether a license to carry a weapon should be issued. When such a waiver is required by the judge, the applicant shall pay a fee of $3.00 for reimbursement of the cost of making such a report by the mental health hospital, alcohol or drug treatment center, or the Department of Behavioral Health and Developmental Disabilities, which the judge shall remit to the hospital, center, or department. The judge shall keep any such hospitalization or treatment information confidential. It shall be at the discretion of the judge, considering the circumstances surrounding the hospitalization and the recommendation of the superintendent of the hospital or treatment center where the individual was a patient, to issue the weapons carry license or renewal license;

(K) Except as provided for in subsection (b.1) of this Code section, any person who has been adjudicated mentally incompetent to stand trial; or

(L) Except as provided for in subsection (b.1) of this Code section, any person who has been adjudicated not guilty by reason of insanity at the time of the crime pursuant to Part 2 of Article 6 of Chapter 7 of Title 17.

(b.1) **Petitions for relief from certain licensing exceptions.**

(1) Persons provided for under subparagraphs (b)(2)(J), (b)(2)(K), and (b)(2)(L) of this Code section may petition the court in which such adjudication, hospitalization, or treatment proceedings, if any, under Chapter 3 or 7 of Title 37 occurred for relief. A copy of such petition for relief shall be served as notice upon the opposing civil party or the prosecuting attorney for the state, as the case may be, or their successors, who appeared in the underlying case. Within 30 days of the receipt of such petition, such court shall hold a hearing on such petition for relief. Such prosecuting attorney for the state may represent the interests of the state at such hearing.

(2) At the hearing provided for under paragraph (1) of this subsection, the court shall receive and consider evidence in a closed proceeding concerning:

(A) The circumstances which caused the person to be subject to subparagraph (b)(2)(J), (b)(2)(K), or (b)(2)(L) of this Code section;

(B) The person's mental health and criminal history records, if any. The judge of such court may require any such person to sign a waiver authorizing the superintendent of any mental hospital or treatment center to make to the judge a recommendation regarding whether such person is a threat to the safety of others. When such a waiver is required by the judge, the applicant shall pay a fee of $3.00 for reimbursement of the cost of making such a report by the mental health hospital, alcohol or drug treatment center, or the Department of Behavioral Health and Developmental Disabilities, which the judge shall remit to the hospital, center, or department;

(C) The person's reputation which shall be established through character witness statements, testimony, or other character evidence; and

(D) Changes in the person's condition or circumstances since such adjudication, hospitalization, or treatment proceedings under Chapter 3 or 7 of Title 37.

The judge shall issue an order of his or her decision no later than 30 days after the hearing.

(3) The court shall grant the petition for relief if such court finds by a preponderance of the evidence that the person will not likely act in a manner dangerous to public safety in carrying a weapon and that granting the relief will not be contrary to the public interest. A record shall be kept of the hearing; provided, however, that such records shall remain confidential and be disclosed only to a court or to the parties in the event of an appeal. Any appeal of the court's ruling on the petition for relief shall be de novo review.

(4) If the court grants such person's petition for relief, the applicable subparagraph (b)(2)(J), (b)(2)(K), or (b)(2)(L) of this Code section shall not apply to such person in his or her application for a weapons carry license or renewal; provided, however, that such person shall comply with all other requirements for the issuance of a weapons carry license or renewal license. The clerk of such court shall report such order to the Georgia Crime Information Center immediately, but in no case later than ten business days after the date of such order.

(5) A person may petition for relief under this subsection not more than once every two years. In the case of a person who has been hospitalized as an inpatient, such person shall not petition for relief prior to being discharged from such treatment.

(c) **Fingerprinting.** Following completion of the application for a weapons carry license, the judge of the probate court shall require the applicant to proceed to an appropriate law enforcement agency in the

county or to any vendor approved by the Georgia Bureau of Investigation for fingerprint submission services with the completed application so that such agency or vendor can capture the fingerprints of the applicant. The law enforcement agency shall be entitled to a fee of $5.00 from the applicant for its services in connection with fingerprinting and processing of an application. Fingerprinting shall not be required for applicants seeking temporary renewal licenses or renewal licenses.

(d) **Investigation of applicant; issuance of weapons carry license; renewal.**

(1)(A) For weapons carry license applications, the judge of the probate court shall within five business days following the receipt of the application or request direct the law enforcement agency to request a fingerprint based criminal history records check from the Georgia Crime Information Center and Federal Bureau of Investigation for purposes of determining the suitability of the applicant and return an appropriate report to the judge of the probate court. Fingerprints shall be in such form and of such quality as prescribed by the Georgia Crime Information Center and under standards adopted by the Federal Bureau of Investigation. The Georgia Bureau of Investigation may charge such fee as is necessary to cover the cost of the records search.

(B) For requests for license renewals, the presentation of a weapons carry license issued by any probate judge in this state shall be evidence to the judge of the probate court to whom a request for license renewal is made that the fingerprints of the weapons carry license holder are on file with the judge of the probate court who issued the weapons carry license, and the judge of the probate court to whom a request for license renewal is made shall, within five business days following the receipt of the request, direct the law enforcement agency to request a nonfingerprint based criminal history records check from the Georgia Crime Information Center and Federal Bureau of Investigation for purposes of determining the suitability of the applicant and return an appropriate report to the judge of the probate court to whom a request for license renewal is made.

(2) For both weapons carry license applications and requests for license renewals, the judge of the probate court shall within five business days following the receipt of the application or request also direct the law enforcement agency, in the same manner as provided for in subparagraph (B) of paragraph (1) of this subsection, to conduct a background check using the Federal Bureau of Investigation's National Instant Criminal Background Check System and return an appropriate report to the probate judge.

(3) When a person who is not a United States citizen applies for a weapons carry license or renewal of a license under this Code section,

the judge of the probate court shall direct the law enforcement agency to conduct a search of the records maintained by United States Immigration and Customs Enforcement and return an appropriate report to the probate judge. As a condition to the issuance of a license or the renewal of a license, an applicant who is in nonimmigrant status shall provide proof of his or her qualifications for an exception to the federal firearm prohibition pursuant to 18 U.S.C. Section 922(y).

(4) The law enforcement agency shall report to the judge of the probate court within 20 days, by telephone and in writing, of any findings relating to the applicant which may bear on his or her eligibility for a weapons carry license or renewal license under the terms of this Code section. When no derogatory information is found on the applicant bearing on his or her eligibility to obtain a license or renewal license, a report shall not be required. The law enforcement agency shall return the application directly to the judge of the probate court within such time period. Not later than ten days after the judge of the probate court receives the report from the law enforcement agency concerning the suitability of the applicant for a license, the judge of the probate court shall issue such applicant a license or renewal license to carry any weapon unless facts establishing ineligibility have been reported or unless the judge determines such applicant has not met all the qualifications, is not of good moral character, or has failed to comply with any of the requirements contained in this Code section. The judge of the probate court shall date stamp the report from the law enforcement agency to show the date on which the report was received by the judge of the probate court. The judge of the probate court shall not suspend the processing of the application or extend, delay, or avoid any time requirements provided for under this paragraph.

(e) **Revocation, loss, or damage to license.**

(1) If, at any time during the period for which the weapons carry license was issued, the judge of the probate court of the county in which the license was issued shall learn or have brought to his or her attention in any manner any reasonable ground to believe the licensee is not eligible to retain the license, the judge may, after notice and hearing, revoke the license of the person upon a finding that such person is not eligible for a weapons carry license pursuant to subsection (b) of this Code section or an adjudication of falsification of application, mental incompetency, or chronic alcohol or narcotic usage. The judge of the probate court shall report such revocation to the Georgia Crime Information Center immediately but in no case later than ten days after such revocation. It shall be unlawful for any person to possess a license which has been revoked pursuant to this

paragraph, and any person found in possession of any such revoked license, except in the performance of his or her official duties, shall be guilty of a misdemeanor.

(2) If a person is convicted of any crime or otherwise adjudicated in a matter which would make the maintenance of a weapons carry license by such person unlawful pursuant to subsection (b) of this Code section, the judge of the superior court or state court hearing such case or presiding over such matter shall inquire whether such person is the holder of a weapons carry license. If such person is the holder of a weapons carry license, then the judge of the superior court or state court shall inquire of such person the county of the probate court which issued such weapons carry license, or if such person has ever had his or her weapons carry license renewed, then of the county of the probate court which most recently issued such person a renewal license. The judge of the superior court or state court shall notify the judge of the probate court of such county of the matter which makes the maintenance of a weapons carry license by such person to be unlawful pursuant to subsection (b) of this Code section. The Council of Superior Court Judges of Georgia and The Council of State Court Judges of Georgia shall provide by rule for the procedures which judges of the superior court and the judges of the state courts, respectively, are to follow for the purposes of this paragraph.

(3) Loss of any license issued in accordance with this Code section or damage to the license in any manner which shall render it illegible shall be reported to the judge of the probate court of the county in which it was issued within 48 hours of the time the loss or damage becomes known to the license holder. The judge of the probate court shall thereupon issue a replacement for and shall take custody of and destroy a damaged license; and in any case in which a license has been lost, he or she shall issue a cancellation order. The judge shall charge the fee specified in subsection (k) of Code Section 15-9-60 for such services.

(4) Any person, upon petition to the judge of the probate court, who has a weapons carry license or renewal license with more than 90 days remaining before the expiration of such weapons carry license or renewal license and who has had a legal name change, including, but not limited to, on account of marriage or divorce, or an address change shall be issued a replacement weapons carry license for the same time period of the weapons carry license or renewal license being replaced. Upon issuance and receipt of such replacement weapons carry license, the license holder shall surrender the weapons carry license being replaced to the judge of the probate court and such judge shall take custody of and destroy the weapons carry license being replaced. The judge of the probate court shall provide

for the updating of any records as necessary to account for the license holder's change of name or address. The judge of the probate court shall charge the fee specified in paragraph (13) of subsection (k) of Code Section 15-9-60 for services provided under this paragraph.

(f) **Weapons carry license specifications.**

(1) Weapons carry licenses issued prior to January 1, 2012, shall be in the format specified by the former provisions of this paragraph as they existed on June 30, 2013.

(2) On and after January 1, 2012, newly issued or renewal weapons carry licenses shall incorporate overt and covert security features which shall be blended with the personal data printed on the license to form a significant barrier to imitation, replication, and duplication. There shall be a minimum of three different ultraviolet colors used to enhance the security of the license incorporating variable data, color shifting characteristics, and front edge only perimeter visibility. The weapons carry license shall have a color photograph viewable under ambient light on both the front and back of the license. The license shall incorporate custom optical variable devices featuring the great seal of the State of Georgia as well as matching demetalized optical variable devices viewable under ambient light from the front and back of the license incorporating microtext and unique alphanumeric serialization specific to the license holder. The license shall be of similar material, size, and thickness of a credit card and have a holographic laminate to secure and protect the license for the duration of the license period.

(3) Using the physical characteristics of the license set forth in paragraph (2) of this subsection, The Council of Probate Court Judges of Georgia shall create specifications for the probate courts so that all weapons carry licenses in this state shall be uniform and so that probate courts can petition the Department of Administrative Services to purchase the equipment and supplies necessary for producing such licenses. The department shall follow the competitive bidding procedure set forth in Code Section 50-5-102.

(g) **Alteration or counterfeiting of license; penalty.** A person who deliberately alters or counterfeits a weapons carry license or who possesses an altered or counterfeit weapons carry license with the intent to misrepresent any information contained in such license shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for a period of not less than one nor more than five years.

(h) **Licenses for former law enforcement officers.**

(1) Except as otherwise provided in Code Section 16-11-130, any person who has served as a law enforcement officer for at least:

(A) Ten of the 12 years immediately preceding the retirement of such person as a law enforcement officer; or

(B) Ten years and left such employment as a result of a disability arising in the line of duty; and

retired or left such employment in good standing with a state or federal certifying agency and receives benefits under the Peace Officers' Annuity and Benefit Fund provided for under Chapter 17 of Title 47 or from a county, municipal, State of Georgia, state authority, federal, private sector, individual, or educational institution retirement system or program shall be entitled to be issued a weapons carry license as provided for in this Code section without the payment of any of the fees provided for in this Code section.

(2) Such person as provided for in paragraph (1) of this subsection shall comply with all the other provisions of this Code section relative to the issuance of such licenses, including, but not limited to the requirements under paragraph (2) of subsection (b) of this Code section. Any person seeking to be issued a license pursuant to this subsection shall state his or her qualifications for eligibility under this subsection on his or her application under oath as provided for in subsection (a) of this Code section.

(3) As used in this subsection, the term "law enforcement officer" means any peace officer who is employed by the United States government or by the State of Georgia or any political subdivision thereof and who is required by the terms of his or her employment, whether by election or appointment, to give his or her full time to the preservation of public order or the protection of life and property or the prevention of crime. Such term shall include conservation rangers.

(i) **Temporary renewal licenses.**

(1) Any person who holds a weapons carry license under this Code section may, at the time he or she applies for a renewal of the license, also apply for a temporary renewal license if less than 90 days remain before expiration of the license he or she then holds or if the previous license has expired within the last 30 days.

(2) Unless the judge of the probate court knows or is made aware of any fact which would make the applicant ineligible for a five-year renewal license, the judge shall at the time of application issue a temporary renewal license to the applicant.

(3) Such a temporary renewal license shall be in the form of a paper receipt indicating the date on which the court received the renewal application and shall show the name, address, sex, age, and

race of the applicant and that the temporary renewal license expires 90 days from the date of issue.

(4) During its period of validity the temporary renewal license, if carried on or about the holder's person together with the holder's previous license, shall be valid in the same manner and for the same purposes as a five-year license.

(5) A $1.00 fee shall be charged by the probate court for issuance of a temporary renewal license.

(6) A temporary renewal license may be revoked in the same manner as a five-year license.

(j) **Applicant may seek relief.** When an eligible applicant fails to receive a license, temporary renewal license, or renewal license within the time period required by this Code section and the application or request has been properly filed, the applicant may bring an action in mandamus or other legal proceeding in order to obtain a license, temporary renewal license, or renewal license. When an applicant is otherwise denied a license, temporary renewal license, or renewal license and contends that he or she is qualified to be issued a license, temporary renewal license, or renewal license, the applicant may bring an action in mandamus or other legal proceeding in order to obtain such license. Additionally, the applicant may request a hearing before the judge of the probate court relative to the applicant's fitness to be issued such license. Upon the issuance of a denial, the judge of the probate court shall inform the applicant of his or her rights pursuant to this subsection. If such applicant is the prevailing party, he or she shall be entitled to recover his or her costs in such action, including reasonable attorney's fees.

(k) **Data base prohibition.** A person or entity shall not create or maintain a multijurisdictional data base of information regarding persons issued weapons carry licenses.

(l) **Verification of license.** The judge of a probate court or his or her designee shall be authorized to verify the legitimacy and validity of a weapons carry license of a license holder pursuant to a subpoena or court order, for public safety purposes to law enforcement agencies pursuant to paragraph (40) of subsection (a) of Code Section 50-18-72, and for licensing to a judge of a probate court or his or her designee pursuant to paragraph (40) of subsection (a) of Code Section 50-18-72; provided, however, that the judge of a probate court or his or her designee shall not be authorized to provide any further information regarding license holders. (Ga. L. 1910, p. 134, §§ 2, 3; Code 1933, §§ 26-5104, 26-5105; Ga. L. 1960, p. 938, § 1; Code 1933, § 26-2904, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 1430, § 4; Ga. L. 1978, p. 1607, §§ 1, 2; Ga. L. 1981, p. 946, § 1; Ga. L. 1981, p. 1325, § 1;

Ga. L. 1983, p. 1431, § 1; Ga. L. 1984, p. 935, § 1; Ga. L. 1984, p. 1388, § 1; Ga. L. 1986, p. 305, § 1; Ga. L. 1986, p. 481, §§ 1, 2; Ga. L. 1990, p. 138, § 1; Ga. L. 1990, p. 2012, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1994, p. 351, § 1; Ga. L. 1996, p. 108, §§ 3-5; Ga. L. 1997, p. 514, § 2; Ga. L. 2002, p. 1011, § 2; Ga. L. 2006, p. 264, § 1/HB 1032; Ga. L. 2008, p. 1199, § 6/HB 89; Ga. L. 2009, p. 453, § 3-2/HB 228; Ga. L. 2010, p. 963, § 1-7/SB 308; Ga. L. 2011, p. 752, § 16/HB 142; Ga. L. 2014, p. 599, § 1-7/HB 60; Ga. L. 2015, p. 805, § 6/HB 492; Ga. L. 2016, p. 864, § 16/HB 737; Ga. L. 2017, p. 509, § 1/SB 15; Ga. L. 2017, p. 555, § 6/HB 292; Ga. L. 2018, p. 1112, § 16/SB 365.)

The 2016 amendment, effective May 3, 2016, part of an Act to revise, modernize, and correct the Code, substituted "subparagraph (B) of paragraph (1) of this subsection" for "subparagraph (d)(1)(B) of this subsection" in the middle of paragraph (d)(2).

The 2017 amendments. — The first 2017 amendment, effective July 1, 2017, substituted the present provisions of subsection (h) for the former provisions, which read: "Except as otherwise provided in Code Section 16-11-130, any person who has served as a law enforcement officer for at least ten of the 12 years immediately preceding the retirement of such person as a law enforcement officer shall be entitled to be issued a weapons carry license as provided for in this Code section without the payment of any of the fees provided for in this Code section. Such person shall comply with all the other provisions of this Code section relative to the issuance of such licenses. As used in this subsection, the term 'law enforcement officer' means any peace officer who is employed by the United States government or by the State of Georgia or any political subdivision thereof and who is required by the terms of his or her employment, whether by election or appointment, to give his or her full time to the preservation of public order or the protection of life and property or the prevention of crime. Such term shall include conservation rangers." The second 2017 amendment, effective May 8, 2017, added subsection (a.1); in paragraph (d)(4), substituted "20 days" for "30 days" near the middle of the first sentence, and added the last sentence; in paragraph (e)(2), substituted "otherwise adjudicated in a matter" for "involved in any matter" near the beginning of the first sentence; and added paragraph (e)(4).

The 2018 amendment, effective May 8, 2018, part of an Act to revise, modernize, and correct the Code, revised the designations in subsections (f) and (h).

Cross references. — Bail recovery agents, § 17-6-56 et seq. Exemption from section for private detectives and private security agents who hold firearms permits issued by Georgia Board of Private Detective and Security Agencies, § 43-38-10. Inquiry regarding weapons carry license, Uniform Rules for the Superior Court of Georgia, Rule 48.

Editor's notes. — Ga. L. 2008, p. 1199, § 1/HB 89, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Business Security and Employee Privacy Act.'"

Ga. L. 2010, p. 963, § 3-1/SB 308, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Ga. L. 2015, p. 805, § 6/HB 492, which amended this Code section, purported to amend subparagraph (b)(2)(A) but no changes were made, and also purported to amend paragraph (d)(1) but actually amended both paragraphs (d)(1) and (d)(2).

Ga. L. 2017, p. 555, § 1/HB 292, not codified by the General Assembly, provides that: "The General Assembly finds that:

"(1) The ownership of firearms is a clear and explicit right protected by the United States Constitution and the Constitution of this state;

"(2) Access to financial services provides for the functioning of a firearms industry and, thus, the constitutionally protected right of firearm ownership; and

"(3) The provisions of this Act are intended to implement the constitutional protections provided for under the law."

Law reviews. — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 65 Mercer L. Rev. 295 (2013). For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014). For annual survey on criminal law, see 68 Mercer L. Rev. 93 (2016).

For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 124 (1994). For review of 1996 offenses against public order and safety legislation, see 13 Ga. St. U.L. Rev. 123 (1996).

For comment on Johnson v. Wright, 509 F.2d 828 (5th Cir. 1975), see 27 Mercer L. Rev. 1207 (1976).

JUDICIAL DECISIONS

Legislative intent behind 1976 amendment (Ga. L. 1976, pp. 1430, 1433) was to require, after July 1, 1976, that any information as to identification of a weapon be treated as "nonpertinent and irrelevant." Holtzendorf v. State, 146 Ga. App. 823, 247 S.E.2d 599 (1978).

Intent of 1976 amendment to former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129) was that section not require registration of firearms until former licenses expired. Holtzendorf v. State, 146 Ga. App. 823, 247 S.E.2d 599 (1978).

There is no conflict between former Code 1933, §§ 26-2902 and 26-2904 (see now O.C.G.A. § 16-11-127 and O.C.G.A. § 16-11-129). Byrdsong v. State, 245 Ga. 336, 265 S.E.2d 15 (1980).

Paragraph (b)(3) superseded. — Clear impact of O.C.G.A. § 16-11-131(b) and (c) is to implicitly repeal O.C.G.A. § 16-11-129(b)(3). Fain v. State, 259 Ga. 708, 386 S.E.2d 144 (1989).

Provision in O.C.G.A. § 16-11-129(b)(4) that probate court can require applicants to sign a waiver authorizing mental hospitals and drug and alcohol treatment centers to inform court whether applicant had been an inpatient within the past five years is allowed because the court needs these facts in order to make an informed decision to grant or deny applicant a license to carry a gun. Propst v. McCurry, 252 Ga. 56, 310 S.E.2d 914 (1984).

Statute not unconstitutional. — O.C.G.A. § 16-11-129, which regulated the ability of citizens to carry a weapon in public, was justified by the goal to protect the safety of individuals who are in public places, which was a legitimate and compelling government interest. The statute was not unconstitutional as applied to an applicant who pled nolo contendre to violent felonies in Florida more than 20 years earlier, under either U.S. Const., amend. II or Ga. Const. 1983, Art. I, Sec. I, Para. VIII. Hertz v. Bennett, 294 Ga. 62, 751 S.E.2d 90 (2013).

Controlling law. — Trial court properly granted the defendant's motion to dismiss the complaint, seeking a judgment declaring that it was not a crime for a person with a weapons carry license to carry a firearm within a school safety zone, because the language of the house bill at issue, codified in O.C.G.A. § 16-11-127.1, was controlling law and prohibited such conduct. GeorgiaCarry.Org, Inc. v. Code Revision Commission, 299 Ga. 896, 793 S.E.2d 35 (2016).

Organization lacked standing. — Because an applicant's claim was moot since the applicant received a new weapons license and an organization lacked standing, it was incumbent upon the trial court to enter an order dismissing the organization's claims instead of granting the organization summary judgment.

GeorgiaCarry.Org, Inc. v. James, 298 Ga. 420, 782 S.E.2d 284 (2016).

Suit challenging carrying a weapon in a school safety zone properly dismissed. — Trial court properly dismissed the plaintiff's suit challenging the enforcement of O.C.G.A. § 16-11-127.1(b)(1), making it a crime to carry a firearm in a school safety zone, by the school that the plaintiff's child attended because the school had sovereign immunity against state law claims and the threat of arrest if the plaintiff brought a weapon in the school safety zone did not constitute a Fourth Amendment violation to be remedied by the suit. Evans v. Gwinnett County Public Schools, 337 Ga. App. 690, 788 S.E.2d 577 (2016).

Burden of proof. — Defendant charged with carrying a concealed weapon has the burden of proving that defendant had a valid permit authorizing defendant to carry a handgun in a motor vehicle. London v. State, 235 Ga. App. 30, 508 S.E.2d 247 (1998).

First offender prohibited from obtaining permit. — Provision of O.C.G.A. § 16-11-129(b), prohibiting the granting of a pistol permit to a person convicted as a first offender for possession of a controlled substance, applied prospectively to an applicant who had been discharged as a first offender five years before enactment of the provision. Foss v. Probate Court of Chatham County, 232 Ga. App. 612, 502 S.E.2d 278 (1998).

License issued by probate court of county of former residence does not satisfy requirements. Asberry v. State, 142 Ga. App. 51, 234 S.E.2d 847 (1977).

Possession of license under O.C.G.A. § 16-11-129 did not dispense with municipal ordinance requirement that a certificate be obtained prior to the sale of a handgun. Montgomery Ward & Co. v. Cooper, 177 Ga. App. 540, 339 S.E.2d 755 (1986).

Nonpertinent or irrelevant information. — When plaintiff gun permit applicant's complaint alleged that to apply for a Georgia Firearms License, the applicant had to supply the applicant's employment information in violation of O.C.G.A. § 16-11-129 because the applicant's employment information was nonpertinent or irrelevant under § 16-11-129(a), dismissing that claim as moot after a temporary restraining order (TRO) required defendant agency official to process the application without the applicant's social security number, was error; the state law claim for prospective relief — enjoining the official from requiring employment information — was not moot. Camp v. Cason, No. 06-15404; No. 06-16425, 2007 U.S. App. LEXIS 6882 (11th Cir. Mar. 23, 2007) (Unpublished).

Evidence of bad character. — Gun ownership, and carrying such a weapon, do not by themselves impute bad character. Gomillion v. State, 236 Ga. App. 14, 512 S.E.2d 640 (1999).

Right to weapons carry license restored. — When the Georgia Board of Pardons and Paroles restored "all" of the applicant's civil rights and removed "all" disabilities imposed on the applicant by Georgia law, it was apparent that the applicant regained any right to keep and bear arms that the applicant had lost as a result of a felony moonshining conviction, and the applicant was not subject to the disabilities to obtain a weapons carry license and possess firearms that otherwise would have applied to the applicant under O.C.G.A. §§ 16-11-129 and 16-11-131(b). Ferguson v. Perry, 292 Ga. 666, 740 S.E.2d 598 (2013).

After 18-year-old defendant admitted possession, the evidence was sufficient to convict defendant of carrying a pistol without a license since no license to carry a pistol can be issued to any person under 21 years of age. Waugh v. State, 218 Ga. App. 301, 460 S.E.2d 871 (1995).

Discretion of probate judge. — Because a probate court may only issue a Georgia firearms license if no disqualifying or derogatory information is discovered as a result of background checks conducted by the Georgia Bureau of Investigation, the FBI, or the U.S. Bureau of Immigrations and Customs Enforcement, the 60-day period for issuing a license under O.C.G.A. § 16-11-129(d)(4) is extended by the statute itself when necessary to accommodate any delays that reasonably may be attributed to the investigative process. Moore v. Cranford, 285 Ga. App. 666, 647 S.E.2d 295 (2007),

cert. denied, 2007 Ga. LEXIS 706 (Ga. 2007).

Cited in Coleman v. State, 163 Ga. App. 173, 293 S.E.2d 395 (1982); Luke v. State, 178 Ga. App. 614, 344 S.E.2d 452 (1986); Moore v. Nelson, 394 F. Supp. 2d 1365 (M.D. Ga. 2005); Moore v. State, 286 Ga. App. 313, 649 S.E.2d 337 (2007).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 26-5104 and 26-5105 are included in the annotations for this Code section.

Public interest underlying section. — Former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129) concerns public interest, since its objective is to avoid unrestrained carrying of firearms outside of homes or places of business. 1975 Op. Att'y Gen. No. U75-10.

Permit to carry pistol issued by another state is not recognized in Georgia. 1957 Op. Att'y Gen. p. 143 (rendered under former Code 1933, §§ 26-5104, 26-5105).

There is no restriction against carrying an unloaded shotgun in a vehicle through this state. 1970 Op. Att'y Gen. No. U70-30.

Discretion of probate court judge in considering application for firearms permit. — The judge of the probate court, in considering an application for a firearms permit under O.C.G.A. § 16-11-129, has no discretion to exercise, but must issue the permit unless provided with information indicating the disqualification of the applicant. 1989 Op. Att'y Gen. U89-21.

Probate judge's authority under former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129(a)) was permissive, not mandatory. 1972 Op. Att'y Gen. No. U72-112.

Discretionary meaning of word "may" in former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129) was revitalized and strengthened when viewed along with former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129(b)) which used word "shall" in regard to what a probate court judge must do when granting a license for a handgun; having both words "may" and "shall" used in that section, and in an almost side-by-side way, restores permissive or discretionary use of word "may." 1975 Op. Att'y Gen. No. U75-10.

Probate judge has discretion regarding issuance of more than one permit to an individual. — Former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129) gives discretionary authority to probate court judge in county to determine whether or not to issue more than one license per person to carry a handgun in the county; further, a probate court judge has a duty to guard against having any one individual in the county becoming a threat to the community by issuing numerous permits to any one citizen. 1975 Op. Att'y Gen. No. U75-10.

Validity of license based on county residence. — Person possesses a valid handgun license only when the handgun is issued in the person's county of present residence. When the holder of a handgun license changes the person's county of legal residence, the person must apply for a new license in the person's county of present residence, and the application should be processed as a first-time application pursuant to O.C.G.A. § 16-11-129(c)(2) (paragraph (c)(2) deleted in 2006). 1985 Op. Att'y Gen. No. U85-49.

Word "resident" as used in former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129) meant domicile. 1976 Op. Att'y Gen. No. U76-71

Demonstration of domiciliary intent is necessary for issuance of license. — General Assembly did not intend for probate judges to issue handgun licenses to every individual who passes through state for short period of time, but rather has extended this privilege to those individuals in this state who have demonstrated domiciliary intent and are known to be responsible citizens in their respective counties. 1981 Op. Att'y Gen. No. U81-26.

Considerations in determining residency. — In making determination as to whether an individual is a resident, evidence of whether the individual pays

Georgia income taxes and/or property taxes, which county the individual resides in, and what county the individual is registered to vote in should be considered. 1981 Op. Att'y Gen. No. U81-26.

"Resident" requirement precludes issuance of permit to persons merely working or doing business in county. — As used in O.C.G.A. § 16-11-129, term "resident" means actual physical residence with intent to remain a resident. This precludes issuance of firearm permit to those persons who merely work or do business in county. 1981 Op. Att'y Gen. No. U81-26.

Military personnel generally not residents of county in which military installation is situated. — One residing on military reservation does not qualify as resident of county in which military installation is situated, unless he or she has previously declared Georgia as his or her legal residence prior to moving onto reservation; military members residing off base would not be residents within meaning of former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129) unless they intend to make Georgia their legal residence, and the county in which they were residing their place of domicile. 1976 Op. Att'y Gen. No. U76-71 (rendered prior to 1996 amendment)

Licensing foreign nationals. — Probate judge may issue a firearm license to a qualified foreign national who is domiciled in the county over which the judge presides. 1985 Op. Att'y Gen. No. U85-15.

Former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129) did not require recording of any portion of application to carry a handgun. 1976 Op. Att'y Gen. No. U76-33; 1981 Op. Att'y Gen. No. U81-47

Only written memorial necessary to be kept in discharge of duties imposed by former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129) was name of licensee and date of issuance of permit. 1981 Op. Att'y Gen. No. U81-47

Only name of permit holder and date of permit issuance are matters of public record. 1981 Op. Att'y Gen. No. U81-47.

Although law enforcement agency check exceeds 60 days, license cannot issue prior to its return. — In light of 60-day provision in former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129), the background check by a law enforcement agency is an essential condition precedent to issuing of license by probate judge to an applicant; the General Assembly never intended for a probate judge to issue a license until the judge had received a report from the respective law enforcement agency conducting the background check; therefore, a probate judge may not issue a pistol permit prior to return of law enforcement agency check should such check exceed 60 days as provided by law. 1978 Op. Att'y Gen. No. U78-45

Entitlement to fee for processing applications. — Law enforcement agency is entitled to a fee for processing applications for a license to carry a pistol or revolver when a background investigation is performed by accessing the records of the Georgia Crime Information Center. 1985 Op. Att'y Gen. No. U85-16.

Information obtained pursuant to criminal history check is confidential. — Information obtained pursuant to criminal history background check, required by O.C.G.A. § 16-11-129, from taking of fingerprints and checking of these fingerprints with those presently on file with Georgia Crime Information Center is of a confidential nature and prohibited from public disclosure. 1981 Op. Att'y Gen. No. U81-47.

Disclosure of confidential information would be unlawful. — Disclosure of information obtained by local law enforcement agencies from Georgia Crime Information Center in conducting criminal history check would violate law and regulations governing dissemination of information contained in Georgia Crime Information Center's files, and would discourage voluntary compliance with the licensing provisions of O.C.G.A. § 16-11-129. 1981 Op. Att'y Gen. No. U81-47.

Effect of suspension of processing of nonfederal applicant fingerprint cards by FBI. — Suspension of processing of nonfederal applicant fingerprint cards by FBI limits processing of applicants for permits to carry a firearm to

criminal history information available from Georgia Crime Information Center and local law enforcement agencies, but does not change procedure for processing applications. 1981 Op. Att'y Gen. No. 81-97.

Carrying pistol or revolver at shopping mall. — Person who has properly obtained a license to carry a pistol or revolver under O.C.G.A. § 16-11-129 may legally carry a pistol or revolver at a shopping mall without violating O.C.G.A. § 16-11-127, which prohibits the carriage of firearms to or while at a public gathering. 1984 Op. Att'y Gen. No. U84-37.

Private detectives and security guards may carry firearms while on duty or en route only when issued a permit from the Georgia Board of Private Detective and Security Agencies. 1986 Op. Att'y Gen. 86-22.

Former Code 1933, § 26-2914 (see now O.C.G.A. § 16-11-131) was only an additional qualification to requirements presently provided for under former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129(b)(3)). 1980 Op. Att'y Gen. No. U80-32.

Discharge under First Offender Act prevents operation of disabilities. — Applicant for license to carry a pistol or revolver under former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129) who has successfully completed, or who has been released prior to termination of the probationary period under the First Offender Act (O.C.G.A. Art. 3, Ch. 8, T. 42), does not have to be free from all restraint or supervision for a specified period of years before applying for a pistol permit, since successful completion of period of probation has resulted in there being no adjudication of guilty and, therefore, no conviction. 1978 Op. Att'y Gen. No. U78-21

Plea of nolo contendere to felony is not a statutory disqualification for a pistol license. — Plea of nolo contendere to felony was not deemed plea of guilty to that felony, so as to prevent individual from qualifying for license to carry a pistol under former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129), however, probate judge might be able to deny a permit under such circumstances in view of the judge's discretion under subsection (a). 1974 Op. Att'y Gen. No. U74-67

Plea of nolo contendere to drug violation as disqualification. — Person charged with a violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., who has tendered a plea of nolo contendere to the charges, when such plea has been accepted by the trial court, has been convicted of that offense for the purposes of consideration of an application for a firearms permit, and is thus statutorily ineligible for the issuance of such a permit. 1991 Op. Att'y Gen. U91-11.

Conviction arising out of the possession of marijuana precludes an applicant from obtaining a license to carry a pistol or revolver. 1997 Op. Att'y Gen. No. U97-29.

Relief by pardon applies to disabilities upon individuals within coverage of paragraph (b)(3). — Relief by pardon applies to those disabilities placed upon persons who have been convicted of felony or forcible misdemeanor and who are seeking to secure a license to carry a pistol under former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129). Op. Att'y Gen. No. U71-10

Arrest while in drunken condition and carrying pistol in full view. 1952-53 Op. Att'y Gen. p. 50 (rendered under former Code 1933, §§ 26-5104, 26-5105).

Renewing license requires going through same procedures as for applying for license for first time. 1980 Op. Att'y Gen. No. U80-9 (rendered prior to 1983 amendment).

Fingerprinting not required. — Offenses arising from a violation of subsection (e) of O.C.G.A. § 16-11-129 does not appear to be an offense for which fingerprinting is required. 2010 Op. Att'y Gen. No. 10-6.

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Weapons and Firearms, §§ 4, 8, 26, 34.

C.J.S. — 94 C.J.S., Weapons, § 56.

ALR. — Who is entitled to carry concealed weapons, 51 A.L.R.3d 504.

Judicial review of state or local administrative order approving, denying, or revoking permit or license to carry, possess, or own firearm, 91 A.L.R.6th 435.

Construction and application of state statutes and local ordinances regulating licenses or permits to carry concealed weapons, 12 A.L.R.7th 4.

16-11-130. Exemptions from Code Sections 16-11-126 through 16-11-127.2.

(a) Except to the extent provided for in subsection (c.1) of this Code section, Code Sections 16-11-126 through 16-11-127.2 shall not apply to or affect any of the following persons if such persons are employed in the offices listed below or when authorized by federal or state law, regulations, or order:

(1) Peace officers, as such term is defined in paragraph (11) of Code Section 16-1-3, and retired peace officers so long as they remain certified whether employed by the state or a political subdivision of the state or another state or a political subdivision of another state but only if such other state provides a similar privilege for the peace officers of this state;

(2) Wardens, superintendents, and keepers of correctional institutions, jails, or other institutions for the detention of persons accused or convicted of an offense;

(3) Persons in the military service of the state or of the United States;

(4) Persons employed in fulfilling defense contracts with the government of the United States or agencies thereof when possession of the weapon or long gun is necessary for manufacture, transport, installation, and testing under the requirements of such contract;

(5) District attorneys, investigators employed by and assigned to a district attorney's office, assistant district attorneys, attorneys or investigators employed by the Prosecuting Attorneys' Council of the State of Georgia, and any retired district attorney, assistant district attorney, district attorney's investigator, or attorney or investigator retired from the Prosecuting Attorneys' Council of the State of Georgia, if such employee is retired in good standing and is receiving benefits under Title 47 or is retired in good standing and receiving benefits from a county or municipal retirement system;

(6) State court solicitors-general; investigators employed by and assigned to a state court solicitor-general's office; assistant state

court solicitors-general; the corresponding personnel of any city court expressly continued in existence as a city court pursuant to Article VI, Section X, Paragraph I, subparagraph (5) of the Constitution; and the corresponding personnel of any civil court expressly continued as a civil court pursuant to said provision of the Constitution;

(7) Those employees of the State Board of Pardons and Paroles when specifically designated and authorized in writing by the members of the State Board of Pardons and Paroles to carry a weapon or long gun;

(8) The Attorney General and those members of his or her staff whom he or she specifically authorizes in writing to carry a weapon or long gun;

(9) Community supervision officers employed by and under the authority of the Department of Community Supervision when specifically designated and authorized in writing by the commissioner of community supervision;

(10) Public safety directors of municipal corporations;

(11) Explosive ordnance disposal technicians, as such term is defined by Code Section 16-7-80, and persons certified as provided in Code Section 35-8-13 to handle animals trained to detect explosives, while in the performance of their duties;

(12) Federal judges, Justices of the Supreme Court, Judges of the Court of Appeals, judges of superior, state, probate, juvenile, and magistrate courts, full-time judges of municipal and city courts, permanent part-time judges of municipal and city courts, and administrative law judges;

(12.1) Former federal judges, Justices of the Supreme Court, Judges of the Court of Appeals, judges of superior, state, probate, juvenile, and magistrate courts, full-time judges of municipal and city courts, permanent part-time judges of municipal courts, and administrative law judges who are retired from their respective offices, provided that such judge or Justice would otherwise be qualified to be issued a weapons carry license;

(12.2) Former federal judges, Justices of the Supreme Court, Judges of the Court of Appeals, judges of superior, state, probate, juvenile, and magistrate courts, full-time judges of municipal and city courts, permanent part-time judges of municipal courts, and administrative law judges who are no longer serving in their respective office, provided that he or she served as such judge or Justice for more than 24 months; and provided, further, that such judge or Justice would otherwise be qualified to be issued a weapons carry license;

(13) United States Attorneys and Assistant United States Attorneys;

(14) County medical examiners and coroners and their sworn officers employed by county government;

(15) Clerks of the superior courts; and

(16) Constables employed by a magistrate court of this state.

(b) Except to the extent provided for in subsection (c.1) of this Code section, Code Sections 16-11-126 through 16-11-127.2 shall not apply to or affect persons who at the time of their retirement from service with the Department of Community Supervision were community supervision officers, when specifically designated and authorized in writing by the commissioner of community supervision.

(c)(1) As used in this subsection, the term "courthouse" means a building or annex occupied by judicial courts and containing rooms in which judicial proceedings are held.

(2) Except to the extent provided for in subsection (c.1) of this Code section, Code Sections 16-11-126 through 16-11-127.2 shall not apply to or affect any:

(A) Sheriff, retired sheriff, deputy sheriff, or retired deputy sheriff if such retired sheriff or deputy sheriff is eligible to receive or is receiving benefits under the Peace Officers' Annuity and Benefit Fund provided under Chapter 17 of Title 47, the Sheriffs' Retirement Fund of Georgia provided under Chapter 16 of Title 47, or any other public retirement system established under the laws of this state for service as a law enforcement officer;

(B) Member of the Georgia State Patrol, agent of the Georgia Bureau of Investigation, retired member of the Georgia State Patrol, or retired agent of the Georgia Bureau of Investigation if such retired member or agent is receiving benefits under the Employees' Retirement System;

(C) Full-time law enforcement chief executive engaging in the management of a county, municipal, state, state authority, or federal law enforcement agency in the State of Georgia, including any college or university law enforcement chief executive who is registered or certified by the Georgia Peace Officer Standards and Training Council; or retired law enforcement chief executive who formerly managed a county, municipal, state, state authority, or federal law enforcement agency in the State of Georgia, including any college or university law enforcement chief executive who was registered or certified at the time of his or her retirement by the Georgia Peace Officer Standards and Training Council, if such

retired law enforcement chief executive is receiving benefits under the Peace Officers' Annuity and Benefit Fund provided under Chapter 17 of Title 47 or is retired in good standing and receiving benefits from a county, municipal, State of Georgia, state authority, or federal retirement system;

(D) Police officer of any county, municipal, state, state authority, or federal law enforcement agency in the State of Georgia, including any college or university police officer who is registered or certified by the Georgia Peace Officer Standards and Training Council, or retired police officer of any county, municipal, state, state authority, or federal law enforcement agency in the State of Georgia, including any college or university police officer who was registered or certified at the time of his or her retirement by the Georgia Peace Officer Standards and Training Council, if such retired police officer is receiving benefits under the Peace Officers' Annuity and Benefit Fund provided under Chapter 17 of Title 47 or is retired in good standing and receiving benefits from a county, municipal, State of Georgia, state authority, or federal retirement system; or

(E) Person who is a citizen of this state and:

(i) Has retired with at least ten years of aggregate service as a law enforcement officer with powers of arrest under the laws of any state of the United States or of the United States;

(ii) Separated from service in good standing, as determined by criteria established by the Georgia Peace Officer Standards and Training Council, from employment with his or her most recent law enforcement agency; and

(iii) Possesses on his or her person an identification card for retired law enforcement officers as issued by the Georgia Peace Officer Standards and Training Council; provided, however, that such person meets the standards for the issuance of such card as provided for by the council, including, but not limited to, maintenance of qualification in firearms training.

In addition, any such sheriff, retired sheriff, deputy sheriff, retired deputy sheriff, member or retired member of the Georgia State Patrol, agent or retired agent of the Georgia Bureau of Investigation, officer or retired officer of the Department of Natural Resources, active or retired law enforcement chief executive, person who is a retired law enforcement officer as provided for in paragraph (2) of this subsection, or other law enforcement officer referred to in this subsection shall be authorized to carry a handgun on or off duty anywhere within this state, including, but not limited to, in a courthouse except to the extent provided for in subsection (c.1) of this Code section, and Code Sections

16-11-126 through 16-11-127.2 shall not apply to the carrying of such firearms.

(c.1)(1) As used in the subsection, the term:

(A) "Active" means nonretired.

(B) "Courthouse" means a building or annex occupied by judicial courts and containing rooms in which judicial proceedings are held.

(C) "Law enforcement agency" means sheriffs or any unit, organ, or department of this state, or a subdivision or municipality thereof, whose functions by law include the enforcement of criminal or traffic laws; the preservation of public order; the protection of life and property; the prevention, detection, or investigation of crime; or court security that is providing security for a courthouse.

(D) "Law enforcement personnel" means sheriffs or deputy sheriffs or peace officers employed by a law enforcement agency.

(2)(A) Pursuant to a security plan implemented by law enforcement personnel, including as provided for under a comprehensive plan as provided for in subsection (a) of Code Section 15-16-10, the law enforcement agency with jurisdiction over a courthouse may provide for facilities or the means for the holding of weapons carried by persons enumerated under this Code section, except as provided for in paragraph (3) of this subsection, provided that ingress to such courthouse is actively restricted or screened by law enforcement personnel and such facilities or means are located in the immediate proximity of the area which is restricted or screened by such law enforcement personnel.

(B) If the requirements of this paragraph are met, the persons enumerated under this Code section shall, except as provided for in paragraph (3) of this subsection, upon request of law enforcement personnel place his or her weapons in such holding with law enforcement personnel while such persons are within the restricted or screened area. Upon request of any person enumerated under this Code section, in preparation for his or her exit from the restricted or screened area, law enforcement personnel shall immediately provide for the return of the person's weapons which are in holding.

(3) Notwithstanding a security plan implemented by law enforcement personnel, including as provided for under a comprehensive plan as provided for in subsection (a) of Code Section 15-16-10, active law enforcement officers referred to in subsection (c) of this Code section shall be authorized to carry their service handguns and weapons in any courthouse if they are wearing the assigned uniform of their law enforcement office or have the official badge and identi-

fication credentials issued to them by their law enforcement office displayed and plainly visible on their person while in the performance of their official duties.

(d) A prosecution based upon a violation of Code Section 16-11-126 or 16-11-127 need not negative any exemptions. (Code 1933, § 26-2907, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1974, p. 481, § 1; Ga. L. 1979, p. 1019, § 1; Ga. L. 1982, p. 3, § 16; Ga. L. 1982, p. 789, § 2; Ga. L. 1984, p. 22, § 16; Ga. L. 1985, p. 283, § 1; Ga. L. 1986, p. 1205, § 2; Ga. L. 1988, p. 472, § 1; Ga. L. 1990, p. 558, § 1; Ga. L. 1991, p. 94, § 16; Ga. L. 1993, p. 604, § 1; Ga. L. 1994, p. 547, § 2; Ga. L. 1996, p. 416, § 6; Ga. L. 1996, p. 748, § 12; Ga. L. 1997, p. 514, § 3; Ga. L. 1998, p. 657, §§ 1-3; Ga. L. 2000, p. 843, §§ 1, 2; Ga. L. 2003, p. 140, § 16; Ga. L. 2006, p. 531, § 1/HB 1044; Ga. L. 2008, p. 577, § 16/SB 396; Ga. L. 2010, p. 963, § 2-7/SB 308; Ga. L. 2011, p. 508, § 1/HB 266; Ga. L. 2014, p. 599, § 1-8/HB 60; Ga. L. 2015, p. 422, § 5-28/HB 310; Ga. L. 2016, p. 263, § 1/SB 332; Ga. L. 2017, p. 24, § 1/SB 18; Ga. L. 2017, p. 555, § 7/HB 292.)

The 2016 amendment, effective July 1, 2016, substituted the present provisions of paragraph (a)(12) for the former provisions, which read: "State and federal judges, judges of probate, juvenile, and magistrate courts, full-time judges of municipal and city courts, and permanent part-time judges of municipal and city courts."; substituted the present provisions of paragraph (a)(12.1) for the former provisions, which read: "Former state and federal judges, judges of probate, juvenile, and magistrate courts, full-time judges of municipal and city courts, and permanent part-time judges of municipal courts who are retired from their respective offices, provided that such judge would otherwise be qualified to be issued a weapons carry license;"; and substituted the present provisions of paragraph (a)(12.2) for the former provisions, which read: "Former state and federal judges, judges of probate, juvenile, and magistrate courts, full-time judges of municipal and city courts, and permanent part-time judges of municipal courts who are no longer serving in their respective office, provided that he or she served as such judge for more than 24 months; and provided, further, that such judge would otherwise be qualified to be issued a weapons carry license;".

The 2017 amendments. — The first 2017 amendment, effective July 1, 2017, in paragraph (c)(2), substituted "Patrol, agent of the Georgia Bureau of Investigation," for "Patrol or agent of the Georgia Bureau of Investigation or", inserted a comma following "Georgia State Patrol", and inserted "retired" preceding "agent"; substituted "who" for "that" throughout paragraphs (c)(3) and (c)(4); deleted "or" at the end of paragraph (c)(3); in paragraph (c)(4), substituted "such retired police officer" for "such retired employee" in the middle, and added "; or" at the end; added paragraph (c)(5); and in the ending undesignated text of subsection (c), inserted the language beginning "member of the Georgia State Patrol," and ending with "Georgia Bureau of Investigation," near the middle, inserted "person who is a retired law enforcement officer as provided for in paragraph (5) of this subsection," in the middle, and substituted "this state" for "the state" near the end. The second 2017 amendment, effective May 8, 2017, in subsections (a) and (b), added "Except to the extent provided for in subsection (c.1) of this Code section," at the beginning; rewrote subsection (c); and added subsection (c.1).

Cross references. — State-wide Probation Act, T. 42, C. 8, A. 2. Exemptions for private detectives and private security agents who hold firearms permits issued by Georgia Board of Private Detective and

Security Agencies, § 43-38-10. Power of employees of Department of Juvenile Justice designated to investigate and apprehend escaping delinquent and unruly children to carry weapons, § 49-4A-8.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, the redesignation of paragraph (5.1) as paragraph (6) by Ga. L. 1996, p. 416, § 6 was not given effect; and paragraph (5.1), as amended by Ga. L. 1996, p. 748, § 12 was redesignated as paragraph (6) and, a semicolon was substituted for a period at the end of paragraph (a)(11).

Pursuant to Code Section 28-9-5, in 2017, the amendment of subsection (c) of this Code section by Ga. L. 2017, p. 24, § 1/SB 18, was treated as impliedly repealed and superseded by Ga. L. 2017, p. 555, § 7/HB 292, due to irreconcilable conflict.

Editor's notes. — Ga. L. 2010, p. 963, § 3-1/SB 308, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Ga. L. 2017, p. 555, § 1/HB 292, not codified by the General Assembly, provides that: "The General Assembly finds that:

"(1) The ownership of firearms is a clear and explicit right protected by the United States Constitution and the Constitution of this state;

"(2) Access to financial services provides for the functioning of a firearms industry and, thus, the constitutionally protected right of firearm ownership; and

"(3) The provisions of this Act are intended to implement the constitutional protections provided for under the law."

Ga. L. 2017, p. 24, § 1/SB 18, which amended this Code section, purported to amend subsection (c) but actually amended paragraph (c)(1).

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 231 (2015).

JUDICIAL DECISIONS

Private detectives and security guards are not peace officers. — Private detective or security guard, even though given courtesy of a card labeling the person a "special" deputy sheriff was not a peace officer under former Code 1933, § 26-2907 (see now O.C.G.A. § 16-11-130). Talley v. State, 129 Ga. App. 479, 199 S.E.2d 908 (1973).

Scope of exemption. — Exemptions stated in former Code 1933, § 26-2907 (see now O.C.G.A. § 16-11-130) appertain only to certain persons employed by government and its subdivisions, and then only when engaged in pursuit of official duty or otherwise specifically authorized by law to do so. Talley v. State, 129 Ga. App. 479, 199 S.E.2d 908 (1973).

Carrying of service weapons by officers in courthouse. — Department of Public Safety officers are permitted to carry their service weapons and handguns into courthouses, but O.C.G.A. § 16-11-30 does not authorize the officers' entry into courtrooms where the courthouse's security plan and/or judges of that court have directed otherwise. 2017 Op. Att'y Gen. No. 17-5.

Former Code 1933, § 26-2907 (see now O.C.G.A. § 16-11-130(b)) was burden reducing but not burden shifting. Simmons v. State, 246 Ga. 390, 271 S.E.2d 468 (1980), cert. denied, 449 U.S. 1125, 101 S. Ct. 942, 67 L. Ed. 2d 111 (1981).

Cited in Simmons v. State, 154 Ga. App. 234, 267 S.E.2d 806 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Trooper cadets are not "peace officers" within meaning of former Code 1933, § 26-2907 (see now O.C.G.A. § 16-11-130), and thus, are subject to licensing requirements. 1974 Op. Att'y Gen. No. 74-135

Solicitor (now solicitor-general) of a state court does not fall within the definition of "peace officer," and is not thereby exempt from the requirements of O.C.G.A. §§ 16-11-126 through 16-11-128 (now repealed), nor is that office otherwise exempt from these requirements. 1985 Op. Att'y Gen. No. U85-5 (rendered prior to 1996 amendment, adding paragraph (5.1), (now (6)).

Full-time peace officers are entitled to the same exemption as are active duty military personnel. 1997 Op. Att'y Gen. No. U97-13.

Off-duty police officers may carry a concealed weapon only if the officers are authorized to do so by state or federal law, regulation or order. 1987 Op. Att'y Gen. No. U87-28.

License may not be issued to underage off-duty peace officer. — Although peace officers under 21 are exempt from handgun licensing requirements when engaged in official duties, a probate judge may not lawfully issue handgun licenses to peace officers under 21 for use while off duty. 1984 Op. Att'y Gen. No. U84-23.

Security guards employed by State Board of Education are not "peace officers" within meaning of former Code 1933, § 26-2907 (see now O.C.G.A. § 16-11-130). 1978 Op. Att'y Gen. No. 78-3

Correctional officers at a state prison are peace officers. 1987 Op. Att'y Gen. No. U87-28.

Special deputy sheriff is not authorized, by virtue of that office, to carry firearms. 1970 Op. Att'y Gen. No. U70-204.

Investigators employed by the solicitor's office of the juvenile court may not be authorized by the solicitor to carry weapons and may not exercise the powers of a peace officer unless they are certified as peace officers pursuant to O.C.G.A. Ch. 8, T. 35. 1990 Op. Att'y Gen. No. U90-22.

Military personnel. — Active duty military personnel are exempt from the requirement of a firearms license, and the exemption is not limited to military action on the military reservation. 1997 Op. Att'y Gen. No. U97-13.

Active duty military personnel may obtain a firearms license if otherwise qualified, and dependents of military personnel are eligible for a license if it is determined that they have established domicile. 1997 Op. Att'y Gen. No. U97-13.

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Weapons and Firearms, § 22.

C.J.S. — 94 C.J.S., Weapons, § 51 et seq.

ALR. — Who is entitled to carry concealed weapons, 51 A.L.R.3d 504.

16-11-130.1. Allowing personnel to carry weapons within certain school safety zones and at school functions.

(a) As used in this Code section, the term:

(1) "Bus or other transportation furnished by a school" means a bus or other transportation furnished by a public or private elementary or secondary school.

(2) "School function" means a school function or related activity that occurs outside of a school safety zone for a public or private elementary or secondary school.

(3) "School safety zone" means in or on any real property or building owned by or leased to any public or private elementary or secondary school or local board of education and used for elementary or secondary education.

(4) "Weapon" shall have the same meaning as set forth in Code Section 16-11-127.1.

(b) This Code section shall not be construed to require or otherwise mandate that any local board of education or school administrator adopt or implement a practice or program for the approval of personnel to possess or carry weapons within a school safety zone, at a school function, or on a bus or other transportation furnished by a school nor shall this Code section create any liability for adopting or declining to adopt such practice or program. Such decision shall rest with each individual local board of education. If a local board of education adopts a policy to allow certain personnel to possess or carry weapons as provided in paragraph (6) of subsection (c) of Code Section 16-11-127.1, such policy shall include approval of personnel to possess or carry weapons and provide for:

(1) Training of approved personnel prior to authorizing such personnel to carry weapons. The training shall at a minimum include training on judgment pistol shooting, marksmanship, and a review of current laws relating to the use of force for the defense of self and others; provided, however, that the local board of education training policy may substitute for certain training requirements the personnel's prior military or law enforcement service if the approved personnel has previously served as a certified law enforcement officer or has had military service which involved similar weapons training;

(2) An approved list of the types of weapons and ammunition and the quantity of weapons and ammunition authorized to be possessed or carried;

(3) The exclusion from approval of any personnel who has had an employment or other history indicating any type of mental or emotional instability as determined by the local board of education; and

(4) A mandatory method of securing weapons which shall include at a minimum a requirement that the weapon, if permitted to be carried concealed by personnel, shall be carried on the person and not in a purse, briefcase, bag, or similar other accessory which is not secured on the body of the person and, if maintained separate from the person, shall be maintained in a secured lock safe or similar lock box that cannot be easily accessed by students.

(c) Any personnel selected to possess or carry weapons within a school safety zone, at a school function, or on a bus or other transpor-

tation furnished by a school shall be a license holder, and the local board of education shall be responsible for conducting a criminal history background check of such personnel annually to determine whether such personnel remains qualified to be a license holder.

(d) The selection of approved personnel to possess or carry a weapon within a school safety zone, at a school function, or on a bus or other transportation furnished by a school shall be done strictly on a voluntary basis. No personnel shall be required to possess or carry a weapon within a school safety zone, at a school function, or on a bus or other transportation furnished by a school and shall not be terminated or otherwise retaliated against for refusing to possess or carry a weapon.

(e) The local board of education shall be responsible for any costs associated with approving personnel to carry or possess weapons within a school safety zone, at a school function, or on a bus or other transportation furnished by a school; provided, however, that nothing contained in this Code section shall prohibit any approved personnel from paying for part or all of such costs or using any other funding mechanism available, including donations or grants from private persons or entities.

(f) Documents and meetings pertaining to personnel approved to carry or possess weapons within a school safety zone, at a school function, or on a bus or other transportation furnished by a school shall be considered employment and public safety security records and shall be exempt from disclosure under Article 4 of Chapter 18 of Title 50. (Code 1981, § 16-11-130.1, enacted by Ga. L. 2014, p. 599, § 1-9/HB 60.)

Cross references. — School safety plans, § 20-2-1185.

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

RESEARCH REFERENCES

ALR. — Construction and application of state statutes and local ordinances regulating licenses or permits to carry concealed weapons, 12 A.L.R.7th 4.

16-11-130.2. Carrying a weapon or long gun at a commercial service airport.

(a) No person shall enter the restricted access area of a commercial service airport, in or beyond the airport security screening checkpoint, knowingly possessing or knowingly having under his or her control a weapon or long gun. Such area shall not include an airport drive,

general parking area, walkway, or shops and areas of the terminal that are outside the screening checkpoint and that are normally open to unscreened passengers or visitors to the airport. Any restricted access area shall be clearly indicated by prominent signs indicating that weapons are prohibited in such area.

(a.1) As used in this Code section, the term:

(1) "Commercial service airport" means an airport that receives scheduled passenger aircraft service from any major airline carrier.

(2) "Major airline carrier" means an airline that has more than $1 billion in annual operating revenue during a fiscal year.

(b) A person who is not a license holder and who violates this Code section shall be guilty of a misdemeanor. A license holder who violates this Code section shall be guilty of a misdemeanor; provided, however, that a license holder who is notified at the screening checkpoint for the restricted access area that he or she is in possession of a weapon or long gun and who immediately leaves the restricted access area following such notification and completion of federally required transportation security screening procedures shall not be guilty of violating this Code section.

(c) Any person who violates this Code section with the intent to commit a separate felony offense shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not less than $1,000.00 nor more than $15,000.00, imprisonment for not less than one nor more than ten years, or both.

(d) Any ordinance, resolution, regulation, or policy of any county, municipality, or other political subdivision of this state which is in conflict with this Code section shall be null, void, and of no force and effect, and this Code section shall preempt any such ordinance, resolution, regulation, or policy. (Code 1981, § 16-11-130.2, enacted by Ga. L. 2014, p. 599, § 1-9/HB 60; Ga. L. 2017, p. 555, § 8/HB 292.)

The 2017 amendment, effective May 8, 2017, added subsection (a.1).

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

OPINIONS OF THE ATTORNEY GENERAL

Updating of crimes and offenses for which Georgia Crime Information Center is authorized to collect and file fingerprints. — Pursuant to authority granted to the Attorney General in O.C.G.A. § 35-3-33(a)(1)(A)(v), any misdemeanor offenses arising under O.C.G.A. §§ 16-8-14.1(a), 16-8-22, 16-11-90(b), 16-11-130.2, and 33-24-53, are designated as ones for which those charged are to be fingerprinted. 2014 Op. Att'y Gen. No. 2014-2.

16-11-131. Possession of firearms by convicted felons and first offender probationers.

(a) As used in this Code section, the term:

(1) "Felony" means any offense punishable by imprisonment for a term of one year or more and includes conviction by a court-martial under the Uniform Code of Military Justice for an offense which would constitute a felony under the laws of the United States.

(2) "Firearm" includes any handgun, rifle, shotgun, or other weapon which will or can be converted to expel a projectile by the action of an explosive or electrical charge.

(b) Any person who is on probation as a felony first offender pursuant to Article 3 of Chapter 8 of Title 42, who is on probation and was sentenced for a felony under subsection (a) or (c) of Code Section 16-13-2, or who has been convicted of a felony by a court of this state or any other state; by a court of the United States including its territories, possessions, and dominions; or by a court of any foreign nation and who receives, possesses, or transports any firearm commits a felony and, upon conviction thereof, shall be imprisoned for not less than one year nor more than ten years; provided, however, that upon a second or subsequent conviction, such person shall be imprisoned for not less than five nor more than ten years; provided, further, that if the felony for which the person is on probation or has been previously convicted is a forcible felony, then upon conviction of receiving, possessing, or transporting a firearm, such person shall be imprisoned for a period of five years.

(b.1) Any person who is prohibited by this Code section from possessing a firearm because of conviction of a forcible felony or because of being on probation as a first offender or under conditional discharge for a forcible felony and who attempts to purchase or obtain transfer of a firearm shall be guilty of a felony and upon conviction shall be punished by imprisonment for not less than one year nor more than five years; provided, however, that upon a second or subsequent conviction, such person shall be punished by imprisonment for not less than five nor more than ten years.

(c) This Code section shall not apply to any person who has been pardoned for the felony by the President of the United States, the State Board of Pardons and Paroles, or the person or agency empowered to grant pardons under the constitutions or laws of the several states or of a foreign nation and, by the terms of the pardon, has expressly been authorized to receive, possess, or transport a firearm.

(d) A person who has been convicted of a felony, but who has been granted relief from the disabilities imposed by the laws of the United

States with respect to the acquisition, receipt, transfer, shipment, or possession of firearms by the secretary of the United States Department of the Treasury pursuant to 18 U.S.C. Section 925, shall, upon presenting to the Board of Public Safety proof that the relief has been granted and it being established from proof submitted by the applicant to the satisfaction of the Board of Public Safety that the circumstances regarding the conviction and the applicant's record and reputation are such that the acquisition, receipt, transfer, shipment, or possession of firearms by the person would not present a threat to the safety of the citizens of Georgia and that the granting of the relief sought would not be contrary to the public interest, be granted relief from the disabilities imposed by this Code section. A person who has been convicted under federal or state law of a felony pertaining to antitrust violations, unfair trade practices, or restraint of trade shall, upon presenting to the Board of Public Safety proof, and it being established from said proof, submitted by the applicant to the satisfaction of the Board of Public Safety that the circumstances regarding the conviction and the applicant's record and reputation are such that the acquisition, receipt, transfer, shipment, or possession of firearms by the person would not present a threat to the safety of the citizens of Georgia and that the granting of the relief sought would not be contrary to the public interest, be granted relief from the disabilities imposed by this Code section. A record that the relief has been granted by the board shall be entered upon the criminal history of the person maintained by the Georgia Crime Information Center and the board shall maintain a list of the names of such persons which shall be open for public inspection.

(e) As used in this Code section, the term "forcible felony" means any felony which involves the use or threat of physical force or violence against any person and further includes, without limitation, murder; murder in the second degree; burglary in any degree; robbery; armed robbery; home invasion in any degree; kidnapping; hijacking of an aircraft or hijacking a motor vehicle in the first degree; aggravated stalking; rape; aggravated child molestation; aggravated sexual battery; arson in the first degree; the manufacturing, transporting, distribution, or possession of explosives with intent to kill, injure, or intimidate individuals or destroy a public building; terroristic threats; or acts of treason or insurrection.

(f) Any person sentenced as a first offender pursuant to Article 3 of Chapter 8 of Title 42 or sentenced pursuant to subsection (a) or (c) of Code Section 16-13-2 and subsequently discharged without court adjudication of guilt as a matter of law pursuant to Code Section 42-8-60 or 16-13-2, as applicable, shall, upon such discharge, be relieved from the disabilities imposed by this Code section. (Code 1933, § 26-2914, enacted by Ga. L. 1980, p. 1509, § 1; Ga. L. 1982, p. 1171, § 2; Ga. L. 1983, p. 945, § 1; Ga. L. 1987, p. 476, §§ 1, 2; Ga. L. 1989, p. 14, § 16;

Ga. L. 2000, p. 1630, § 5; Ga. L. 2012, p. 899, § 8-5/HB 1176; Ga. L. 2014, p. 426, § 4/HB 770; Ga. L. 2014, p. 444, § 2-5/HB 271; Ga. L. 2016, p. 443, § 6C-2/SB 367; Ga. L. 2017, p. 417, § 3-1/SB 104; Ga. L. 2018, p. 550, § 4-4/SB 407.)

The 2016 amendment, effective July 1, 2016, substituted "as a matter of law pursuant to Code Section 42-8-60" for "pursuant to Code Section 42-8-62" near the middle of subsection (f).

The 2017 amendment, effective July 1, 2017, in the middle of subsection (e), inserted "hijacking a" and inserted "in the first degree".

The 2018 amendment, effective July 1, 2018, in subsection (b), inserted ", who is on probation and was sentenced for a felony under subsection (a) or (c) of Code Section 16-13-2," near the middle, inserted "year", and substituted "ten years" for "five years" in the middle, in the proviso, inserted "upon a second or subsequent conviction, such person shall be imprisoned for not less than five nor more than ten years; provided, further, that", and substituted "for" for "as to" in the middle of the proviso; in paragraph (b.1), inserted "or under conditional discharge", deleted "pursuant to this Code section" following "forcible felony" near the middle, inserted "upon conviction", inserted "year" in the middle, and added the proviso; and, in subsection (f), substituted "sentenced" for "placed on probation" near the beginning, and, in the middle, inserted "or sentenced pursuant to subsection (a) or (c) of Code Section 16-13-2" and inserted "or 16-13-2, as applicable,".

Cross references. — Unauthorized possession of weapon by person confined in penal institution, § 42-5-63.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, "of" was deleted following "Chapter " in subsection (e) (now (f)).

Pursuant to Code Section 28-9-5, in 1996, "18 U.S.C. Section 925" was substituted for "18 U.S.C. 925" in the first sentence of subsection (d).

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Administrative rules and regulations. — Brady Handgun Violence Prevention Act, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Crime Information Center Council, § 140-2-.17.

Law reviews. — For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012). For article on the 2016 amendment of this Code section, see 33 Ga. St. U.L. Rev. 139 (2016). For article on the 2017 amendment of this Code section, see 34 Ga. St. U.L. Rev. 61 (2017). For annual survey on criminal law, see 69 Mercer L. Rev. 73 (2017).

JUDICIAL DECISIONS

Analysis

General Consideration
Double Jeopardy

General Consideration

Constitutionality. — O.C.G.A. § 16-11-131(a), defining a felony for purposes of the charge of possession of a firearm by a convicted felon, creates an ambiguity in that a person of ordinary intelligence could fail to appreciate that the definition was meant to look past the treatment given a criminal offense by an

General Consideration (Cont'd)

out-of-state jurisdiction and encompass within the ambit of O.C.G.A. § 16-11-131 any offense with a maximum sentence exceeding 12 months, even those denominated "misdemeanor" by the rendering jurisdiction; section was held partly unconstitutional in that it failed to give sufficient notice as to what out-of-state convictions could be used in support of the charge. State v. Langlands, 276 Ga. 721, 583 S.E.2d 18 (2003).

O.C.G.A. § 16-11-131 is a reasonable regulation authorized by the police power and thus is not violative of Ga. Const. 1976, Art. I, Sec. I, Para. V (see now Ga. Const. 1983, Art. I, Sec. I, Para. VIII). Landers v. State, 250 Ga. 501, 299 S.E.2d 707 (1983).

O.C.G.A. § 16-11-131 is not an ex post facto law because it creates a new offense and imposes punishment for that offense only. Landers v. State, 250 Ga. 501, 299 S.E.2d 707 (1983).

O.C.G.A. § 16-11-131 is not an ex post facto law. The applicable date is the date of the offense of possession, not the date of the previous felony conviction. Ledesma v. State, 251 Ga. 487, 306 S.E.2d 629 (1983), cert. denied, 464 U.S. 1069, 104 S. Ct. 975, 79 L. Ed. 2d 213 (1984).

Construction with § 16-3-24.2. — In a case in which the evidence showed that defendant, a convicted felon, used a firearm to shoot the deceased, a trial court erred in granting defendant's motion to quash the indictment under O.C.G.A. § 16-3-24.2. Since defendant possessed the firearm in violation of O.C.G.A. § 16-11-131, defendant was not entitled to the immunity offered by § 16-3-24.2 State v. Burks, 285 Ga. 781, 684 S.E.2d 269 (2009).

Construction of firearms. — Phrase "any firearm" found in O.C.G.A. § 16-11-131(b), when read in conjunction with the statutory proviso and with subsection (b.1), is unambiguous and was intended by the Georgia legislature to refer to a single firearm rather than multiple firearms. Coates v. State, 342 Ga. App. 148, 802 S.E.2d 65 (2017).

Probable cause for arrest. — Police search of a defendant's bag and person, which produced handguns, cocaine, cash, and other drugs was lawful because the search was made pursuant to the police officers' lawful warrantless arrest of the defendant when the defendant arrived at a motel room exactly answering a detailed description provided by a confidential informant, who stated that the defendant would be carrying a shoulder bag containing drugs and a loaded handgun. Green v. State, 302 Ga. App. 388, 691 S.E.2d 283 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer recovered from a rental car because the officer had reasonable grounds for detaining the defendant since the officer found the defendant and a friend in the parking lot of a closed business late at night, knew that several burglaries and thefts had occurred in the area recently, and observed that the defendant and the friend appeared to be nervous when the officer spoke with them; in the course of securing a firearm the officer saw a firearm in the center console of the rental car, the officer saw in plain view a digital scale with white residue, affording the officer probable cause to effect a custodial arrest of the defendant. Culpepper v. State, 312 Ga. App. 115, 717 S.E.2d 698 (2011).

Proof required. — To support a conviction for possession of a firearm by a convicted felon, the state need only prove that the accused is a convicted felon and in possession of a firearm as defined in O.C.G.A. § 16-11-131(a)(2). Malone v. State, 337 Ga. App. 178, 786 S.E.2d 558 (2016).

No speedy trial violation. — Convictions for armed robbery, aggravated assault with the intent to rob, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon were proper because the defendant's right to a speedy trial was not violated by the 20-month delay between the date the indictment was issued to the date of the defendant's actual trial as the delay was due to a higher priority of statutory speedy trial demands, so it was not a deliberate delay on the part of the state, and as the defendant failed to show any prejudice from the delay. Herndon v.

State, 277 Ga. App. 374, 626 S.E.2d 579 (2006).

Constructive possession is sufficient to prove a violation. Simpson v. State, 213 Ga. App. 143, 444 S.E.2d 115 (1994).

Defendant's conviction of possession of a firearm by a convicted felon was proper because the act of any one of the conspirators involved was the act of all, and because the defendant's co-conspirator possessed a weapon, it followed that the defendant was in constructive possession of the weapon. Murray v. State, 309 Ga. App. 828, 711 S.E.2d 387 (2011).

Possession of firearms by convicted felons. — It is the public policy of Georgia that possession of firearms by convicted felons generally presents a threat to the safety of the citizens of the state. Edmunds v. Cowan, 192 Ga. App. 616, 386 S.E.2d 39, cert. denied, 192 Ga. App. 901, 386 S.E.2d 39 (1989).

Nonforcible felon who has been free of restraint or supervision for five years is not eligible to apply for a license to carry firearms unless the felon obtains a pardon within the meaning of O.C.G.A. § 16-11-131(c). Absent a pardon, such an applicant commits a felony under O.C.G.A. § 16-11-131(b) if the felon carries a firearm. Fain v. State, 259 Ga. 708, 386 S.E.2d 144 (1989).

Evidence that defendant kept guns in storage in safes immediately after defendant was released from prison on parole after defendant's convictions for aggravated assault and firing a gun at another was sufficient to show that defendant was guilty of possession of a firearm by a first offender probationer. Quinn v. State, 255 Ga. App. 744, 566 S.E.2d 450 (2002), overruled in part by Ross v. State, 279 Ga. 365, 614 S.E.2d 31 (2005).

Any error in the admission of a witness's statements under the necessity exception to the hearsay rule was harmless in light of the overwhelming evidence of defendant's guilt for assault and possession of a firearm by a convicted felon, including the exact match of defendant's blood sample to the blood found at the scene, the location and timing of defendant's capture, and the fact that defendant had a recent gunshot wound. Porter v. State, 275 Ga. App. 513, 621 S.E.2d 523 (2005).

Defendant's conviction of possession of a firearm by a convicted felon under O.C.G.A. § 16-11-131 merged with the defendant's conviction of felony murder under O.C.G.A. § 16-5-1(c) predicated on possession of a firearm by a convicted felon. Lawson v. State, 280 Ga. 881, 635 S.E.2d 134 (2006).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failure to request a bifurcated trial on felony murder under O.C.G.A. § 16-5-1 and on possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-11-131; because the possession count was a predicate offense for the felony murder count, the prior conviction that was admitted into evidence was relevant to the felony murder count, and it was not necessary to sever the possession count. Wells v. State, 281 Ga. 253, 637 S.E.2d 8 (2006).

Evidence was sufficient to support the defendant's convictions for trafficking in cocaine, possession of a firearm during the commission of a felony, possession of a firearm by a convicted felon, and felony fleeing or attempting to elude based on the defendant's involvement in a police chase that included speeds in excess of 100 m.p.h. in a residential area and the defendant's attempt to flee on foot; a backpack that the defendant was carrying while running from the police and which was recovered from the roof of the house around which the defendant had disappeared had drugs and a pistol in the backpack. Hinton v. State, 297 Ga. App. 565, 677 S.E.2d 752 (2009).

Evidence was sufficient to show that the defendant constructively possessed three firearms as a convicted felon in violation of O.C.G.A. § 16-11-131(b) because the defendant's bedroom contained two firearms and ammunition for a third gun that was found in a spare bedroom, and a shed the defendant used also contained ammunition for the guns. Layne v. State, 313 Ga. App. 608, 722 S.E.2d 351 (2012).

Sufficient evidence supported the defendant's conviction for possession of a firearm by a convicted felon based on the gun being found in close physical proximity to

General Consideration (Cont'd)

the defendant and that the defendant had in a pocket the exact number of the proper caliber bullets to completely reload the gun; although others had access to the car before the defendant took possession of the car, the evidence authorized the conclusion that the car had been visually inspected at a point close in time to when the defendant had sole access. Malone v. State, 337 Ga. App. 178, 786 S.E.2d 558 (2016).

Possession of black powder guns sufficient. — Evidence that the defendant was found in possession of two black powder guns was sufficient to support the convictions for possession of a firearm during the commission of a crime and by a convicted felon. Hall v. State, 322 Ga. App. 313, 744 S.E.2d 833 (2013).

Disassembled rifle was firearm. — Jury was authorized to find that the disassembled rifle was a firearm within the statutory definition. Mantooth v. State, 335 Ga. App. 734, 783 S.E.2d 133 (2016).

Firearms includes handguns. — Juvenile court erred by modifying the juvenile's disposition after determining that the disposition was void on the ground that the juvenile's conduct did not qualify as a Class-B felony because carrying a weapon in a school zone qualified as a Class-B designated felony under O.C.G.A. § 15-11-2 and "firearm" included "handguns" under O.C.G.A. § 16-11-131. In the Interest of D. B., 341 Ga. App. 559, 802 S.E.2d 19 (2017).

Relevancy of possession evidence. — Evidence that the defendant was in possession of a handgun "around the time of the shooting" was relevant and material to a charge of possession of a weapon by a convicted felon. Jones v. State, 282 Ga. 306, 647 S.E.2d 576 (2007).

Failure to sever firearms charge not ineffective assistance. — In a case where the defendant shot and killed the victim during a robbery, trial counsel's performance was not deficient simply because counsel did not move to sever the firearm possession charge from the other counts of the indictment, since that charge was material to the more serious charges, including malice murder, and, thus, it was not incumbent upon the trial court to bifurcate the trial. Lee v. State, 280 Ga. 521, 630 S.E.2d 380 (2006).

No requirement to sever charges. — Defendant was not entitled to a new jury on a trial of a possession of a firearm by a convicted felon charge as, generally, all charges arising out of the same conduct had to be tried in a single prosecution; although there were limited exceptions to the rule allowing, under proper circumstances, the bifurcation of a possession of a firearm by a convicted felon charge, the defendant was not entitled to a separate trial before a new jury on that charge. Walker v. State, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Construed with O.C.G.A. § 16-11-129(b)(3). — Clear impact of O.C.G.A. § 16-11-131(b) and (c) is to implicitly repeal O.C.G.A. § 16-11-129(b)(3). Fain v. State, 259 Ga. 708, 386 S.E.2d 144 (1989).

Construction with O.C.G.A. § 17-10-7. — Because defendant's three prior felony convictions, and a subsequent conviction of possession of a firearm by a convicted felon as a result of one or more of those felonies, remained separate felonies that could be used to impose a recidivist punishment for the commission of yet another felony, and defendant did not seek to collaterally attack any of those convictions, the recidivists sentences imposed under O.C.G.A. § 17-10-7 were valid. Campbell v. State, 279 Ga. App. 331, 631 S.E.2d 388 (2006).

Defendant waived defendant's objection to the trial court's consideration of a particular conviction in aggravation of sentencing under the recidivist statute, O.C.G.A. § 17-10-7, when the state had already used that conviction in support of the charge of possession of a firearm by a convicted felon because the defendant failed to object at sentencing to the exhibit containing the conviction. Thomas v. State, 305 Ga. App. 801, 701 S.E.2d 202 (2010).

Pistol as "firearm." — O.C.G.A. § 16-11-131's definition of a firearm does not include toys or nonfunctional replicas, and whether a pistol is a firearm is a matter to be determined by the jury. Head

v. State, 170 Ga. App. 324, 316 S.E.2d 791, rev'd on other grounds, 253 Ga. 429, 322 S.E.2d 228 (1984), overruled in part by Ross v. State, 279 Ga. 365, 614 S.E.2d 31 (2005).

When there was no evidence that a pistol was not a firearm, the evidence was sufficient to support the jury's finding that the pistol was such beyond a reasonable doubt. Head v. State, 170 Ga. App. 324, 316 S.E.2d 791, rev'd on other grounds, 253 Ga. 429, 322 S.E.2d 228 (1984), overruled in part by Ross v. State, 279 Ga. 365, 614 S.E.2d 31 (2005).

Jury was authorized to find that guns found in defendant's automobile were actual working firearms since there was no evidence introduced to refute a police officer's testimony that the guns were pistols. Jolly v. State, 183 Ga. App. 370, 358 S.E.2d 912 (1987).

Antique shotgun. — Possession of an antique shotgun while a convicted felon was sufficient to sustain a conviction under O.C.G.A. § 16-11-131 as the state was not required to prove that the gun was operational at the time the defendant possessed the gun. Senior v. State, 277 Ga. App. 197, 626 S.E.2d 169 (2006).

Evidence of bullets properly admitted. — With regard to a defendant's convictions on two counts of armed robbery, possession of a firearm during the commission of a crime, failure to obey a traffic control device, fleeing and attempting to elude a police officer, reckless driving, failure to stop at the scene of an accident, and possession of a firearm by a convicted felon, the trial court properly denied the defendant's motion for a new trial and sufficient evidence existed to support the defendant's convictions as the trial court did not err in admitting into evidence certain bullets found in the defendant's possession at the time of the defendant's arrest based on the state allegedly not providing a proper chain of custody; the bullets, unlike fungible articles, were distinct and recognizable physical objects that were identifiable by observation, eliminating the necessity of a chain-of-custody showing. Green v. State, 287 Ga. App. 248, 651 S.E.2d 174 (2007).

Tender of weapons into evidence unnecessary. — Defendant's contention that the evidence was not sufficient to convict defendant of possessing firearms while a convicted felon because the weapons were not tendered into evidence is without merit. Midura v. State, 183 Ga. App. 523, 359 S.E.2d 416 (1987).

Firearms properly admitted into evidence. — Firearms found in the defendant's girlfriend's room, occupied by the defendant and defendant's girlfriend at the time of arrest, were properly admitted as being relevant to prove the necessary elements of O.C.G.A. § 16-11-131. Thompson v. State, 168 Ga. App. 734, 310 S.E.2d 725 (1983).

Motion to suppress evidence of the seized firearm found in plain view was properly denied. — Defendant voluntarily consented to police officers searching the defendant's bedroom; moreover, the officers did not threaten defendant into giving defendant's consent merely by telling defendant that they could obtain a warrant based on their earlier seizure of marijuana in another part of the house. Butler v. State, 272 Ga. App. 557, 612 S.E.2d 865 (2005).

Fingerprint card improperly admitted. — Trial court erred in admitting into evidence over objection a fingerprint card taken following a felony arrest of defendant for violation of, inter alia, O.C.G.A. § 16-11-131, since the violation of that statute was an other crime not shown to be connected with the one on trial, served no useful or relevant purpose, placed the defendant's character in evidence, and was prejudicial to the defendant. Strawder v. State, 207 Ga. App. 365, 427 S.E.2d 792 (1993).

Prior criminal record. — In a prosecution of defendant for possession of a firearm by a convicted felon, introduction of evidence showing defendant had a prior criminal record was necessary to prove the charge. Belt v. State, 225 Ga. App. 813, 485 S.E.2d 39 (1997).

Out-of-state convictions. — Defendant's charge of possession of a firearm by a felon, on which a charge of felony murder was predicated, was based on defendant's Pennsylvania misdemeanor conviction for involuntary manslaughter, which carried a maximum five-year sentence. O.C.G.A. § 16-11-131, criminalizing a fel-

General Consideration (Cont'd)

on's firearm possession, gave insufficient notice to defendant that the Pennsylvania misdemeanor could be a predicate felony for a charge under the statute. O.C.G.A. § 16-11-131(a)'s definition of a felony created an ambiguity, in that a person of ordinary intelligence could fail to appreciate that the statute intended to encompass any offense with a maximum penalty over 12 months, even if it was called a misdemeanor. Had sufficient notice been given, the full faith and credit clause, U.S. Const. art. IV, § 1, would not prohibit according defendant's misdemeanor conviction felony status. State v. Langlands, 276 Ga. 721, 583 S.E.2d 18 (2003).

O.C.G.A. § 16-11-131 provides sufficient notice to a person of ordinary intelligence that a conviction by an out-of-state court of a crime, which authorized punishment of up to three years in prison, is a felony conviction for purposes of the statute. Warren v. State, 289 Ga. App. 481, 657 S.E.2d 533 (2008), cert. denied, No. S08C0978, 2008 Ga. LEXIS 508 (Ga. 2008).

With regard to a defendant's conviction on two counts of possession of a firearm by a convicted felon, the trial court did not err in denying the defendant's motion for directed verdict based on the defendant's contention that a prior out-of-state conviction was not a felony conviction; given that the defendant was convicted of an offense that carried a maximum punishment of three years in prison, the trier of fact properly concluded that the defendant had been convicted of an offense punishable by imprisonment for a term of one year or more, pursuant to O.C.G.A. § 16-11-131, because in determining whether a sentence is a felony, the established consideration is what sentence can be imposed under the law, not what was imposed. Warren v. State, 289 Ga. App. 481, 657 S.E.2d 533 (2008), cert. denied, No. S08C0978, 2008 Ga. LEXIS 508 (Ga. 2008).

After the plaintiff appealed a district court's dismissal with prejudice of the complaint seeking declaratory and injunctive relief to prevent the plaintiff's prosecution for violating 18 U.S.C. § 922(g)(1), the plaintiff lacked standing because even if § 922(g)(1) was declared unconstitutional as applied to the plaintiff, Georgia law independently barred the plaintiff from possessing a firearm because of the plaintiff's Michigan convictions. Daogaru v. Brandon, No. 16-15722, 2017 U.S. App. LEXIS 5451 (11th Cir. Mar. 29, 2017) (Unpublished).

Proof of previous felony conviction is necessary element of state's proof under O.C.G.A. § 16-11-131, and introduction of evidence of previous conviction during trial of issue of guilt was not error. Prather v. State, 247 Ga. 789, 279 S.E.2d 697 (1981); Favors v. State, 182 Ga. App. 179, 355 S.E.2d 109 (1987).

Defendant's prior felony conviction for armed robbery is properly admitted where it is the basis for the charge of possession of a firearm by a convicted felon. Johnson v. State, 203 Ga. App. 896, 418 S.E.2d 155 (1992).

Because conviction of a prior felony is a necessary element of the crime of firearm possession as proscribed by O.C.G.A. § 16-11-131, insufficiency in the proof of this element demands entry of a judgment of acquittal as to that offense; thus, since the Court of Appeals determined that the state's evidence was insufficient to prove that the defendant was a convicted felon, it was error for that court to remand the case for a hearing on the sole issue of whether the defendant had in fact pled guilty to any prior charges. Brantley v. State, 272 Ga. 892, 536 S.E.2d 509 (2000).

Certified copies of a defendant's out-of-state judgment of conviction, associated complaint, and plea hearing transcript were properly admitted into evidence to show that the defendant was a convicted felon for purposes of O.C.G.A. § 16-11-131, which prohibits possession of a firearm by a convicted felon. Warren v. State, 289 Ga. App. 481, 657 S.E.2d 533 (2008), cert. denied, No. S08C0978, 2008 Ga. LEXIS 508 (Ga. 2008).

Sufficient proof of prior felony conviction. — Since the state offered as proof of defendant's previous felony conviction a certified copy of the 1974 burglary conviction of one Henry Levi Glass and defendant presented no evidence contradicting that defendant was the person named in

the 1974 documents, it was held that concordance of name alone is some evidence of identity and that in the absence of any denial by defendant and no proof to the contrary, this concordance of name was sufficient to show that defendant and the individual previously convicted were the same person. Glass v. State, 181 Ga. App. 448, 352 S.E.2d 642 (1987).

Admission of a certified copy of defendant's five-year sentence for a prior conviction of armed robbery showing both that defendant had pled guilty to armed robbery and that defendant had been represented by counsel satisfied the requirement of O.C.G.A. § 16-11-131. Ingram v. State, 240 Ga. App. 172, 523 S.E.2d 31 (1999).

Evidence supported a defendant's conviction of possession of a firearm by a convicted felon even though the only evidence presented during the separate guilt/innocence phase on that charge was the certified copy of the defendant's indictment, guilty plea, and sentence for the felony offense of theft by taking; the jury was properly instructed that the jury was authorized to consider the evidence presented in the first guilt/innocence phase of the trial, as well as the evidence presented in the second guilt/innocence phase, in reaching the jury's verdict regarding the charge of possession of a firearm by a convicted felon. The evidence at trial on the malice murder and possession of a firearm during the commission of a crime charges was sufficient and was incorporated by reference into the trial on the firearm count. Walker v. State, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

After verdicts were entered on the other counts charged against the defendant, evidence submitted by the state consisting of a certified copy of the defendant's prior conviction showing the defendant's probationary status as a first time offender for felony theft by taking at the time of the crimes was sufficient to support a conviction under O.C.G.A. § 16-11-131. Thompson v. State, 281 Ga. App. 627, 636 S.E.2d 779 (2006).

After the defendant was found guilty of rape and aggravated assault, a separate guilt/innocence trial was held on the firearm possession charge, wherein the state introduced into evidence, without objection, a certified copy of the defendant's guilty plea and sentence for the crime of voluntary manslaughter, which testimony and documentary evidence from the combined proceedings sufficiently established that the defendant was guilty of possession of a firearm by a convicted felon. Harris v. State, 283 Ga. App. 374, 641 S.E.2d 619 (2007).

Evidence establishing that the defendant was a convicted felon included not only the defendant's guilty plea to a charge of first-degree forgery, a felony, but also the defendant's admissions in closing argument that the defendant had been convicted on just that charge; thus, the evidence was sufficient to convict the defendant of possession of a firearm by a convicted felon. McKie v. State, 345 Ga. App. 84, No. A17A1443, 2018 Ga. App. LEXIS 177 (2018).

Insufficient proof of prior felony conviction. — Because the only evidence before the jury regarding the defendant's status as a convicted felon was the entry of a guilty plea to a crime that could have been either a felony or a misdemeanor, the evidence failed to provide the jury with a sufficient basis for finding that element beyond a reasonable doubt; consequently, the defendant's conviction for possession of a firearm by a convicted felon had to be reversed. Tiller v. State, 286 Ga. App. 230, 648 S.E.2d 738 (2007).

O.C.G.A. § 16-11-131 does not limit the number of prior felony convictions that may be considered to establish the offense. Head v. State, 170 Ga. App. 324, 316 S.E.2d 791, rev'd on other grounds, 253 Ga. 429, 322 S.E.2d 228 (1984), overruled in part by Ross v. State, 279 Ga. 365, 614 S.E.2d 31 (2005).

Sufficiency of indictment. — In a recitation of felonies in an indictment for violation of O.C.G.A. § 16-11-131, the failure to correctly list a conviction as forgery in the first degree, instead of forgery, did not result in a variance between the indictment and proof offered at the trial so as to affect defendant's substantial rights. Hutchison v. State, 218 Ga. App. 601, 462 S.E.2d 648 (1995).

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Although the trial court might not have been presented with evidence that the defendant was in physical possession of a firearm during the hijacking of the victim's car, because the evidence that was presented authorized a finding that the defendant was a party to that crime, and that all those involved were joint conspirators, the trial court did not err in denying the defendant a new trial on grounds that the indictment charging possession of a firearm during the commission of a felony was at fatal variance with the proof presented at trial. Davis v. State, 287 Ga. App. 786, 653 S.E.2d 104 (2007).

Collateral attack prohibited. — One charged with possession of a firearm by a convicted felon was prohibited from collaterally attacking a prior felony conviction that served as the predicate offense since O.C.G.A. § 16-11-131(b) clearly prohibited all convicted felons from possessing a firearm until the felons were pardoned from the felons' felony convictions or otherwise relieved of the disability, and no exception was made for an invalid outstanding felony conviction. Martin v. State, 281 Ga. 778, 642 S.E.2d 837 (2007).

Introduction of evidence of previous conviction not error. — Proof of previous felony conviction is necessary element of state's proof under O.C.G.A. § 16-11-131, and introduction of evidence of such previous conviction during trial of issue of guilt is not error. Joiner v. State, 163 Ga. App. 521, 295 S.E.2d 219 (1982).

Joint trial and use of evidence concerning offense of having been convicted of a felony and thereafter being in possession of a firearm during the trial and deliberation as to counts for armed robbery and possession of the sawed-off shotgun did not prejudice defendant's right to a fair trial by denial of due process and equal protection of the law. Adkins v. State, 164 Ga. App. 273, 297 S.E.2d 47 (1982).

After the appellant was found guilty of criminal damage to property, kidnapping, and possession of a firearm by a convicted felon, evidence of the appellant's prior felony conviction for voluntary manslaughter was clearly admissible since the state's evidence proving the appellant's prior conviction contained references not only to voluntary manslaughter, as alleged in the indictment, but also to charges of murder and aggravated assault. Smith v. State, 192 Ga. App. 246, 384 S.E.2d 451 (1989).

In a prosecution for possession of a firearm by a convicted felon, armed robbery, and possession of a firearm during the commission of a crime, trial of the charges together was not required since defendant made no motion to sever and, in view of the limiting instructions given and the weight of the testimony of the victim and a corroborating witness, proof of a prior conviction did not place defendant's character in issue to such an extent as to affect the verdict on the armed robbery and firearm charges. Baker v. State, 214 Ga. App. 640, 448 S.E.2d 745 (1994).

Despite the trial court's abuse of discretion in rejecting the defendant's offer to stipulate to a prior conviction for aggravated child molestation, that error was harmless as it was undisputed that the defendant was a convicted felon, admitted to possessing the firearm, and failed to give any justification for possession or offer any evidence of a legal reason to do so. Whitt v. State, 281 Ga. App. 3, 635 S.E.2d 270 (2006).

Any error in the admission of a certified copy of a defendant's burglary conviction without redacting an attachment that set forth the evidence supporting the conviction was waived by the defendant as the defendant failed to object to the admission of the document at trial; however, the defendant was not unduly prejudiced by the admission of the document as the defendant did not offer to stipulate to the conviction and neither the conviction nor the facts surrounding the conviction were of a nature likely to inflame the passions of the jury. Tanksley v. State, 281 Ga. App. 61, 635 S.E.2d 353 (2006).

Because a defendant was a convicted felon in possession of a firearm, a felony under O.C.G.A. § 16-11-131(b), the defendant was not entitled to a jury instruction on involuntary manslaughter under O.C.G.A. § 16-5-3(a), a killing resulting from an unlawful act other than a felony. Finley v. State, 286 Ga. 47, 685 S.E.2d 258 (2009).

When the record shows two prior convictions and the records of the two convictions are so inextricably intertwined that one could not effectively be masked or otherwise removed from the jury's view, both convictions should be listed by the prosecutor. Biggers v. State, 162 Ga. App. 163, 290 S.E.2d 159 (1982).

Merely having once been sentenced to a term of probation as a first offender is not an element of the crime defined in O.C.G.A. § 16-11-131(b); the crime is committed when one who is currently on probation as a first offender possesses a firearm. Williams v. State, 238 Ga. App. 310, 520 S.E.2d 466 (1999).

Sentence for each separate firearm conviction. — Unit of prosecution under O.C.G.A. § 16-11-131(b) is possession of a single firearm, and the defendant could be separately punished for possession of each of the firearms seized from the defendant's house; thus, the trial court committed no error in declining to merge the defendant's four firearm-related convictions for purposes of sentencing. Coates v. State, 342 Ga. App. 148, 802 S.E.2d 65 (2017).

Expert testimony. — Testimony by a ballistics expert proving the operability of the firearm is not required for conviction under O.C.G.A. § 16-11-131. Bryant v. State, 169 Ga. App. 764, 315 S.E.2d 257 (1984).

License to carry pistol is no defense. — Trial court's charge that "the fact that a convicted felon obtains a license to carry a pistol is no defense to a charge of being a Convicted Felon in Possession of a Firearm" was correct. Daughtry v. State, 180 Ga. App. 711, 350 S.E.2d 53 (1986).

No assumption that homeowner owns firearms found in home. — It could not be presumed that defendant, as owner and head of a household, owned or possessed the firearms found therein during a search for drugs, where there was no other evidence to show that defendant owned or possessed the firearms; the evidence was not sufficient to support defendant's conviction of possession of a firearm by a convicted felon. Smith v. State, 180 Ga. App. 657, 350 S.E.2d 302 (1986).

Putting character in issue. — It was proper under O.C.G.A. §§ 16-1-7 and former 24-9-20 (see now O.C.G.A. § 24-5-506) to try a firearms possession charge, which required evidence of a prior felony conviction, together with a marijuana and a burglary charge. State v. Santerfeit, 163 Ga. App. 627, 295 S.E.2d 756 (1982).

Conducting a trial on a possession of a firearm charge prior to the sentencing phase and before the same jury that imposed a death sentence on a defendant did not unnecessarily prejudice the jury by impermissibly placing the defendant's character in issue in the sentencing phase since the state could have introduced evidence of the defendant's prior convictions during the sentencing phase. Walker v. State, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Bifurcation. — Trial court had no obligation to bifurcate a trial for possession of a firearm by a convicted felon from other unrelated charges in the same indictment where defendant made no motion to bifurcate. Belt v. State, 225 Ga. App. 813, 485 S.E.2d 39 (1997).

Trial court did not err in denying the defendant's motion to bifurcate and separately try the count for being a felon in possession of a firearm because bifurcation was not authorized when the charge of being a felon in possession served as the underlying felony for felony murder. Poole v. State, 291 Ga. 848, 734 S.E.2d 1 (2012).

Jury instruction on justification. — When a defendant was charged with possession of a firearm by a convicted felon, the defendant was entitled to a charge as to justification, the only defense defendant claimed; the refusal to so charge and to charge merely the language of O.C.G.A. § 16-11-131 was tantamount to a directed verdict, requiring reversal. Little v. State, 195 Ga. App. 130, 392 S.E.2d 896 (1990).

Instructions on "possession." — In a prosecution for violation of O.C.G.A. § 16-11-131, the trial court did not err in instructing the jury on the definitions of constructive and joint possession to enable the jury to consider whether defendant "possessed" the weapon within the meaning of that section. Waugh v. State, 218 Ga. App. 301, 460 S.E.2d 871 (1995).

No error found in court's charging the language of O.C.G.A. § 16-11-131 or

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in refusing to charge sudden emergency, specific intent, or O.C.G.A. § 16-11-126(c), which concerns carrying a concealed weapon. Ledesma v. State, 251 Ga. 487, 306 S.E.2d 629 (1983), cert. denied, 464 U.S. 1069, 104 S. Ct. 975, 79 L. Ed. 2d 213 (1984).

Evidence sufficient to dismiss charges. — Because the defendant had completed a three-year first-offender probationary sentence and had been discharged without court adjudication of guilt pursuant to O.C.G.A. § 42-8-62 at the time the defendant allegedly violated O.C.G.A. § 16-11-131, the trial court properly dismissed the charge. State v. Mills, 268 Ga. 873, 495 S.E.2d 1 (1998).

Spatial proximity to weapon insufficient to warrant conviction. — See Wofford v. State, 262 Ga. App. 291, 585 S.E.2d 207 (2003).

Ineffective counsel established as to aggravated assault but not as to gun possession charge. — Because the defendant presented sufficient evidence to show that trial counsel was ineffective in failing to stipulate to the defendant's felon status or to obtain a jury charge limiting the jury's consideration of the defendant's criminal history, such failures prejudiced the defendant's defense sufficiently to require a new trial on a charge of aggravated assault; however, given the defendant's admission to possessing a gun at the time of the altercation, no prejudice resulted to warrant reversal and a new trial on the possession of a firearm by a convicted felon conviction. Starling v. State, 285 Ga. App. 474, 646 S.E.2d 695 (2007).

Counsel ineffective for failing to move to suppress a weapon found after a warrantless arrest. — Defendant's counsel's performance was defective for failing to file a motion to suppress a handgun found by police in the defendant's rear waistband because the defendant was in handcuffs, face down on the floor, and could have reasonably believed that the defendant was under arrest. The arrest was made without a warrant or probable cause. Suluki v. State, 302 Ga. App. 735, 691 S.E.2d 626 (2010).

Counsel not ineffective. — Defendant's trial counsel could not be ineffective in failing to specifically demur to the charges of possession of a firearm by a convicted felon, and the felony murder based on the same, as it was not necessary for the charge to state what felony formed the basis of the prior conviction. Miller v. State, 283 Ga. 412, 658 S.E.2d 765 (2008).

Plea to misdemeanor not element of offense. — Trial counsel was ineffective in failing to seek to redact the portion of a defendant's first offender plea that related to carrying a concealed weapon. The plea to carrying a concealed weapon, a misdemeanor, was not an element of the current charge of the possession of a firearm by a first offender probationer under O.C.G.A. § 16-11-131(b). Cobb v. State, 283 Ga. 388, 658 S.E.2d 750 (2008).

Identification of defendant sufficient. — Victim's testimony at trial sufficiently identified the defendant as the assailant who fired shots at the victim and the evidence was sufficient to support convictions for aggravated assault, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon since the victim knew the defendant from a previous encounter and although it was dark, the victim was able to see the defendant's face during the incident because the area was illuminated by a streetlight. Johnson v. State, 279 Ga. App. 153, 630 S.E.2d 661 (2006).

Suppression motion erroneously denied. — Because no exigency existed to justify a search after the defendant was handcuffed and placed under the watchful eye of a police officer, and even assuming that the defendant was under arrest while being detained in the kitchen, a search of the defendant's bedroom, which yielded a shotgun found under the bed in the bedroom, a box of unspent shotgun shells, and some loose unspent shotgun shells, was not one incident to an arrest; thus, the defendant's possession of a firearm while a convicted felon conviction was reversed, and the case was remanded for a new trial in which the illegally-obtained evidence could not be introduced. Hicks v. State, 287 Ga. App. 105, 650 S.E.2d 767 (2007).

Recidivist sentencing. — Conviction for possession of a firearm by a convicted

felon could not stand because the same prior conviction could not support both recidivist sentencing and a conviction of possession of a firearm by a convicted felon, and also a nolo contendere plea could not serve as proof of a prior conviction for a charge of possession of a firearm by a convicted felon; the prior conviction remained available to support enhanced sentencing as a recidivist, however. Wyche v. State, 291 Ga. App. 165, 661 S.E.2d 226 (2008), cert. denied, No. S08C1413, 2008 Ga. LEXIS 914 (Ga. 2008).

Consent of probationer to search. — When officers went to a defendant's residence to conduct a probation search based on a tip that the defendant was involved with drugs, as the defendant willingly led the officers to a concealed gun, and voluntarily furnished a urine sample that tested positive for methamphetamine, the defendant gave valid consent to the search, which eliminated the need for either probable cause or a search warrant under U.S. Const., amend. IV. Brooks v. State, 285 Ga. 424, 677 S.E.2d 68 (2009).

Evidence sufficient to sustain conviction. — See Murray v. State, 180 Ga. App. 493, 349 S.E.2d 490 (1986); Booker v. State, 257 Ga. 37, 354 S.E.2d 425 (1987); Jackson v. State, 186 Ga. App. 847, 368 S.E.2d 771, cert. denied, 186 Ga. App. 918, 368 S.E.2d 771 (1988); Spivey v. State, 193 Ga. App. 127, 386 S.E.2d 868 (1989), cert. denied, 193 Ga. App. 911, 386 S.E.2d 868 (1989); Black v. State, 261 Ga. 791, 410 S.E.2d 740 (1991), cert. denied, 506 U.S. 839, 113 S. Ct. 118, 121 L. Ed. 2d 74 (1992); Holcomb v. State, 231 Ga. App. 15, 443 S.E.2d 662 (1994); Willis v. State, 214 Ga. App. 479, 448 S.E.2d 223 (1994); Boone v. State, 229 Ga. App. 379, 494 S.E.2d 100 (1997); Crawford v. State, 233 Ga. App. 323, 504 S.E.2d 19 (1998); Adams v. State, 239 Ga. App. 42, 520 S.E.2d 746 (1999); Evans v. State, 240 Ga. App. 215, 522 S.E.2d 506 (1999); Green v. State, 244 Ga. App. 697, 536 S.E.2d 565 (2000); Scott v. State, 276 Ga. 195, 576 S.E.2d 860 (2003); Laster v. State, 276 Ga. 645, 581 S.E.2d 522 (2003).

Convicted felon's conviction for possession of a shotgun was authorized, even though the shotgun was not in the felon's immediate possession, where the evidence supported a finding that the felon was a party to the crime of burglary and the felon and codefendant were co-conspirators. Coursey v. State, 196 Ga. App. 135, 395 S.E.2d 574 (1990).

Evidence was sufficient to support defendant's conviction for possession of a firearm by a convicted felon under O.C.G.A. § 16-11-131 where a victim testified to seeing the weapon emerge from the window of defendant's truck, and then saw the muzzle flash. Tanner v. State, 259 Ga. App. 94, 576 S.E.2d 71 (2003).

Evidence that the defendant, a convicted felon, accompanied the victim to a store with the codefendant; shot the victim in the head with a handgun that the defendant had in defendant's possession; thereby, causing a wound in which the victim lost one eye; and along with the codefendant took all the victim's money was sufficient to support the defendant's conviction for and possession of a firearm by a convicted felon. Drummer v. State, 264 Ga. App. 617, 591 S.E.2d 481 (2003).

When the defendant shot a victim in the head after an argument and also shot at another victim but failed to hit the second victim, a rational trier of fact could have found beyond a reasonable doubt that the defendant was guilty of felony murder, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon. Hightower v. State, 278 Ga. 39, 597 S.E.2d 362 (2004).

Evidence was sufficient to support defendant's conviction for possession of a firearm by a convicted felon where defendant did not dispute that defendant was a convicted felon, and an officer observed defendant with a firearm. Taylor v. State, 267 Ga. App. 588, 600 S.E.2d 675 (2004).

Defendant's conviction for possession of a firearm by a convicted felon, based upon defendant's and an accomplice's robbing a store at gunpoint, was affirmed because the evidence was sufficient to support the conviction as latent fingerprints, which belonged to defendant, that were found in the car used in the armed robbery sufficiently corroborated the testimony of the accomplice who identified defendant as the driver of the car before the accomplice recanted the accomplice's custodial state-

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ment at trial. Brown v. State, 268 Ga. App. 24, 601 S.E.2d 405 (2004).

Evidence was sufficient to support defendant's conviction for possession of a firearm by a convicted felon as the conviction was supported by more evidence than just defendant's mere spatial proximity to the gun because: (1) the jury could have inferred that defendant actually lived in the apartment rented by defendant's sister and that the items found in the apartment belonged to defendant; and (2) the gun was found in plain view on the television, which defendant claimed as defendant's own, next to defendant's keys to the apartment. Ballard v. State, 268 Ga. App. 55, 601 S.E.2d 434 (2004).

Testimony provided by two accomplices, together with inside information wherein defendant learned about the location of the robbery, the security camera on the premises, the people that worked there, how many people worked there, who was in the back area, and about the safe, when coupled with the fact that the gunman was not captured on the security camera, provided some evidence, though slight, that the robber had such inside information; under the circumstances, the accomplices' testimony was sufficiently corroborated, and the jury was authorized to find defendant guilty of armed robbery, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. Ziegler v. State, 270 Ga. App. 787, 608 S.E.2d 230 (2004), cert. denied, 546 U.S. 1019, 126 S. Ct. 656, 163 L. Ed. 2d 532 (2005).

When a victim paid defendant money the victim owed, and, after the victim paid the money, defendant told the victim that the victim was going to die anyway and shot the victim as the victim sat in a vehicle with two other people, the evidence was sufficient to allow a rational trier of fact to find defendant guilty beyond a reasonable doubt of felony murder, possession of a weapon by a convicted felon, and possession of a weapon during the commission of a felony. Stephens v. State, 279 Ga. 43, 609 S.E.2d 344 (2005).

Defendant was not convicted of possession of a firearm by a convicted felon under O.C.G.A. § 16-11-131(b) merely based on circumstantial evidence that failed, in violation of former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6), to exclude every other reasonable hypothesis except that of the defendant's guilt; the defendant made several admissions to officers that constituted direct evidence including that the defendant had a gun in the defendant's bedroom and that the defendant used the gun to hunt. Parramore v. State, 277 Ga. App. 372, 626 S.E.2d 567 (2006).

Evidence was sufficient to support the defendant's aggravated assault, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon convictions since the jury was entitled to give greater weight to the victim's positive contemporaneous identification of the defendant as the shooter and to conclude that the victim's subsequent uncertainty resulted from fear of retaliation by the defendant rather than from any real confusion about who fired the shot; the jury was also entitled to give little weight to a negative gunshot residue test result on defendant's hands as a sergeant regularly ordered gunshot residue tests on suspects. Haggins v. State, 277 Ga. App. 742, 627 S.E.2d 448 (2006).

Sufficient evidence supported convictions of felony murder, armed robbery, aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm in the commission of a felony where, upon pulling into an apartment complex to turn around and ask for directions, the victims were approached by defendant and another man, defendant pulled out a gun and told the victims to "give it up," when one of the victims hesitated, defendant shot the victim, defendant then stole that victim's money and jewelry, and later, the gunshot victim died; the second victim described defendant, who was wearing a specific jersey at the time of the crimes, and two witnesses who knew defendant testified that defendant robbed and shot the victim while wearing that jersey. Davis v. State, 280 Ga. 442, 629 S.E.2d 238 (2006).

Because the evidence showed that the probationer had continuous access to the firearms in the house on the day of a fatal

shooting, and that the probationer intended to, and did in fact exercise control over the sons' access to one of the guns in the minutes leading up to the shooting, the trial court properly found that the probationer had constructive possession of the firearm. Wright v. State, 279 Ga. App. 299, 630 S.E.2d 774 (2006).

Convictions of felony murder, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon were supported by sufficient evidence showing that, during an argument involving the defendant and the two victims, the defendant told one of the victims to go get the victim's guns, adding that the defendant had guns, the victim went to the victim's vehicle and retrieved two handguns, approached with arms crossed and a gun in each hand, and the defendant took a gun out of the waistband of the defendant's pants and started shooting, wounding one victim and killing the other victim. McKee v. State, 280 Ga. 755, 632 S.E.2d 636 (2006).

Convictions of murder, aggravated assault, and possession of a firearm by a convicted felon were supported by sufficient evidence showing that while the victim was in the process of buying drugs from a third party, the defendant approached the driver's side of the victim's car, demanded the victim's money, and shot the victim several times, killing the victim and injuring a passenger in the car; the seller of the drugs testified that the seller had observed the defendant carrying a gun, and both the codefendant and another witness identified the defendant as the shooter. Major v. State, 280 Ga. 746, 632 S.E.2d 661 (2006).

Evidence was sufficient to find the defendant guilty of voluntary manslaughter in violation of O.C.G.A. § 16-5-2, felony murder predicated on possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-5-1, two counts of aggravated assault in violation of O.C.G.A. § 16-5-21, possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-11-131, and possession of a firearm during the commission of a felony murder in violation of O.C.G.A. § 16-11-106, as the defendant was angered by the victim's presence in the residence, the defendant assaulted the victim with a baseball bat and threatened to kill the victim if the victim did not leave the residence, and when the victim returned to the residence, the defendant fatally shot the victim in the stomach. Lawson v. State, 280 Ga. 881, 635 S.E.2d 134 (2006).

Evidence supported defendant's conviction for possession of a firearm by a convicted felon as defendant's possession of the victim's handgun and shotgun on the night of the crimes was shown by the victim's direct testimony, rather than by circumstantial evidence, since: (1) the victim testified that two men forced their way into the victim's house, hit the victim in the head with a blunt object, recovered a .380 caliber handgun and a 20-gauge single-barrel shotgun, forced the victim to give them thousands of dollars the victim had hidden in the attic, and then fled; (2) during a consensual search, the police found a .380 caliber handgun hidden in the defendant's bedroom that was identified as the victim's by the victim and that bore the same serial number as the victim's gun; and (3) the victim identified defendant in a photo array and at trial; thus, the evidence authorized the jury to find that the defendant was in actual possession of the handgun and that defendant continued to be in at least constructive possession of the handgun when the handgun was found in defendant's bedroom. Tanksley v. State, 281 Ga. App. 61, 635 S.E.2d 353 (2006).

Evidence was sufficient to sustain the defendant's convictions of two counts of armed robbery under O.C.G.A. § 16-8-41(a) and possession of a firearm by a convicted felon under O.C.G.A. § 16-11-131; the victims of both armed robberies, who testified as to the defendant's conduct of holding the victims up with a gun and taking cash, identified the defendant as the perpetrator, and when the officers apprehended the defendant, the defendant had a gun. Robinson v. State, 281 Ga. App. 76, 635 S.E.2d 380 (2006).

Sufficient evidence supported the defendant's convictions of two counts of felony murder under O.C.G.A. § 16-5-1, armed robbery under O.C.G.A. § 16-8-41, aggravated assault under O.C.G.A. § 16-5-21,

General Consideration (Cont'd)

possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106, and possession of a firearm by a first offender probationer under O.C.G.A. § 16-11-131; two witnesses testified that the defendant had told the witnesses that the defendant shot the victim, and one of the witnesses testified that the defendant stated that the shooting occurred during a robbery, the defendant discarded a gun that was later found to be the murder weapon while fleeing police on another crime, and the defendant admitted to police that the murder weapon was the defendant's, that the defendant stole $100 from the victims, and that the defendant shot the murder victim. Chenoweth v. State, 281 Ga. 7, 635 S.E.2d 730 (2006).

Defendant's conviction for malice murder, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon was supported by the evidence as: (1) the defendant told the defendant's girlfriend that the defendant knew who had taken the defendant's drugs from a motel room and that the defendant was going to get them; (2) the defendant and an accomplice forced a woman with something "glossy" on the woman's forehead; (3) the defendant told the driver to stop at a secluded area so that the defendant could put the woman "somewhere safe"; (4) the defendant threw a gun from a bridge on the return; (5) the defendant instructed the driver to clean blood from the car's backseat; and (6) the defendant told the defendant's girlfriend that the defendant had killed the person who had the defendant's drugs and told a cell mate that the defendant had shot a person. Walker v. State, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Despite the defendant's contrary contentions, evidence seized via the execution of a valid search warrant, specifically a substantial amount of methamphetamine, a set of scales in a case marked "dope kit inside," a .38 revolver, common tools of the drug trade, written instructions for making pure ephedrine, a loose bag of vitamin B-12 commonly used to dilute methamphetamine, over $2,000 in cash, and evidence that the defendant installed a video surveillance system to monitor the front door and driveway, both a trafficking in methamphetamine and possession of a weapon by a convicted felon conviction were supported by sufficient evidence. McTaggart v. State, 285 Ga. App. 178, 645 S.E.2d 658 (2007).

When the state's evidence showed that the defendant pulled into a parking lot while the victim was robbing a friend of the defendant's, waited in the defendant's car until the victim came around a corner, and then shot the victim three times without the victim ever having aimed the victim's gun at the defendant, there was sufficient evidence to convict the defendant of felony murder based on the defendant's killing the victim while being a convicted felon in possession of a firearm in violation of O.C.G.A. § 16-11-131; although the defendant claimed that the defendant acted in self-defense, the jury was free to reject the defendant's claim. Roper v. State, 281 Ga. 878, 644 S.E.2d 120 (2007).

There was sufficient evidence to support the defendant's convictions of felony murder, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony; a witness who sold drugs for the defendant got into a dispute with a third person over drugs before the shooting, the defendant upon seeing the victim asked the witness if the victim was the third person in question and then shot the victim, and witnesses placed the defendant at the scene of the crime and testified that the witnesses saw the defendant carrying a gun. Johnson v. State, 282 Ga. 235, 647 S.E.2d 48 (2007).

There was sufficient evidence to support the defendant's convictions of malice murder, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony; the defendant and the victim lived in the same rooming house where the defendant often intimidated the victim and demanded money from the victim, on the night of the crime the defendant sent the victim to buy crack cocaine and became angry when the victim returned empty-handed, the defen-

dant argued with the victim and shot the victim in the eye, and at the hospital the victim repeatedly declined to say who shot the victim, except to say that a person with a first name other than the defendant's shot the victim accidentally. Jones v. State, 282 Ga. 306, 647 S.E.2d 576 (2007).

Because sufficient direct and circumstantial evidence showed that the defendant, a prior felon wielding a weapon, engaged in a fight with the two victims, fatally wounding one and shooting the other in the arm, and thereafter fled from police, the defendant's convictions for involuntary manslaughter, reckless conduct, fleeing and eluding, and possession of a firearm by a convicted felon were upheld on appeal. Alvin v. State, 287 Ga. App. 350, 651 S.E.2d 489 (2007).

Because Georgia abolished the inconsistent verdict rule, and despite the fact that the jury found that the defendant did not commit armed robbery, this did not preclude the trial judge from finding the defendant guilty of possessing a firearm while a convicted felon given evidence that: (1) the defendant's status as a convicted felon was not contested; and (2) the defendant was in constructive possession of the firearm used by another to commit the crimes charged and conspired to possess the firearm as a party to the crime. Davis v. State, 287 Ga. App. 783, 653 S.E.2d 107 (2007).

There was sufficient evidence to support a defendant's convictions of malice murder, felony murder, armed robbery, aggravated assault, attempted burglary, and possession of a firearm by a convicted felon; in addition to testimony by a codefendant and eyewitness testimony by the victim's spouse, the victim's blood was on the defendant's clothes, the defendant had the victim's keys, and the knife used to kill the victim and a pistol were discovered near the site of the defendant's arrest in some woods near the scene of the crime. Walker v. State, 282 Ga. 774, 653 S.E.2d 439 (2007), cert. denied, 129 S. Ct. 481, 172 L.Ed.2d 344 (2008), overruled on other grounds, No. S10P1859, 2011 Ga. LEXIS 267 (Ga. 2011).

Defendant was properly convicted on two counts of possession of a firearm by a convicted felon as a result of the police finding a silver .32 caliber handgun in the closet of the defendant's master bedroom, which also contained the defendant's clothes and other possessions, and to which the defendant admitted ownership; in turn, the victim testified that the defendant shot the victim with a gun, and the police found .380 caliber shell casings at the crime scene. The evidence authorized the trier of fact to conclude that the defendant used one firearm to shoot the victim and possessed another firearm in the defendant's bedroom. Warren v. State, 289 Ga. App. 481, 657 S.E.2d 533 (2008), cert. denied, No. S08C0978, 2008 Ga. LEXIS 508 (Ga. 2008).

Evidence supported the defendant's convictions for malice murder, felony murder, aggravated assault, armed robbery, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime. The four victims were found dead in two hotel rooms from gunshot wounds to the back of their heads; identification documents belonging to the four victims were found in the defendant's car; there was expert testimony that the defendant's gun had been used to kill the victims; the defendant's baseball cap contained one victim's deoxyribonucleic acid; there was evidence that the defendant and two friends used three victims' tickets to attend a football game after the victims were murdered; the defendant was identified as being in an elevator with one victim; the defendant was seen leaving the hotel with one victim's cooler; and a duffle bag belonging to one victim was in the defendant's car when the defendant was arrested on weapons charges. Dawson v. State, 283 Ga. 315, 658 S.E.2d 755 (2008), cert. denied, 129 S. Ct. 169, 172 L.Ed.2d 122 (2008).

Evidence supported convictions of malice murder, possessing a firearm during the commission of that murder, and possession of a weapon by a convicted felon. A drug dealer told police that the drug dealer saw the defendant shoot the victim, although the drug dealer said at trial that the drug dealer did not see the shooting; the drug dealer's spouse testified as to a statement by the drug dealer that was

General Consideration (Cont'd)

inconsistent with the drug dealer's trial testimony; and another prosecution witness testified that before the shooting, the defendant said that the defendant was "going to get" the victim and that afterward, the defendant said, "I told you I was going to do" the victim. Broner v. State, 284 Ga. 402, 667 S.E.2d 613 (2008).

Evidence that handguns belonging to a passenger in a defendant's car, that the handguns were within an arm's reach of the defendant during the commission of felony drug offenses, that the defendant knew that the passenger carried guns for protection while in the drug trade in which the defendant actively participated, and that the defendant was a first offender probationer was sufficient to show that the defendant jointly and constructively possessed the handguns in violation of O.C.G.A. § 16-11-131(b). Driscoll v. State, 295 Ga. App. 5, 670 S.E.2d 824 (2008).

There was sufficient evidence to support a defendant's burglary conviction as it was within the province of the jury to believe the testimony of the owner of the burglarized home, who was a police officer, and the testimony of a detective, regardless if the owner's trial testimony contradicted a prior written statement. Further, because the evidence showed that the defendant committed the burglary in which certain guns were stolen, it followed that the defendant took possession of the guns during the burglary, thus, there was sufficient circumstantial evidence to support the verdict of guilty on the possession of a firearm by a convicted felon charge with regard to the guns found in the bedroom of defendant's parent. Smallwood v. State, 296 Ga. App. 16, 673 S.E.2d 537 (2009), cert. denied, No. S09C0986, 2009 Ga. LEXIS 341 (Ga. 2009).

Evidence supported the defendants' convictions of malice murder and possession of a firearm by a convicted felon. The first defendant told a driver to stop a car while the second defendant and the victim got out of another car; the second defendant held the victim at gunpoint with an AK-47; the first defendant jumped out of the car and approached the second car with a .45 caliber handgun; both defendants fired their weapons at the victim as the victim was running; after the victim fell, the second defendant stood over the victim with the rifle and fired several more times; the victim suffered five back-to-front bullet wounds; and shell casings from a .45 caliber handgun as well as an AK-47 were found at the scene. Anderson v. State, 285 Ga. 496, 678 S.E.2d 84 (2009).

Jury was authorized to find the defendant guilty of voluntary manslaughter, O.C.G.A. § 16-5-2(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), carrying a concealed weapon, O.C.G.A. § 16-11-126(b), and possession of a firearm by a convicted felon, O.C.G.A. § 16-11-131(b), because during an argument with the victims, the defendant shot the victims and threatened to kill the victims. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Evidence that the defendant, who threatened to kill the victim in the past, took the victim to a retention pond, shot the victim, wrapped the body with a large boulder, placed the victim in a retention pond, and, for days, misled the victim's mother and authorities about the victim's whereabouts was sufficient to support convictions for malice murder, felony murder, feticide, aggravated assault, and possession of a firearm. Platt v. State, 291 Ga. 631, 732 S.E.2d 75 (2012).

Evidence was sufficient to convict the defendant of burglary, aggravated assault, possession of a firearm during the commission of the aggravated assault, and possession of a firearm by a convicted felon because a house-sitter returned to a residence to discover an intruder inside; the intruder flashed a gun and told the house-sitter that the intruder would shoot the house-sitter; the house-sitter identified the defendant, whom the house-sitter had known for over 20 years, as the intruder; and a back window of the home had been shattered. Davis v. State, 325 Ga. App. 572, 754 S.E.2d 151 (2014).

Defendant's conviction for possession of a firearm by a convicted felon was supported by evidence that the defendant was

present in the apartment above the defendant's mother's garage, had access to the garage at any time, and was present in the apartment almost every time probation officers visited, allowing the jury to find the defendant had access, power, and intention to exercise dominion or control over the firearm found in the apartment. Mantooth v. State, 335 Ga. App. 734, 783 S.E.2d 133 (2016).

Evidence insufficient to support conviction. — Evidence was insufficient to convict the defendant of possession of a firearm by a convicted felon because the defendant's name did not appear on the lease for the apartment and there was no evidence that the defendant had any clothing or personal items at the apartment; the only evidence linking the defendant to the gun, other than the defendant's proximity to it, was the discovery of paperwork bearing the defendant's name in a closet of the apartment; and that circumstantial evidence did not provide a link between the defendant and the gun, nor did it exclude the possibility that the gun belonged to others present in the apartment — such as the other individual detained in the bedroom or those individuals found in the living room. Harvey v. State, 344 Ga. App. 7, 806 S.E.2d 302 (2017).

No evidence of constructive possession. — Conviction was reversed in part because while the defendant knew the location of the shotgun, there was no evidence presented that the defendant had actual possession of the shotgun outside of possibly handing the shotgun to officers at the officers' request, nor was there evidence that the defendant was in constructive possession of the shotgun in violation of O.C.G.A. § 16-11-131(b). Peppers v. State, 315 Ga. App. 770, 728 S.E.2d 286 (2012).

Cited in Robinson v. State, 159 Ga. App. 296, 283 S.E.2d 356 (1981); Rothfuss v. State, 160 Ga. App. 863, 288 S.E.2d 579 (1982); Grant v. State, 163 Ga. App. 775, 296 S.E.2d 110 (1982); Brooks v. State, 250 Ga. 739, 300 S.E.2d 810 (1983); Alexander v. State, 166 Ga. App. 233, 303 S.E.2d 773 (1983); Mayweather v. State, 254 Ga. 660, 333 S.E.2d 597 (1985); Hamilton v. State, 179 Ga. App. 434, 346 S.E.2d 881 (1986); Hall v. State, 180 Ga. App. 210, 348 S.E.2d 736 (1986); Dickerson v. State, 180 Ga. App. 852, 350 S.E.2d 835 (1986); Marshall v. State, 193 Ga. App. 314, 387 S.E.2d 602 (1989); 123 A.L.R. 88; Gray v. State, 254 Ga. App. 487, 562 S.E.2d 712 (2002); Reece v. State, 257 Ga. App. 137, 570 S.E.2d 424 (2002); Herring v. State, 277 Ga. 317, 588 S.E.2d 711 (2003); Thornton v. State, 288 Ga. App. 60, 653 S.E.2d 361 (2007); Hyman v. State, 320 Ga. App. 106, 739 S.E.2d 395 (2013); Ferguson v. Perry, 292 Ga. 666, 740 S.E.2d 598 (2013); Vann v. State, 322 Ga. App. 148, 742 S.E.2d 767 (2013); Banks v. State, 329 Ga. App. 174, 764 S.E.2d 187 (2014); Davis v. State, 340 Ga. App. 652, 798 S.E.2d 474 (2017).

Double Jeopardy

O.C.G.A. § 16-11-131 punishes a discrete crime and subjects a defendant to neither double jeopardy nor multiple prosecutions for the same offense. Ledesma v. State, 251 Ga. 487, 306 S.E.2d 629 (1983), cert. denied, 464 U.S. 1069, 104 S. Ct. 975, 79 L. Ed. 2d 213 (1984).

When a convicted felon is in possession of a sawed-off shotgun, two separate and distinct crimes are being committed, because a prohibited person is in possession of a prohibited weapon. One crime is not "included" in the other and they do not merge. Bivins v. State, 166 Ga. App. 580, 305 S.E.2d 29 (1983); Brown v. State, 168 Ga. App. 537, 309 S.E.2d 683 (1983).

Convictions for possession of a firearm by a convicted felon and possession of a firearm during the commission of a felony did not merge, where one crime was not "included" in the other, and each involved proof of distinct essential elements. Scott v. State, 190 Ga. App. 492, 379 S.E.2d 199, cert. denied, 190 Ga. App. 899, 379 S.E.2d 199 (1989); Clark v. State, 206 Ga. App. 10, 424 S.E.2d 310 (1992).

Conviction not precluded by collateral estoppel. — Defendant's conviction of possession of a firearm by a convicted felon was not precluded by collateral estoppel where defendant was acquitted of two other charges (aggravated assault and possession of a firearm during commission of a crime against a person) arising out of the same incident; the jury could

Double Jeopardy (Cont'd)

have concluded that defendant had the gun but did not assault or attempt to rob the victim with it. Clark v. State, 194 Ga. App. 280, 390 S.E.2d 425 (1990).

Conviction for malice murder and possession. — Because defendant was found guilty of malice murder, defendant was properly convicted also of a possession count, it being unrelated to malice murder. Malcolm v. State, 263 Ga. 369, 434 S.E.2d 479 (1993).

Count of possession of firearm by convicted felon does not merge with related armed robbery charge. Smallwood v. State, 166 Ga. App. 247, 304 S.E.2d 95 (1983); McGee v. State, 173 Ga. App. 604, 327 S.E.2d 566 (1985).

Merger with shooting of firearm. — Possession of a firearm by a convicted felon does not merge with act of shooting the firearm; therefore, a jury may find a convicted felon guilty of felony murder by treating the felon's possession of a firearm in committing the murder as the underlying felony. Scott v. State, 250 Ga. 195, 297 S.E.2d 18 (1982).

Failure to merge offense. — Trial court erred in failing to merge, for purposes of sentencing, the defendant's convictions for possession of a firearm during the commission of a crime and possession of a firearm by a convicted felon with use of a firearm by a convicted felon during the commission of another felony, because the same act was used to establish each of the offenses and each crime did not require proof of a fact not required by the other. Jones v. State, 318 Ga. App. 105, 733 S.E.2d 407 (2012).

State may convict and punish for burglary and for unlawful possession of firearm by a previously convicted felon, when the firearm was taken in the burglary. The offenses charged were separate and distinct and there was no merger; evidence used to establish the burglary was not again used to establish the later crime of possession of a weapon by a convicted felon. Bogan v. State, 177 Ga. App. 614, 340 S.E.2d 256 (1986).

Conviction may not be used in repeat offender prosecution. — Prior felony conviction under O.C.G.A. § 16-11-131 cannot also be used to punish a defendant as a repeat offender under O.C.G.A. § 17-10-7(a). King v. State, 169 Ga. App. 444, 313 S.E.2d 144 (1984).

OPINIONS OF THE ATTORNEY GENERAL

Former Code 1933, § 26-2914 (see now O.C.G.A. § 16-11-131) was only an additional qualification to requirements presently provided in former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129(b)(3)). 1980 Op. Att'y Gen. No. U80-32.

Restoration, pursuant to pardon, of right to receive, possess or transport firearm. — State Board of Pardons and Paroles has authority to restore, in a pardon to a Georgian convicted of a felony, the right to receive, possess or transport in commerce a firearm, so long as the pardon expressly uses wording which appears in 18 U.S.C. appx. § 1203(2). 1980 Op. Att'y Gen. No. 80-122.

An order of restoration of civil rights granted by the State Board of Pardons and Paroles which expressly authorizes an individual to receive, possess, or transport a firearm satisfies the requirements of O.C.G.A. § 16-11-131(c) mandating the granting of a pardon. 1986 Op. Att'y Gen. No. 86-4.

RESEARCH REFERENCES

ALR. — Propriety of using single prior felony conviction as basis for offense of possessing weapon by convicted felon and to enhance sentence, 37 A.L.R.4th 1168.

Sufficiency of evidence as to nature of firearm in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms, 37 A.L.R.4th 1179.

Fact that weapon was acquired for self-defense or to prevent its use against

defendant as defense in prosecution for violation of state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 39 A.L.R.4th 967.

Sufficiency of prior conviction to support prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 39 A.L.R.4th 983.

Sufficiency of evidence of possession in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 43 A.L.R.4th 788.

What amounts to "control" under state statute making it illegal for felon to have possession or control of firearm or other dangerous weapon, 66 A.L.R.4th 1240.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

What constitutes "constructive possession" of unregistered or otherwise prohibited weapon under state law, 88 A.L.R.5th 121.

What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 A.L.R. Fed. 347.

Validity of state gun control legislation under state constitutional provisions securing right to bear arms — convicted felons, 85 A.L.R.6th 641.

Construction and application of state statutes and local ordinances regulating licenses or permits to carry concealed weapons, 12 A.L.R.7th 4.

16-11-132. Possession of handgun by person under the age of 18 years.

(a) For the purposes of this Code section, a handgun is considered loaded if there is a cartridge in the chamber or cylinder of the handgun.

(b) Notwithstanding any other provisions of this part and except as otherwise provided in this Code section, it shall be unlawful for any person under the age of 18 years to possess or have under such person's control a handgun. A person convicted of a first violation of this subsection shall be guilty of a misdemeanor and shall be punished by a fine not to exceed $1,000.00 or by imprisonment for not more than 12 months, or both. A person convicted of a second or subsequent violation of this subsection shall be guilty of a felony and shall be punished by a fine of $5,000.00 or by imprisonment for a period of three years, or both.

(c) Except as otherwise provided in subsection (d) of this Code section, the provisions of subsection (b) of this Code section shall not apply to:

(1) Any person under the age of 18 years who is:

(A) Attending a hunter education course or a firearms safety course;

(B) Engaging in practice in the use of a firearm or target shooting at an established range authorized by the governing body of the jurisdiction where such range is located;

(C) Engaging in an organized competition involving the use of a firearm or participating in or practicing for a performance by an

organized group under 26 U.S.C. Section 501(c)(3) which uses firearms as a part of such performance;

(D) Hunting or fishing pursuant to a valid license if such person has in his or her possession such a valid hunting or fishing license if required; is engaged in legal hunting or fishing; has permission of the owner of the land on which the activities are being conducted; and the handgun, whenever loaded, is carried only in an open and fully exposed manner; or

(E) Traveling to or from any activity described in subparagraphs (A) through (D) of this paragraph if the handgun in such person's possession is not loaded;

(2) Any person under the age of 18 years who is on real property under the control of such person's parent, legal guardian, or grandparent and who has the permission of such person's parent or legal guardian to possess a handgun; or

(3) Any person under the age of 18 years who is at such person's residence and who, with the permission of such person's parent or legal guardian, possesses a handgun for the purpose of exercising the rights authorized in Code Section 16-3-21 or 16-3-23.

(d) Subsection (c) of this Code section shall not apply to any person under the age of 18 years who has been convicted of a forcible felony or forcible misdemeanor, as defined in Code Section 16-1-3, or who has been adjudicated for committing a delinquent act under the provisions of Article 6 of Chapter 11 of Title 15 for an offense which would constitute a forcible felony or forcible misdemeanor, as defined in Code Section 16-1-3, if such person were an adult. (Code 1981, § 16-11-132, enacted by Ga. L. 1994, p. 1012, § 12; Ga. L. 2000, p. 1630, § 6; Ga. L. 2010, p. 963, § 1-8/SB 308; Ga. L. 2013, p. 294, § 4-11/HB 242.)

Editor's notes. — Ga. L. 1994, p. 1012, § 1, not codified by the General Assembly, provides that the Act shall be known and may be cited as the "School Safety and Juvenile Justice Reform Act of 1994".

Ga. L. 1994, p. 1012, § 2, not codified by the General Assembly, sets forth legislative findings and determinations for the "School Safety and Juvenile Justice Reform Act of 1994".

Ga. L. 1994, p. 1012, § 29, not codified by the General Assembly, provides for severability.

Ga. L. 2010, p. 963, § 3-1/SB 308, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment

of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011).

JUDICIAL DECISIONS

Involuntary manslaughter. — When the defendant's indictment charged that while committing possession of a firearm by a person under the age of 18 years, in violation of O.C.G.A. § 16-11-132, the defendant caused a victim's death without any intention to do so, the indictment was fatally defective because it was not sufficient to allege that the unintentional death was caused solely by the defendant's possession of the firearm as the state did not allege an unlawful act which under any circumstances could be the proximate cause of the unintentional death. Scraders v. State, 263 Ga. App. 754, 589 S.E.2d 315 (2003).

Evidence sufficient for adjudication. — Evidence was sufficient to support a juvenile's delinquency adjudication based on charges of aggravated assault, possession of a firearm by a minor, and discharge of a gun or pistol near a street, in violation of O.C.G.A. §§ 16-5-21(a), 16-11-132(b), and 16-11-103, as the juvenile was at a party and went outside with a crowd of others due to a fight, and the juvenile fired a gun into the air while standing in the midst of a crowd; the juvenile was identified by three eyewitnesses, whose testimony established that they were placed in reasonable apprehension of immediate violent injury due to the juvenile's actions. In the Interest of C.D.G., 279 Ga. App. 718, 632 S.E.2d 450 (2006).

Adjudication of delinquency for giving a false name to a law enforcement officer, carrying a concealed weapon, and possession of a pistol by a person under the age of 18 was proper when juvenile defendant who was driving a relative's vehicle had free run of the relative's property while the relative was deployed overseas; also, defendant was in the vehicle the morning of and night before a traffic stop, defendant directed the other juvenile where to drive, neither gun was registered to the relative, defendant seemed to know about the guns' existence, and defendant gave a deputy false information about the defendant's identity. In the Interest of C.M., 290 Ga. App. 788, 661 S.E.2d 598 (2008).

Juvenile court did not err in adjudicating the defendant juvenile delinquent based on the defendant's possession of firearms because the evidence authorized the juvenile court to find that the juvenile had possessed firearms in violation of O.C.G.A. § 16-11-132; at the adjudicatory hearing, an officer who searched the juvenile's house testified to finding two handguns in a bedroom along with the juvenile's school report card, and although a person under 18 could produce evidence to support an affirmative defense that he or she was in possession of firearms with his or her parent's permission at real property under the parent's control, the juvenile did not produce any such evidence. In re A.Z., 301 Ga. App. 524, 687 S.E.2d 887 (2009), cert. denied, No. S10C0492, 2010 Ga. LEXIS 335 (Ga. 2010).

Because proof of the fact that the defendant juvenile was under the age of 18 was not required to establish a violation of former O.C.G.A. § 16-11-128 (now repealed), and proof of the facts that the defendant carried a pistol outside the defendant's home, vehicle, or business without a license were not necessary to show a violation of O.C.G.A. § 16-11-132, the weapons offenses did not merge, and the defendant was not exempt from adjudication of delinquency and punishment for each offense; the statutes defining the offenses of carrying a pistol without a license and possession of a handgun by a minor each require proof of at least one fact that the other does not. In the Interest of D. M., 307 Ga. App. 751, 706 S.E.2d 683 (2011).

Evidence was sufficient to support a finding of guilt on six counts of aggravated assault and one count of possession of a handgun by an underage person because the evidence included direct evidence in

the form of eyewitness testimony identifying the juvenile as shooting and discarding the gun. In the Interest of T. D. J., 325 Ga. App. 786, 755 S.E.2d 29 (2014).

Evidence sufficient for conviction. — Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find defendant guilty of felony murder, aggravated assault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. Lytle v. State, 290 Ga. 177, 718 S.E.2d 296 (2011).

Evidence insufficient to prove weapon was handgun or long gun. — After the motion to suppress hearing was converted to an adjudicatory hearing, the state retained the burden of proof to present evidence to support each element of the weapons possession offenses of possession of a handgun by a person under the age of 18, and possession and carrying of a handgun or a long gun by persons prohibited by law from such possession, but the state failed to carry the state's burden of proof to establish the elements of the weapons possession offenses by failing to show that the weapon met the definition of a handgun or long gun; furthermore, the state's failure to raise an objection to the procedure and the state's acquiesce to it did not constitute induced error or relieve the state of the state's burden of proof. In the Interest of A. A., 334 Ga. App. 37, 778 S.E.2d 28 (2015).

Evidence insufficient for adjudication. — State failed to present sufficient evidence to demonstrate that the firearm that fell from the juvenile's pocket met the requirements of the firearm offenses of possession of a handgun by a person under the age of 18, and possession and carrying of a handgun or a long gun by persons prohibited by law from such possession because the state never introduced into evidence either photographs of the firearm recovered during the July 18 incident or the firearm itself; and the officer referred to it only as a firearm, weapon, or gun, and never identified the recovered weapon as a handgun or described the length of its barrel; thus, the appellate court reversed the juvenile's adjudications of delinquency as to those offenses. In the Interest of A. A., 334 Ga. App. 37, 778 S.E.2d 28 (2015).

Sentencing error. — Defendant's sentence for violating O.C.G.A. § 16-11-132(b) was vacated and the case was remanded for resentencing because the trial court improperly sentenced the defendant to a felony-level sentence of five years on the conviction for misdemeanor possession of a pistol by a person under the age of 18. Oliphant v. State, 295 Ga. 597, 759 S.E.2d 821 (2014).

Cited in Rodriguez v. State, 284 Ga. 803, 671 S.E.2d 497 (2009).

RESEARCH REFERENCES

ALR. — What constitutes "constructive possession" of unregistered or otherwise prohibited weapon under state law, 88 A.L.R.5th 121.

16-11-133. Minimum periods of confinement for persons convicted who have prior convictions.

(a) As used in this Code section, the term:

(1) "Felony" means any offense punishable by imprisonment for a term of one year or more and includes conviction by a court-martial under the Uniform Code of Military Justice for an offense which would constitute a felony under the laws of the United States.

(2) "Firearm" includes any handgun, rifle, shotgun, stun gun, taser, or other weapon which will or can be converted to expel a projectile by the action of an explosive or electrical charge.

(b) Any person who has previously been convicted of or who has previously entered a guilty plea to the offense of murder, murder in the second degree, armed robbery, home invasion in any degree, kidnapping, rape, aggravated child molestation, aggravated sodomy, aggravated sexual battery, or any felony involving the use or possession of a firearm and who shall have on or within arm's reach of his or her person a firearm during the commission of, or the attempt to commit:

(1) Any crime against or involving the person of another;

(2) The unlawful entry into a building or vehicle;

(3) A theft from a building or theft of a vehicle;

(4) Any crime involving the possession, manufacture, delivery, distribution, dispensing, administering, selling, or possession with intent to distribute any controlled substance as provided in Code Section 16-13-30; or

(5) Any crime involving the trafficking of cocaine, marijuana, or illegal drugs as provided in Code Section 16-13-31,

and which crime is a felony, commits a felony and, upon conviction thereof, shall be punished by confinement for a period of 15 years, such sentence to run consecutively to any other sentence which the person has received.

(c) Upon the second or subsequent conviction of a convicted felon under this Code section, such convicted felon shall be punished by confinement for life. Notwithstanding any other law to the contrary, the sentence of any convicted felon which is imposed for violating this Code section a second or subsequent time shall not be suspended by the court and probationary sentence imposed in lieu thereof.

(d) Any crime committed in violation of subsections (b) and (c) of this Code section shall be considered a separate offense. (Code 1981, § 16-11-133, enacted by Ga. L. 1995, p. 137, § 1; Ga. L. 2014, p. 426, § 5/HB 770; Ga. L. 2014, p. 444, § 2-6/HB 271.)

Law reviews. — For notes on the 1995 enactment of this Code section and § 16-11-134, see 12 Ga. St. U.L. Rev. 112 and 118 (1995).

JUDICIAL DECISIONS

Sufficient evidence of defendant's prior felony conviction. — In a prosecution for the use of a firearm by a convicted felon, evidence that a South Carolina court gave the defendant a two-year sentence, with credit for time served, one year of probation to follow, and the balance suspended was sufficient to prove

that the defendant had been convicted of a felony; a "felony" for purposes of O.C.G.A. § 16-11-133(a)(1) was any offense punishable by imprisonment for a term of one year or more. Verdree v. State, 299 Ga. App. 673, 683 S.E.2d 632 (2009).

Insufficient evidence of defendant as convicted felon. — Trial court erred in convicting the defendant of possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-11-133 because the evidence was insufficient to show that the defendant had been convicted of a prior felony; the state's exhibit showed that a "Derrick Beck" had been convicted of armed robbery, but nothing was presented to the jury to establish that Derrick Beck was the defendant. Mubarak v. State, 305 Ga. App. 419, 699 S.E.2d 788 (2010).

Defendant's sentence, as a recidivist, of concurrent 20 year terms on each of three counts of aggravated assault, concurrently five years terms on each of three counts of possession of a firearm during the commission of a crime, to run consecutively to the aggravated assault sentence, and concurrent 15 year terms on each of two counts of possession of a firearm by a convicted felon, to run consecutive to the aggravated assault sentence, was not cruel, inhumane, and unusual punishment because each sentence was within the statutory limits of the crimes charge, and the sentence was not grossly disproportionate to the underlying crimes. Willis v. State, 316 Ga. App. 258, 728 S.E.2d 857 (2012).

Failure to merge. — Trial court erred in failing to merge, for purposes of sentencing, the defendant's convictions for possession of a firearm during the commission of a crime and possession of a firearm by a convicted felon with use of a firearm by a convicted felon during the commission of another felony, because the same act was used to establish each of the offenses and each crime did not require proof of a fact not required by the other. Jones v. State, 318 Ga. App. 105, 733 S.E.2d 407 (2012).

Cited in Lawton v. State, 281 Ga. 459, 640 S.E.2d 14 (2007).

16-11-134. Discharging firearm while under the influence of alcohol or drugs.

(a) It shall be unlawful for any person to discharge a firearm while:

(1) Under the influence of alcohol or any drug or any combination of alcohol and any drug to the extent that it is unsafe for the person to discharge such firearm except in the defense of life, health, and property;

(2) The person's alcohol concentration is 0.08 grams or more at any time while discharging such firearm or within three hours after such discharge of such firearm from alcohol consumed before such discharge ended; or

(3) Subject to the provisions of subsection (b) of this Code section, there is any amount of marijuana or a controlled substance, as defined in Code Section 16-13-21, present in the person's blood or urine, or both, including the metabolites and derivatives of each or both without regard to whether or not any alcohol is present in the person's breath or blood.

(b) The fact that any person charged with violating this Code section is or has been legally entitled to use a drug shall not constitute a defense against any charge of violating this Code section; provided,

however, that such person shall not be in violation of this Code section unless such person is rendered incapable of possessing or discharging a firearm safely as a result of using a drug other than alcohol which such person is legally entitled to use.

(c) Any person convicted of violating subsection (a) of this Code section shall be guilty of a misdemeanor of a high and aggravated nature. (Code 1981, § 16-11-134, enacted by Ga. L. 1995, p. 139, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1995, this Code section, originally designated as Code Section 16-11-133, was redesignated as Code Section 16-11-134.

Editor's notes. — Ga. L. 1995, p. 139, § 7, not codified by the General Assembly, provides that the act shall only apply to the sale and transfer of handguns after January 1, 1996, and that no local ordinance which was in effect on March 22, 1995, shall be affected by Code Section 16-11-184 until January 1, 1996, at which time, unless enacted subsequent to March 22, 1995, as provided by that Code section, any such ordinance shall be of no further force or effect, and further provides that no ordinance or regulation attempting to regulate firearms in any manner shall be enacted by any county, city, or municipality after July 1, 1995.

16-11-135. Public or private employer's parking lots; right of privacy in vehicles in employer's parking lot or invited guests on lot; severability; rights of action.

(a) Except as provided in this Code section, no private or public employer, including the state and its political subdivisions, shall establish, maintain, or enforce any policy or rule that has the effect of allowing such employer or its agents to search the locked privately owned vehicles of employees or invited guests on the employer's parking lot and access thereto.

(b) Except as provided in this Code section, no private or public employer, including the state and its political subdivisions, shall condition employment upon any agreement by a prospective employee that prohibits an employee from entering the parking lot and access thereto when the employee's privately owned motor vehicle contains a firearm or ammunition, or both, that is locked out of sight within the trunk, glove box, or other enclosed compartment or area within such privately owned motor vehicle, provided that any applicable employees possess a Georgia weapons carry license.

(c) Subsection (a) of this Code section shall not apply:

(1) To searches by certified law enforcement officers pursuant to valid search warrants or valid warrantless searches based upon probable cause under exigent circumstances;

(2) To vehicles owned or leased by an employer;

(3) To any situation in which a reasonable person would believe that accessing a locked vehicle of an employee is necessary to prevent an immediate threat to human health, life, or safety; or

(4) When an employee consents to a search of his or her locked privately owned vehicle by licensed private security officers for loss prevention purposes based on probable cause that the employee unlawfully possesses employer property.

(d) Subsections (a) and (b) of this Code section shall not apply:

(1) To an employer providing applicable employees with a secure parking area which restricts general public access through the use of a gate, security station, security officers, or other similar means which limit public access into the parking area, provided that any employer policy allowing vehicle searches upon entry shall be applicable to all vehicles entering the property and applied on a uniform and frequent basis;

(2) To any penal institution, correctional institution, detention facility, jail, or similar place of confinement or confinement alternative;

(3) To facilities associated with electric generation owned or operated by a public utility;

(4) To any United States Department of Defense contractor, if such contractor operates any facility on or contiguous with a United States military base or installation or within one mile of an airport;

(5) To an employee who is restricted from carrying or possessing a firearm on the employer's premises due to a completed or pending disciplinary action;

(6) Where transport of a firearm on the premises of the employer is prohibited by state or federal law or regulation;

(7) To parking lots contiguous to facilities providing natural gas transmission, liquid petroleum transmission, water storage and supply, and law enforcement services determined to be so vital to the State of Georgia, by a written determination of the Georgia Department of Homeland Security, that the incapacity or destruction of such systems and assets would have a debilitating impact on public health or safety; or

(8) To any area used for parking on a temporary basis.

(e) No employer, property owner, or property owner's agent shall be held liable in any criminal or civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession, or use of a firearm, including, but not limited to, the theft of

a firearm from an employee's automobile, pursuant to this Code section unless such employer commits a criminal act involving the use of a firearm or unless the employer knew that the person using such firearm would commit such criminal act on the employer's premises. Nothing contained in this Code section shall create a new duty on the part of the employer, property owner, or property owner's agent. An employee at will shall have no greater interest in employment created by this Code section and shall remain an employee at will.

(f) In any action relating to the enforcement of any right or obligation under this Code section, an employer, property owner, or property owner's agent's efforts to comply with other applicable federal, state, or local safety laws, regulations, guidelines, or ordinances shall be a complete defense to any employer, property owner, or property owner's agent's liability.

(g) In any action brought against an employer, employer's agent, property owner, or property owner's agent relating to the criminal use of firearms in the workplace, the plaintiff shall be liable for all legal costs of such employer, employer's agent, property owner, or property owner's agent if such action is concluded in such employer, employer's agent, property owner, or property owner's agent's favor.

(h) This Code section shall not be construed so as to require an employer, property owner, or property owner's agent to implement any additional security measures for the protection of employees, customers, or other persons. Implementation of remedial security measures to provide protection to employees, customers, or other persons shall not be admissible in evidence to show prior negligence or breach of duty of an employer, property owner, or property owner's agent in any action against such employer, its officers or shareholders, or property owners.

(i) All actions brought based upon a violation of subsection (a) of this Code section shall be brought exclusively by the Attorney General.

(j) In the event that subsection (e) of this Code section is declared or adjudged by any court to be invalid or unconstitutional for any reason, the remaining portions of this Code section shall be invalid and of no further force or effect. The General Assembly declares that it would not have enacted the remaining provisions of this Code section if it had known that such portion hereof would be declared or adjudged invalid or unconstitutional.

(k) Nothing in this Code section shall restrict the rights of private property owners or persons in legal control of property through a lease, a rental agreement, a contract, or any other agreement to control access to such property. When a private property owner or person in legal control of property through a lease, a rental agreement, a contract, or any other agreement is also an employer, his or her rights as a private

property owner or person in legal control of property shall govern. (Code 1981, § 16-11-135, enacted by Ga. L. 2008, p. 1199, § 7/HB 89; Ga. L. 2009, p. 8, § 16/SB 46; Ga. L. 2010, p. 963, § 1-9/SB 308; Ga. L. 2015, p. 805, § 7/HB 492; Ga. L. 2016, p. 443, § 13-3/SB 367.)

The 2016 amendment, effective July 1, 2016, deleted "diversion center," following "detention facility," in paragraph (d)(2).

Editor's notes. — Ga. L. 2008, p. 1199, § 1/HB 89, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Business Security and Employee Privacy Act.'"

Ga. L. 2010, p. 963, § 3-1/SB 308, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Law reviews. — For survey article on labor and employment law, see 60 Mercer L. Rev. 217 (2008). For article, "Georgia's 'Bring Your Gun to Work' Law May Not Have the Firepower to Trouble Georgia Employers After All," see 14 (No. 7) Ga. State Bar J. 12 (2009). For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011). For article on the 2016 amendment of this Code section, see 33 Ga. St. U.L. Rev. 139 (2016). For annual survey on labor and employment law, see 69 Mercer L. Rev. 141 (2017).

JUDICIAL DECISIONS

Employer immunity. — Under the plain language of O.C.G.A. § 16-11-135(e), the employer could not be held liable for the firearm-related injury the lab technician suffered as a result of the employee's negligence which caused the employee's firearm to discharge while the employee attempted to clear the firearm, injuring the technician. Lucas v. Beckman Coulter, Inc., 339 Ga. App. 73, 793 S.E.2d 119 (2016).

In a suit by a shooting victim against an employee (who was making a call at a customer's when the employee accidentally shot the victim) and the employee's employer, O.C.G.A. § 16-11-135(e) of the Business Security and Employee Privacy Act did not grant the employer immunity from firearm-related tort liability. Because the vehicle used was not an employee-owned vehicle, the employee did not enter the employer's parking lot, and the incident occurred at the customer's premises, immunity did not apply. Lucas v. Beckman Coulter, Inc., No. S17G0541, 2018 Ga. LEXIS 133 (Mar. 5, 2018).

Cited in Georgiacarry.Org, Inc. v. Atlanta Botanical Garden, Inc., 299 Ga. 26, 785 S.E.2d 874 (2016).

16-11-136. Restrictions on possession, manufacture, sale, or transfer of knives.

(a) As used in this Code section, the term:

(1) "Courthouse" shall have the same meaning as set forth in Code Section 16-11-127.

(2) "Government building" shall have the same meaning as set forth in Code Section 16-11-127.

(3) "Knife" means any cutting instrument with a blade and shall include, without limitation, a knife as such term is defined in Code Section 16-11-125.1.

(b) Except for restrictions in courthouses and government buildings, no county, municipality, or consolidated government shall, by rule or ordinance, constrain the possession, manufacture, sale, or transfer of a knife more restrictively than the provisions of this part. (Code 1981, § 16-11-136, enacted by Ga. L. 2012, p. 1141, § 1/SB 432.)

16-11-137. Required possession of weapons carry license or proof of exemption when carrying a weapon; detention for investigation of carrying permit.

(a) Every license holder shall have his or her valid weapons carry license in his or her immediate possession at all times when carrying a weapon, or if such person is exempt from having a weapons carry license pursuant to Code Section 16-11-130 or subsection (c) of Code Section 16-11-127.1, he or she shall have proof of his or her exemption in his or her immediate possession at all times when carrying a weapon, and his or her failure to do so shall be prima-facie evidence of a violation of the applicable provision of Code Sections 16-11-126 through 16-11-127.2.

(b) A person carrying a weapon shall not be subject to detention for the sole purpose of investigating whether such person has a weapons carry license.

(c) A person convicted of a violation of this Code section shall be fined not more than $10.00 if he or she produces in court his or her weapons carry license, provided that it was valid at the time of his or her arrest, or produces proof of his or her exemption. (Code 1981, § 16-11-137, enacted by Ga. L. 2014, p. 432, § 1-2/HB 826; Code 1981, § 16-11-137, enacted by Ga. L. 2014, p. 599, § 1-10/HB 60.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2014, the enactment of this Code section by Ga. L. 2014, p. 432, § 1-2/HB 826, was treated as impliedly repealed and superseded by Ga. L. 2014, p. 599, § 1-10/HB 60, due to irreconcilable conflict.

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Weapons and Firearms, § 10 et seq.

16-11-138. Defense of self or others as absolute defense.

Defense of self or others, as contemplated by and provided for under Article 2 of Chapter 3 of this title, shall be an absolute defense to any

violation under this part. (Code 1981, § 16-11-138, enacted by Ga. L. 2014, p. 599, § 1-10/HB 60; Ga. L. 2015, p. 5, § 16/HB 90.)

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For article on the 2014 enactment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

Part 4

Antiterroristic Training

16-11-150. Short title.

This part shall be known and may be cited as the "Georgia Antiterroristic Training Act." (Code 1981, § 16-11-150, enacted by Ga. L. 1987, p. 866, § 1.)

Cross references. — Georgia Emergency Management Act of 1981, § 38-3-1 et seq.

16-11-151. Prohibited training.

(a) As used in this Code section, the term "dangerous weapon" has the same meaning as found in paragraph (1) of Code Section 16-11-121.

(b) It shall be unlawful for any person to:

(1) Teach, train, or demonstrate to any other person the use, application, or making of any illegal firearm, dangerous weapon, explosive, or incendiary device capable of causing injury or death to persons either directly or through a writing or over or through a computer or computer network if the person teaching, training, or demonstrating knows, has reason to know, or intends that such teaching, training, or demonstrating will be unlawfully employed for use in or in furtherance of a civil disorder, riot, or insurrection; or

(2) Assemble with one or more persons for the purpose of being taught, trained, or instructed in the use of any illegal firearm, dangerous weapon, explosive, or incendiary device capable of causing injury or death to persons if such person so assembling knows, has reason to know, or intends that such teaching, training, or instruction will be unlawfully employed for use in or in furtherance of a civil disorder, riot, or insurrection.

(c) Any person who violates any provision of subsection (b) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $5,000.00 or by imprison-

ment for not less than one nor more than five years, or both. (Code 1981, § 16-11-151, enacted by Ga. L. 1987, p. 866, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1995, p. 574, § 4.)

Law reviews. — For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 130 (1995).

16-11-152. Authorized training.

This part shall not apply to:

(1) Any act of any peace officer which is performed in the lawful performance of official duties;

(2) Any training for law enforcement officers conducted by or for any police agency of the state or any political subdivision thereof or any agency of the United States;

(3) Any activities of the National Guard or of the armed forces of the United States; or

(4) Any hunter education classes taught under the auspices of the Department of Natural Resources, or other classes intended to teach the safe handling of firearms for hunting, recreation, competition, or self-defense. (Code 1981, § 16-11-152, enacted by Ga. L. 1987, p. 866, § 1.)

Part 4A

Enhanced Criminal Penalties

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, Part 5 of Article 4 of Chapter 11 of Title 16, enacted by Ga. L. 1996, p. 354, § 1, was redesignated as Part 4A, as there already existed a Part 5.

16-11-160. Use of machine guns, sawed-off rifles, sawed-off shotguns, or firearms with silencers during commission of certain offenses; enhanced criminal penalties.

(a)(1) It shall be unlawful for any person to possess or to use a machine gun, sawed-off rifle, sawed-off shotgun, or firearm equipped with a silencer, as those terms are defined in Code Section 16-11-121, during the commission or the attempted commission of any of the following offenses:

(A) Aggravated assault as defined in Code Section 16-5-21;

(B) Aggravated battery as defined in Code Section 16-5-24;

(C) Robbery as defined in Code Section 16-8-40;

(D) Armed robbery as defined in Code Section 16-8-41;

(D.1) Home invasion in any degree as defined in Code Section 16-7-5;

(E) Murder or felony murder as defined in Code Section 16-5-1;

(F) Voluntary manslaughter as defined in Code Section 16-5-2;

(G) Involuntary manslaughter as defined in Code Section 16-5-3;

(H) Sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances in violation of any provision of Article 2 of Chapter 13 of this title, the "Georgia Controlled Substances Act";

(I) Terroristic threats or acts as defined in Code Section 16-11-37;

(J) Arson as defined in Code Section 16-7-60, 16-7-61, or 16-7-62 or arson of lands as defined in Code Section 16-7-63;

(K) Influencing witnesses as defined in Code Section 16-10-93; and

(L) Participation in criminal gang activity as defined in Code Section 16-15-4.

(2)(A) As used in this paragraph, the term "bulletproof vest" means a bullet-resistant soft body armor providing, as a minimum standard, the level of protection known as "threat level I," which means at least seven layers of bullet-resistant material providing protection from at least three shots of 158-grain lead ammunition fired from a .38 caliber handgun at a velocity of 850 feet per second.

(B) It shall be unlawful for any person to wear a bulletproof vest during the commission or the attempted commission of any of the following offenses:

(i) Any crime against or involving the person of another in violation of any of the provisions of this title for which a sentence of life imprisonment may be imposed;

(ii) Any felony involving the manufacture, delivery, distribution, administering, or selling of controlled substances or marijuana as provided in Code Section 16-13-30; or

(iii) Trafficking in cocaine, illegal drugs, marijuana, or methamphetamine as provided in Code Section 16-13-31.

(b) Any person who violates paragraph (1) of subsection (a) of this Code section shall be guilty of a felony, and, upon conviction thereof, shall be punished by confinement for a period of ten years, such

sentence to run consecutively to any other sentence which the person has received. Any person who violates paragraph (2) of subsection (a) of this Code section shall be guilty of a felony, and, upon conviction thereof, shall be punished by confinement for a period of one to five years, such sentence to run consecutively to any other sentence which the person has received.

(c) Upon the second or subsequent conviction of a person under this Code section, the person shall be punished by life imprisonment. Notwithstanding any other law to the contrary, the sentence of any person which is imposed for violating this Code section a second or subsequent time shall not be suspended by a court or a probationary sentence imposed in lieu thereof.

(d) The punishment prescribed for the violation of subsections (a) and (c) of this Code section shall not be probated or suspended as is provided by Code Section 17-10-7.

(e) Any crime committed in violation of this Code section shall be considered a separate offense. (Code 1981, § 16-11-160, enacted by Ga. L. 1996, p. 354, § 1; Ga. L. 2003, p. 256, § 1; Ga. L. 2008, p. 444, § 4/SB 400; Ga. L. 2014, p. 426, § 6/HB 770; Ga. L. 2015, p. 5, § 16/HB 90.)

Law reviews. — For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 95 (2003).

JUDICIAL DECISIONS

Evidence sufficient to support conviction. — Evidence that showed defendant and other members of the gang attacked rival gang members outside a restaurant and that defendant fired two shots into the back of the brother of two rival gang members after the victim had been beaten with a small bat, that defendant stated to another gang member that defendant had shot the victim, and that the gun used to kill the victim was found in defendant's backyard, supported the convictions for felony murder and possession of a firearm during the commission of a felony. Yat v. State, 279 Ga. 611, 619 S.E.2d 637 (2005).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state statutes criminalizing possession of body armor by felon convicted of violent crime, 31 A.L.R.6th 615.

Validity, construction, and application of 18 U.S.C.S. § 931 criminalizing possession of body armor by felon convicted of violent crime, 21 A.L.R. Fed. 2d 361.

What constitutes "possession" of firearm for purposes of 18 U.S.C.A. § 924(c)(1), providing penalty for possession of firearm in furtherance of drug trafficking crime or crime of violence, 89 A.L.R. Fed. 2d 37.

16-11-161. Consistent local laws or ordinances authorized.

Nothing in this part shall be construed to prohibit a local governing authority from adopting and enforcing laws consistent with this part relating to gangs and gang violence. Where local laws or ordinances duplicate or supplement this part, this part shall be construed as providing alternative remedies and not as preempting the field. (Code 1981, § 16-11-161, enacted by Ga. L. 1996, p. 354, § 1.)

16-11-162. Exemption for use of force in defense of others.

This part shall not apply to persons who use force in defense of others as provided by Code Section 16-3-21. This part is intended to supplement not to supplant Code Section 16-11-106. (Code 1981, § 16-11-162, enacted by Ga. L. 1996, p. 354, § 1.)

Part 5

Brady Law Regulations

Cross references. — Brady Handgun Violence Prevention Act, 18 U.S.C. § 921 et seq.

Editor's notes. — Ga. L. 1995, p. 139, § 7, not codified by the General Assembly, provides that no local ordinance which was in effect on March 22, 1995, shall be affected by Code Section 16-11-184 until January 1, 1996, at which time, unless enacted subsequent to March 22, 1995, as provided by that Code section, any such ordinance shall be of no further force or effect, and further provides that no ordinance or regulation attempting to regulate firearms in any manner shall be enacted by any county, city, or municipality after July 1, 1995.

Ga. L. 1995, p. 139, § 8, not codified by the General Assembly, provides that Code Sections 16-11-170 through 16-11-183 shall be repealed automatically upon a final judicial determination that the Act is invalid for any reason.

Administrative rules and regulations. — Brady Handgun Violence Prevention Act, Official Compilation of the Rules and Regulations of the State of Georgia, Practice and Procedure, Georgia Crime Information Center Council, § 140-2-.17.

16-11-170. Intent to provide state background check law; construction of part.

Reserved. Repealed by Ga. L. 2005, p. 613, § 1/SB 175, effective July 1, 2005.

Editor's notes. — This Code section was based on Code 1981, § 16-11-170, enacted by Ga. L. 1995, p. 139, § 2; Ga. L. 1999, p. 81, § 16; Ga. L. 2000, p. 136, § 16.

16-11-171. Definitions.

As used in this part, the term:

(1) "Center" means the Georgia Crime Information Center within the Georgia Bureau of Investigation.

(2) "Dealer" means any person licensed as a dealer pursuant to 18 U.S.C. Section 921, et seq.

(3) "Firearm" means any weapon that is designed to or may readily be converted to expel a projectile by the action of an explosive or the frame or receiver of any such weapon, any firearm muffler or firearm silencer, or any destructive device as defined in 18 U.S.C. Section 921(a)(3).

(4) "Involuntarily hospitalized" means hospitalized as an inpatient in any mental health facility pursuant to Code Section 37-3-81 or hospitalized as an inpatient in any mental health facility as a result of being adjudicated mentally incompetent to stand trial or being adjudicated not guilty by reason of insanity at the time of the crime pursuant to Part 2 of Article 6 of Title 17.

(5) "NICS" means the National Instant Criminal Background Check System created by the federal "Brady Handgun Violence Prevention Act" (P. L. No. 103-159). (Code 1981, § 16-11-171, enacted by Ga. L. 1995, p. 139, § 2; Ga. L. 2005, p. 613, § 1/SB 175; Ga. L. 2015, p. 5, § 16/HB 90; Ga. L. 2015, p. 805, § 8/HB 492.)

16-11-172. Transfers or purchases of firearms subject to the NICS; information concerning persons who have been involuntarily hospitalized to be forwarded to the FBI; penalties for breach of confidentiality; exceptions.

(a) All transfers or purchases of firearms conducted by a licensed importer, licensed manufacturer, or licensed dealer shall be subject to the NICS. To the extent possible, the center shall provide to the NICS all necessary criminal history information and wanted person records in order to complete an NICS check.

(b) The center shall forward to the Federal Bureau of Investigation information concerning persons who have been involuntarily hospitalized as defined in this part for the purpose of completing an NICS check.

(c) Any government official who willfully or intentionally compromises the identity, confidentiality, and security of any records and data pursuant to this part shall be guilty of a felony and fined no less than $5,000.00 and shall be subject to automatic dismissal from his or her employment.

(d) The provisions of this part shall not apply to:

(1) Any firearm, including any handgun with a matchlock, flintlock, percussion cap, or similar type of ignition system, manufactured in or before 1898;

(2) Any replica of any firearm described in paragraph (1) of this subsection if such replica is not designed or redesigned to use rimfire or conventional center-fire fixed ammunition or uses rimfire or conventional center-fire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; and

(3) Any firearm which is a curio or relic as defined by 27 C.F.R. 178.11. (Code 1981, § 16-11-172, enacted by Ga. L. 1995, p. 139, § 2; Ga. L. 1997, p. 1411, § 1; Ga. L. 2005, p. 613, § 1/SB 175.)

16-11-173. Legislative findings; preemption of local regulation and lawsuits; exceptions.

(a)(1) It is declared by the General Assembly that the regulation of firearms and other weapons is properly an issue of general, state-wide concern.

(2) The General Assembly further declares that the lawful design, marketing, manufacture, and sale of firearms and ammunition and other weapons to the public is not unreasonably dangerous activity and does not constitute a nuisance per se.

(b)(1) Except as provided in subsection (c) of this Code section, no county or municipal corporation, by zoning, by ordinance or resolution, or by any other means, nor any agency, board, department, commission, political subdivision, school district, or authority of this state, other than the General Assembly, by rule or regulation or by any other means shall regulate in any manner:

(A) Gun shows;

(B) The possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of firearms or other weapons or components of firearms or other weapons;

(C) Firearms dealers or dealers of other weapons; or

(D) Dealers in components of firearms or other weapons.

(2) The authority to bring suit and right to recover against any weapons, firearms, or ammunition manufacturer, trade association, or dealer by or on behalf of any governmental unit created by or pursuant to an Act of the General Assembly or the Constitution, or any department, agency, or authority thereof, for damages, abatement, or injunctive relief resulting from or relating to the lawful

design, manufacture, marketing, or sale of weapons, firearms, or ammunition to the public shall be reserved exclusively to the state. This paragraph shall not prohibit a political subdivision or local government authority from bringing an action against a weapons, firearms, or ammunition manufacturer or dealer for breach of contract or express warranty as to weapons, firearms, or ammunition purchased by the political subdivision or local government authority.

(c)(1) A county or municipal corporation may regulate the transport, carrying, or possession of firearms by employees of the local unit of government, or by unpaid volunteers of such local unit of government, in the course of their employment or volunteer functions with such local unit of government; provided, however, that the sheriff or chief of police shall be solely responsible for regulating and determining the possession, carrying, and transportation of firearms and other weapons by employees under his or her respective supervision so long as such regulations comport with state and federal law.

(2) The commanding officer of any law enforcement agency shall regulate and determine the possession, carrying, and transportation of firearms and other weapons by employees under his or her supervision so long as such regulations comport with state and federal law.

(3) The district attorney, and the solicitor-general in counties where there is a state court, shall regulate and determine the possession, carrying, and transportation of firearms and other weapons by county employees under his or her supervision so long as such regulations comport with state and federal law.

(d) Nothing contained in this Code section shall prohibit municipalities or counties, by ordinance or resolution, from requiring the ownership of guns by heads of households within the political subdivision.

(e) Nothing contained in this Code section shall prohibit municipalities or counties, by ordinance or resolution, from reasonably limiting or prohibiting the discharge of firearms within the boundaries of the municipal corporation or county.

(f) As used in this Code section, the term "weapon" means any device designed or intended to be used, or capable of being used, for offense or defense, including but not limited to firearms, bladed devices, clubs, electric stun devices, and defense sprays.

(g) Any person aggrieved as a result of a violation of this Code section may bring an action against the person who caused such aggrievement. The aggrieved person shall be entitled to reasonable attorney's fees and expenses of litigation and may recover or obtain against the person who caused such damages any of the following:

(1) Actual damages or $100.00, whichever is greater;

(2) Equitable relief, including, but not limited to, an injunction or restitution of money and property; and

(3) Any other relief which the court deems proper. (Code 1981, § 16-11-173, enacted by Ga. L. 1995, p. 139, § 2; Ga. L. 2005, p. 613, § 1/SB 175; Ga. L. 2011, p. 752, § 16/HB 142; Ga. L. 2014, p. 599, § 1-11/HB 60; Ga. L. 2015, p. 805, § 9/HB 492.)

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For survey article on local government law, see 60 Mercer L. Rev. 263 (2008). For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

JUDICIAL DECISIONS

Plain language of § 16-11-173 expressly precludes a county from regulating the carrying of firearms. — Because the plain language of O.C.G.A. § 16-11-173 expressly precluded a county from regulating the carrying of firearms in any manner, a county ordinance attempting to regulate the carrying of firearms was preempted by the statute; thus, the trial court erred in concluding otherwise and by denying summary judgment to a citizen and advocacy group on those grounds. GeorgiaCarry.Org, Inc. v. Coweta County, 288 Ga. App. 748, 655 S.E.2d 346 (2007).

Local ordinance did not preempt federal law on handguns. — Because the current versions of the cities' ordinances did not create a local violation, the ordinances did not regulate the carrying of firearms in contravention of the state preemption in O.C.G.A. § 16-11-173(b)(1); accordingly, a gun advocacy organization's objections, however meritorious, to previous versions of the ordinances were rendered moot. GeorgiaCarry.Org, Inc. v. City of Roswell, 298 Ga. App. 686, 680 S.E.2d 697 (2009).

Cited in GeorgiaCarry.Org, Inc. v. City of Atlanta, 602 F. Supp. 2d 1281 (N.D. Ga. 2008); Sosniak v. State, 292 Ga. 35, 734 S.E.2d 362 (2012); Evans v. Gwinnett County Public Schools, 337 Ga. App. 690, 788 S.E.2d 577 (2016).

16-11-174 through 16-11-184.

Repealed by Ga. L. 2005, p. 613, § 1/SB 175, effective July 1, 2005.

Editor's notes. — These Code sections were based on Code 1981, §§ 16-11-174 through 16-11-184, enacted by Ga. L. 1995, p. 139, § 2; Ga. L. 1996, p. 108, § 6; Ga. L. 1997, p. 1411, §§ 2, 3; Ga. L. 1999, p. 2, § 1; Ga. L. 2000, p. 1418, § 1.

ARTICLE 5

OFFENSES INVOLVING ILLEGAL ALIENS

Cross references. — Determination of immigration status of suspects, § 17-5-100. Cooperation of Georgia law enforcement with federal immigration authorities, § 35-1-6. Secure and verifiable identity document act, § 50-36-2. Immigration enforcement review board, § 50-36-3.

Editor's notes. — Ga. L. 2011, p. 794, § 1/HB 87, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Illegal

Immigration Reform and Enforcement Act of 2011.'"

Ga. L. 2011, p. 794, § 21/HB 87, not codified by the General Assembly, provides for severability, and provides, in part, that: "(b) The terms of this Act regarding immigration shall be construed to have the meanings consistent with such terms under federal immigration law.

"(c) The provisions of this Act shall be implemented in a manner consistent with federal laws governing immigration and civil rights."

Ga. L. 2011, p. 794, § 22/HB 87, not codified by the General Assembly, provides, in part, that this article shall apply to offenses and violations occurring on or after July 1, 2011.

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 35 (2011).

For comment, "Immigration Detention Reform: No Band Aid Desired," see 60 Emory L. J. 1211 (2011).

16-11-200. Definitions; offense of transporting or moving illegal aliens; exceptions; penalties.

(a) As used in this Code section, the term:

(1) "Illegal alien" means a person who is verified by the federal government to be present in the United States in violation of federal immigration law.

(2) "Motor vehicle" shall have the same meaning as provided in Code Section 40-1-1.

(b) A person who, while committing another criminal offense, knowingly and intentionally transports or moves an illegal alien in a motor vehicle for the purpose of furthering the illegal presence of the alien in the United States shall be guilty of the offense of transporting or moving an illegal alien.

(c) Except as provided in this subsection, a person convicted for a first offense of transporting or moving an illegal alien who moves seven or fewer illegal aliens at the same time shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment not to exceed 12 months, a fine not to exceed $1,000.00, or both. A person convicted for a second or subsequent offense of transporting or moving an illegal alien, and a person convicted on a first offense of transporting or moving an illegal alien who moves eight or more illegal aliens at the same time, shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one or more than five years, a fine of not less than $5,000.00 or more than $20,000.00, or both. A person who commits the offense of transporting or moving an illegal alien who does so with the intent of making a profit or receiving anything of value shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one or more than five years, a fine of not less than $5,000.00 or more than $20,000.00, or both.

(d) This Code section shall not apply to:

(1) A government employee transporting or moving an illegal alien as a part of his or her official duties or to any person acting at the direction of such employee;

(2) A person who transports an illegal alien to or from a judicial or administrative proceeding when such illegal alien is required to appear pursuant to a summons, subpoena, court order, or other legal process;

(3) A person who transports an illegal alien to a law enforcement agency or a judicial officer for official government purposes;

(4) An employer transporting an employee who was lawfully hired; or

(5) A person providing privately funded social services. (Code 1981, § 16-11-200, enacted by Ga. L. 2011, p. 794, § 7/HB 87.)

Law reviews. — For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U.L. Rev. 51 (2011).

JUDICIAL DECISIONS

Standing. — In a pre-enforcement constitutional challenge to sections 7 and 8 of Georgia House Bill 87, the Illegal Immigration Reform and Enforcement Act of 2011, in which Georgia officials appealed a district court's entry of a preliminary injunction enjoining enforcement of those two sections, an immigration attorney had standing to challenge section 7 because the attorney faced a credible threat of application of section 7. The attorney was a civil immigration attorney who alleged and declared that the attorney regularly transported undocumented immigrants to and from court hearings, met with immigrant clients in the attorney's law office, gave legal advice to undocumented immigrants who wished to remain in Georgia, and helped undocumented immigrants to enter Georgia for court business and hearings. Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising from a violation of O.C.G.A. § 16-11-200 are offenses for which fingerprinting is required. 2011 Op. Att'y Gen. No. 11-5.

16-11-201. Definitions; offense of concealing, harboring, or shielding an illegal alien; penalties; exceptions.

(a) As used in this Code section, the term:

(1) "Harboring" or "harbors" means any conduct that tends to substantially help an illegal alien to remain in the United States in violation of federal law but shall not include a person providing services to infants, children, or victims of a crime; a person providing privately funded social services; a person providing emergency med-

ical service; or an attorney or his or her employees for the purpose of representing a criminal defendant.

(2) "Illegal alien" means a person who is verified by the federal government to be present in the United States in violation of federal immigration law.

(b) A person who is acting in violation of another criminal offense and who knowingly conceals, harbors, or shields an illegal alien from detection in any place in this state, including any building or means of transportation, when such person knows that the person being concealed, harbored, or shielded is an illegal alien, shall be guilty of the offense of concealing or harboring an illegal alien.

(c) Except as provided in this subsection, a person convicted of concealing or harboring an illegal alien who conceals or harbors seven or fewer illegal aliens at the same time in the same location shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment not to exceed 12 months, a fine not to exceed $1,000.00, or both. A person convicted of concealing or harboring an illegal alien who conceals or harbors eight or more illegal aliens at the same time in the same location, or who conceals or harbors an illegal alien with the intent of making a profit or receiving anything of value, shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one or more than five years, a fine of not less than $5,000.00 or more than $20,000.00, or both.

(d) This Code section shall not apply to a government employee or any person acting at the express direction of a government employee who conceals, harbors, or shelters an illegal alien when such illegal alien is or has been the victim of a criminal offense or is a witness in any civil or criminal proceeding or who holds an illegal alien in a jail, prison, or other detention facility. (Code 1981, § 16-11-201, enacted by Ga. L. 2011, p. 794, § 7/HB 87.)

Law reviews. — For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U.L. Rev. 51 (2011).

JUDICIAL DECISIONS

Preempted. — In a pre-enforcement constitutional challenge to sections 7 and 8 of Georgia House Bill 87, the Illegal Immigration Reform and Enforcement Act of 2011, in which Georgia officials appealed a district court's entry of a preliminary injunction enjoining enforcement of those two sections, the district court did not err in finding that section 7 was preempted by the criminal provisions of the Immigration and Nationality Act, particularly 8 U.S.C. § 1324. Section 7 created state criminal violations for: (1) transporting or moving an illegal alien, O.C.G.A. § 16-11-200(b); (2) concealing or harboring an illegal alien, O.C.G.A. § 16-11-201(b); and (3) inducing an illegal alien to enter the State of Georgia,

O.C.G.A. § 16-11-202(b). Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising from a violation of O.C.G.A. § 16-11-201 are offenses for which fingerprinting is required. 2011 Op. Att'y Gen. No. 11-5.

16-11-202. Illegal alien defined; offense of inducing an illegal alien to enter state; penalties.

(a) As used in this Code section, the term "illegal alien" means a person who is verified by the federal government to be present in the United States in violation of federal immigration law.

(b) A person who is acting in violation of another criminal offense and who knowingly induces, entices, or assists an illegal alien to enter into this state, when such person knows that the person being induced, enticed, or assisted to enter into this state is an illegal alien, shall be guilty of the offense of inducing an illegal alien to enter into this state.

(c) Except as provided in subsection (d) of this Code section, for a first offense, a person convicted of inducing an illegal alien to enter into this state shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment not to exceed 12 months, a fine not to exceed $1,000.00, or both. For a second or subsequent conviction of inducing an illegal alien to enter into this state, a person shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one or more than five years, a fine of not less than $5,000.00 or more than $20,000.00, or both.

(d) A person who commits the offense of inducing an illegal alien to enter into this state who does so with the intent of making a profit or receiving any thing of value shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one or more than five years, a fine of not less than $5,000.00 or more than $20,000.00, or both. (Code 1981, § 16-11-202, enacted by Ga. L. 2011, p. 794, § 7/HB 87.)

Law reviews. — For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U.L. Rev. 51 (2011).

JUDICIAL DECISIONS

Preempted. — In a pre-enforcement constitutional challenge to sections 7 and 8 of Georgia House Bill 87, the Illegal Immigration Reform and Enforcement Act of 2011, in which Georgia officials appealed a district court's entry of a preliminary injunction enjoining enforcement of those two sections, the district court did

not err in finding that section 7 was preempted by the criminal provisions of the Immigration and Nationality Act, particularly 8 U.S.C. § 1324. Section 7 created state criminal violations for: (1) transporting or moving an illegal alien, O.C.G.A. § 16-11-200(b); (2) concealing or harboring an illegal alien, O.C.G.A. § 16-11-201(b); and (3) inducing an illegal alien to enter the State of Georgia, O.C.G.A. § 16-11-202(b). Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising from a violation of O.C.G.A. § 16-11-202 are offenses for which fingerprinting is required. 2011 Op. Att'y Gen. No. 11-5.

16-11-203. Authority of law enforcement officers to enforce federal immigration laws; documentation.

The testimony of any officer, employee, or agent of the federal government having confirmed that a person is an illegal alien shall be admissible to prove that the federal government has verified such person to be present in the United States in violation of federal immigration law. Verification that a person is present in the United States in violation of federal immigration law may also be established by any document authorized by law to be recorded or filed and in fact recorded or filed in a public office where items of this nature are kept. (Code 1981, § 16-11-203, enacted by Ga. L. 2011, p. 794, § 7/HB 87.)

ARTICLE 6

DOMESTIC TERRORISM

Effective date. — This article became effective July 1, 2017.

Editor's notes. — Ga. L. 2017, p. 536, § 1-1/HB 452, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Protect Georgia Act.'"

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Terrorism, § 1 et seq.

16-11-220. Definitions.

As used in this article, the term:

(1) "Critical infrastructure" means publicly or privately owned facilities, systems, functions, or assets, whether physical or virtual, providing or distributing services for the benefit of the public, including, but not limited to, energy, fuel, water, agriculture, health care, finance, or communication.

(2) "Domestic terrorism" means any felony violation of, or attempt to commit a felony violation of the laws of this state which, as part of a single unlawful act or a series of unlawful acts which are interrelated by distinguishing characteristics, is intended to cause serious bodily harm, kill any individual or group of individuals, or disable or destroy critical infrastructure, a state or government facility, or a public transportation system when such disability or destruction results in major economic loss, and is intended to:

(A) Intimidate the civilian population of this state or any of its political subdivisions;

(B) Alter, change, or coerce the policy of the government of this state or any of its political subdivisions by intimidation or coercion; or

(C) Affect the conduct of the government of this state or any of its political subdivisions by use of destructive devices, assassination, or kidnapping.

(3) "Public transportation system" means all facilities, conveyances, and instrumentalities, whether publicly or privately owned, that are used in or for publicly available services for the transportation of individuals or cargo.

(4) "Serious bodily harm" means harm to the body of another by depriving him or her of a member of his or her body, by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member thereof.

(5) "State or government facility" means any permanent or temporary facility or conveyance that is used or occupied by representatives of this state or any of its political subdivisions, by the legislature, by the judiciary, or by officials or employees of this state or any of its political subdivisions. (Code 1981, § 16-11-220, enacted by Ga. L. 2017, p. 536, § 2-2/HB 452.)

Law reviews. — 16-11-220 For article on the 2017 enactment of this article, see 34 Ga. St. U.L. Rev. 17 (2017).

16-11-221. Penalties.

(a) Any person who commits domestic terrorism shall be guilty of a felony and upon conviction thereof shall be punished as follows:

(1) If death results to any individual, by death, by imprisonment for life without parole, or by imprisonment for life;

(2) If kidnapping occurs, by imprisonment for not less than 15 nor more than 35 years, or by imprisonment for life;

(3) If serious bodily harm occurs, by imprisonment for not less than 15 nor more than 35 years; or

(4) If critical infrastructure, a state or government facility, or a public transportation system is disabled or destroyed, by imprisonment for not less than five nor more than 35 years.

(b) No sentence imposed under this Code section shall be suspended, stayed, probated, deferred, or withheld by the sentencing court; provided, however, that in the court's discretion, the court may suspend, stay, probate, defer, or withhold part of such sentence when the prosecuting attorney and the defendant have agreed to such sentence. (Code 1981, § 16-11-221, enacted by Ga. L. 2017, p. 536, § 2-2/HB 452.)

16-11-222. Persons and conduct subject to prosecution for offense of domestic terrorism.

A person shall be subject to prosecution in this state pursuant to Code Section 17-2-1 for any conduct made unlawful by this article which the person engages in while:

(1) Either within or outside of this state if, by such conduct, the person commits a violation of this article which involves an individual who resides in this state or which involves critical infrastructure, a state or government facility, or a public transportation system located in this state; or

(2) Within this state if, by such conduct, the person commits a violation of this article which involves an individual who resides within or outside this state or which involves critical infrastructure, a state or government facility, or a public transportation system located in this state. (Code 1981, § 16-11-222, enacted by Ga. L. 2017, p. 536, § 2-2/HB 452.)

16-11-223. Jurisdiction for prosecutions.

The Attorney General shall have concurrent jurisdiction with district attorneys to conduct the criminal prosecution of a violation of this article. (Code 1981, § 16-11-223, enacted by Ga. L. 2017, p. 536, § 2-2/HB 452.)

16-11-224. Construction; constitutional protections.

This article shall not be construed to infringe upon constitutionally protected speech or assembly. (Code 1981, § 16-11-224, enacted by Ga. L. 2017, p. 536, § 2-2/HB 452.)