Severance in Criminal Trials

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1. Severance and other Issues

Confession by a Codefendant

In *Bruton v. United States*, the United States Supreme Court held that a defendant was denied his 6th Amendment right to confront and cross-examine the witnesses against him when a codefendant's confession that implicated the defendant was admitted into evidence during a joint trial and the codefendant did not take the stand.[1]

When determining whether a the trial court acted within its discretion in denying severance, the court will look to (1) "whether a joint trial will create confusion of evidence and law; (2) whether there is danger that evidence implicating one defendant will be considered against another defendant despite cautionary instructions to the contrary; and (3) whether the co-defendants will press antagonistic defenses."[2] The defendant must show that a joint trial would prejudice him and cause as a denial of his due process rights. An appeals court will only overturn a decision by the trial court regarding a motion for severance where an abuse of discretion by the trial court has been demonstrated.

Factor 1:

The court often finds that the evidence presented to the jury will not lead to confusion when there are only two defendants.[3] The court is more likely to find that the evidence would not confuse the jury when the defendants were found to have acted in concert with each other.[4] Also, the court will look to see whether different laws are being applied to each defendant and whether the application of varying law will cause confusion of the jury.

Factor 2:

A "spillover effect" occurs when limiting instructions are given and there is still a danger that evidence admitted against one codefendant will be considered against the other. If the evidence against a codefendant results in a conviction of the other, or if the strength of evidence against a codefendant is so strong that it will likely be considered against the other codefendant, then the trial court abused its discretion by denying a motion for severance.[5]

The mere fact that there is stronger evidence against the codefendant than there is against the defendant does not require a finding that the trial court abused its discretion in denying a

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[1] Bruton v. United States, 391 U.S. 123 (1968).

[2] Adams v. State, 264 Ga. 71, 73 (1994).

[3] See Broyard v. State, 325 Ga. App. 794, 798 (2014); Jones v. State, 315 Ga. App. 427, 431–32 (2012).

[4] See Broyard, 325 Ga. App. at 798 (2014).

[5] Overton v. State, 295 Ga. App. 223 (2008), *cert. denied*, (Apr. 20, 2009) and *cert. dismissed*, (Apr. 20, 2009); Jackson v. State, 284 Ga. App. 619 (2007); Jones v. State, 277 Ga. App. 185 (2006); Salgado v. State, 268 Ga. App. 18 (2004).

motion for severance by the defendant.[6] The court is even less likely to find an abuse of discretion when the defendants were found to have acted in concert.[7]

Factor 3:

When there has been no showing of harm, antagonistic defenses by the co-defendants is not sufficient by itself to warrant the court to grant a separate trial. "The burden is on the defendant requesting the severance to do more than raise the possibility that a separate trial would give him a better chance of acquittal. He must make a clear showing of prejudice and a consequent denial of due process."[8]

Admission of Out-of-Court Statements by a Co-defendant that do not inculpate the defendant

Defendants often argue that the trial court erred because the admission of out-of-court statements made by a codefendant, combined with the failure to sever his or her trial from the codefendant, caused a violation of the *Confrontation Clause.* When evaluating whether the admission of a co-conspirator's statement, which does not inculpate the defendant, violated the defendant's rights under the *Confrontation Clause*, the court will look to whether there were "sufficient indicia of reliability."[9] The factors that the court will evaluate include

> "(1) [T]he absence of express assertion of past facts; (2) the co-conspirator has personal knowledge of the facts he was stating; (3) the possibility that the co-conspirator's recollection was faulty or remote; and (4) the co-conspirator has no reason to lie about the defendant's involvement in the crime."[10]

Admission of Out-of-Court Statements by a Co-defendant that inculpate the defendant

"Unless [a] statement is otherwise directly admissible against the defendant, the Confrontation Clause is violated by the admission of a non-testifying co-defendant's statement which inculpates the defendant by referring to the defendant's name or existence, regardless of the existences of limiting instructions."[11]

Co-Conspirator Exception to the Hearsay Rule for Statements made during the course of a Conspiracy

If a conspiracy can be shown to have occurred, the courts will allow the admission of statements made by codefendants during the pendency or concealment phase of the conspiracy. Under O.C.G.A § 24-3-5, "[a]fter the fact of the conspiracy is proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all."[12] Proving a conspiracy requires "an agreement between two or more persons to commit a

[6] Strozier v. State, 277 Ga. 78 (2003).
[7] Mathis v. State, 299 Ga. App. 831 (2009); Lankford v. State, 295 Ga App. 590 (2009).
[8] Howard v. State, 279 Ga. 166 (2005) (quoting Moss v. State, 275 Ga. 96, 99 (2002)).
[9] Neason v. State, 277 Ga. 789 (2004).
[10] Redwine v. State 280 Ga. 58, 61 (2005) (quoting Neason v. State, 277 Ga. 789 (2004)).
[11] Collins v. State, 242 Ga. App 450, 451–52 (2000).
[12] O.C.G.A § 24-3-5 (2010).

crime."[13] The agreement "'may be established by direct proof, or by inference, as a deduction from acts and conduct, which discloses a common design on their part to act together for the accomplishment of the unlawful purpose.'"[14] "The existence of a common design or purpose between two or more persons to commit an unlawful act may be shown by direct or circumstantial evidence."[15]

"'Hearsay statements made by a conspirator during the course of a conspiracy, including the concealment phase, are admissible against all conspirators.'"[16] The parties of a conspiracy are considered "so much a unit that the declarations of either are admissible against the other."[17] "[When] a co-conspirator's confession to police in which other alleged conspirators are identified and their participation is described is not made 'during the pendency of the criminal project,' [then the confession] is not admissible under O.C.G.A. § 24-3-5.[18]

Written Confessions by a Codefendant

When a defendant's written confession is admitted into evidence, and the written confession implicates the codefendant, the codefendant was denied their rights under the *Confrontation Clause* because the defendant refused to testify.[19] When a codefendant's written confession implicates both defendants, courts have avoided any possible *Bruton* violations by omitting the codefendants name from the other codefendant's written confessions.[20]

A defendant waives any error by the trial court when the issue is not raised at trial

A defendant waives an error by the trial court denying severance, where the codefendant and not the defendant raised the issue at trial.[21]

Any Error by the Trial Court Must be More than Harmless

When a *Confrontation Clause* violation is argued on appeal, the court will not only look to whether a violation actually occurred, but will look to determine if the violation was a harmless error. The factors that the court will use to determine whether a violation was harmless include

> "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-

[13] Kilgore v. State, 251 Ga. 291, 298 (1983).
[14] Kennemore v. State, 222 Ga. 362, 363 (1966) (quoting Fincher v. State, 211 Ga. 89 (1954)).
[15] Harris v. State, 255 Ga. 500, 501 (1986).
[16] Id. at 501 (quoting Fortner v. State 248 Ga. 107 (1981)).
[17] Chatteron v. State 221 Ga. 424, 432 (1965).
[18] Livingston v. State, 268 Ga. 205, 210 (1997) (*quoting* Crowder v. State, 237 Ga. 141 (1976).
[19] Bruton v. United States, 391 U.S. 123 (1968).
[20] Satterfield v. State, 256 Ga. 351 (1987).
[21] Broyard v. State, 325 Ga. App. 794 (2014).

examination otherwise permitted, and, of course, the overall strength of the prosecution's case."[22]

The Order that the Codefendants will be tried when a Motion for Severance was granted

Under Georgia law, if the trial court grants a motion for severance, "the defendants shall be tried in the order requested by the [S]tate."[23] "The State has the sole authority to decide the order in which to try co-defendants as long as it does not result in actual prejudice to their rights to a fair trial."[24]

Fifth Amendment Issues

When a Defendant requests a Severance because a Co-defendant Exercised his or her 5th Amendment Rights

In some cases, a defendant will file a motion for a severance from his codefendant when his codefendant exercises his Fifth Amendment right against self-incrimination and refuses to testify. "[W]hen the defendant requests a severance under these circumstances, the defendant must prove: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the co-defendant will in fact testify if the cases are severed."[25]

When the State Calls a Witness Who Intended to Exercise his or her 5th Amendment Rights

When the prosecution calls a witness that intends to asset his or her Fifth Amendment right against self-incrimination, certain procedures must be followed.

> "When the witness manifests his intention to claim Fifth Amendment protection, the court must conduct a hearing outside the presence of the jury to determine whether the testimony the State seeks to elicit potentially could incriminate the witness. If so, the question whether the testimony might incriminate the witness is left to witness. If the witness concludes he must asset his Fifth Amendment privilege, the State will not be permitted, through the use of leading questions on topics the witness has indicated fall within the privilege, to suggest guilt or complicity of the defendant. Conversely, if during the hearing the court

[22] Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).
[23] O.C.G.A. § 17-8-4 (2014). According to federal case law, the order which defendants will be tried after a severance is granted is to the sole discretion to the trial court as opposed to the prosecution. United States v. DiBernardo, 880 F.2d 1216, 1218 (11th Cir. 1989); Byrd v. Wainwright, 428 F.2d 1017, 1022 (5th Cir. 1970).
[24] Avellaneda v. State, 261 Ga.App. 83, 86 (2003) (*citing* House v. State, 203 Ga.App. 55 (1992); (citation omitted)); *see also* United States v. DiBernardo, 880 F.2d 1216, 1229 (11th Cir. 1989) ("among severed co-defendants, there is no absolute right to be tried in a certain order; each case must be evaulted on its own facts") (citation omitted).
[25] Avellaneda v. State, 261 Ga.App. 83, 87 (2003) (citation omitted).

concludes the testimony could not incriminate the witness, the witness must testify."[26]

"The Supreme Court has adopted the federal rule that '[i]f it appears that a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand . . . ."[27]

Admission of a Co-Conspirator's Out-of-Court Confession that Exculpates the Defendant when the Co-Conspirator Exercises his or her 5th Amendment Rights Against Self-Incrimination

Even if the out-of-court statement by a co-conspirator or co-defendant is exculpatory to the defendant, the admission of the confession is prohibited when the co-defendant or co-conspirator who made the confessions does not testify at trial and is unavailable for cross-examination.[28] The confession by the co-conspirator or co-defendant is subject to the same exceptions for the admission of hearsay evidence.[29]

2. Case Summaries

In *Styles v. State*, the defendant Styles appealed his conviction, arguing that the trial court erred in denying his motion to sever his trial from his co-defendant Sampson.[30] The defendant and co-defendant had entered into the victim's garage wearing masks, armed with a shotgun and automatic pistol respectively.[31] After a scuffle with co-defendant Sampson, the victim died as a result of a gunshot wound.[32] Once arrested and in jail, Sampson told an inmate that "he shot 'Pops'" and that that he was involved in a robbery that "went bad."[33] The court held that under the facts of the case, there was no abuse of discretion in the denial of severance.[34] The court reasoned that there was "no likelihood of confusion because there were only two defendants who acted in concert and the defenses they put forward were not antagonistic in that both denied any involvement in the crimes."[35] There was no evidence admissible against defendant Styles that would not have been admissible if the trial had been severed, "e.g., incriminating statements made by Sampson to police, because such statements would have been admissible against him in a separate trial as the statements of a co-conspirator."[36] Therefore there was no merit to the claim that there was greater evidence against co-defendant Sampson than against defendant Styles.[37]

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[26] Parrot v. State, 206 Ga.App. 829, 832 (1992) (citations omitted).
[27] Davis v. State, 255 Ga. 598, 604 (1986).
[28] King v. State, 202 Ga. App. 817, 819 (1992).
[29] Id.
[30] Styles v. State, 610 S.E.2d 23, 24, (Ga. 2005).
[31] Id.
[32] Id.
[33] Id.
[34] Id. at 25.
[35] Id.
[36] Id.
[37] Id.

In *Bowe v. State*, the defendant Bowe and co-defendant each appealed their convictions, contending that the trial court erred in denying their motions for severance.[38] The facts show that after committing multiple armed robberies, defendant Baker had called police and notified them that his vehicle was used in an armed robbery.[39] The trial court omitted part of Baker's statement that indicated that Bowe had coerced him to take part in the robberies.[40] Bowe argued that admitting this statement made to police by defendant Baker, who did not testify at trial, violated defendant Bowe's Sixth Amendment right to confrontation and was prejudicial to him.[41] The court held that there was no reversible error in denying Bowe's motion for severance. The court reasoned that while the rule in *Crawford v. Washington* holds that "before out-of court testimonial statements may be admitted in a criminal trial, the Confrontation Clause requires that the declarant be unavailable and that the defendant have had a prior opportunity for cross-examination,"[42] the admission of Baker's statement was harmless because "there was no reasonable possibility that it contributed to a guilty verdict."[43] Defendant Bowe also objected to the admission of another statement by defendant Baker that was elicited by a police officer on the stand.[44] Again, the court found that "the substance of this statement merely ties Baker to the robberies and does not implicate Bowe."[45] The statement made by Baker to police was admitted upon cross-examination of the police officer by Bowe, and therefore did not violate the Confrontation Clause, and the other testimony failed to implicate Bowe.[46]

The court held that the trial court erred in denying defendant Baker's motion for severance from defendant Bowe.[47] Baker had argued that he was coerced by Bowe to be present at the robberies, and that severance was required because of his antagonistic defense.[48] The court reasoned that while *Bruton* considerations required that part of Baker's statement be excluded, OCGA § 24-3-38 "authorized [Baker] to introduce . . . the relevant context of his admission that he was at the scene of the two of the armed robberies, i.e., that he was coerced by Bowe."[49] The court continued "the evidence linking Baker to each crime was not so overwhelming as to render sever harmless."[50]

In *Hunsberger v. State*, the defendant argued that the trial court erred by denying his motion for severance from his co-defendant (who was also his brother).[51] The evidence showed that the 16-year old victim was forced into the trunk of defendant's car and driven by the brothers across state lines to South Carolina.[52] Once there, a third defendant fatally shot the

[38] Bowe v. State, 288 Ga. App. 376 (2007).
[39] Id. at 378.
[40] Id. at 383.
[41] Id. at 378.
[42] Id. at 379 (quoting Crawford v. Washington, 541 U.S. 36, 68-69 (2004)).
[43] Id. (quoting Richard v. State, 281 Ga. 401, 404 (2006)).
[44] Id. at 380.
[45] Id.
[46] Id.
[47] Id. at 382.
[48] Id. at 383.
[49] Id. at 384; GA. CODE. ANN. § 24-3-38 (2010); Bruton v. United States, 391 U.S. 123 (1968).
[50] Id.
[51] Hunsberger v. State, 299 Ga. App. 593 (2009).
[52] Id.

victim.[53] The defendant's brother had confessed to police, and the trial court admitted the confession into evidence upon instruction that the confession could not be considered against the defendant.[54] The defendant argued that the trial court committed a reversible error when the defendant's brother testified in his own defense, at which point the defendant believed his brother's defense was antagonistic and would be improperly admissible against himself.[55] The court held that the trial court did not err in denying the defendant's motion for severance.[56] The court reasoned that the evidence indicated that the brothers were involved in a "single scheme" and that a joint trial would not "cause the jury to be confused."[57] While "a co-defendant's confession is not admissible against another defendant at a joint trial . . .the rule applies only where the co-defendant does not testify and is not available for cross-examination."[58] Therefore, defendant's brother's testimony was correctly admissible against the defendant, and the trial court did no err in denying the defendant's motion for severance.[59]

In *Lankford v. State*, the defendant appealed his convictions for robbery, burglary, aggravated assault, arguing that the trial court erred in failing to grant his motion to sever his trial from two co-defendants.[60] The three men had broken into residence wearing ski masks and armed with a shotgun, while claiming to be federal agents.[61] One of the three men had fired a shot, injuring the victim who was attempting to keep the door closed.[62] The three men went into a bedroom, where they demanded money.[63] After gathering the victims' belongings, the three men escaped into a fourth person's vehicle.[64] Police were able to apprehend the four men before the crime was reported.[65] The fourth man, who was the driver of the vehicle, took a plea bargain in exchange for details of the robbery and agreeing to testify against the other three men at trial.[66] The driver identified the defendant Lankford as the man who carried a handgun into the home.[67] The driver's girlfriend testified that the defendant and the driver "were acting in concert before, during and after the robbery."[68]

The court held that there was no abuse of discretion by the trial court denying severance.[69] The court reasoned that because the number of defendants (three) was small, and all "three were charged with jointly participating in the same offenses . . ." which were part of a single scheme, the risk of confusion by the jury was "minimal."[70] The court found that there was

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[53] Id.
[54] Id. at 594.
[55] Id.
[56] Id.
[57] Id.
[58] Id. (citing Bruton v. United States, 391 U.S. 123 (1968); Akins v. State, 173 Ga. App.797, 798 (1985).
[59] Id.
[60] Lankford v. State, 295 Ga. App. 590 (2009).
[61] Id. at 590–91.
[62] Id. at 591.
[63] Id.
[64] Id.
[65] Id.
[66] Id.
[67] Id.
[68] Id. at 593.
[69] Id. at 592.
[70] Id.

"no danger" of evidence that was admitted against one defendant would be considered against another, as "the roles of each of the men [was] fairly well-defined."[71] The court noted that even when there is stronger evidence against one co-defendant, an abuse of discretion finding is not required "where there is evidence showing the defendants acted in concert."[72] Regarding the defendant's argument that defenses of the defendants became antagonistic when the third defendant confessed to all of defendants' involvement in the crime, the court reasoned that the trial court couldn't be expected to "predict that defendants who are presenting complementary defenses will later turn on each other.[73]

In *Jones v. State*, the defendant argued that the trial court erred in denying his motion to sever his trial from his co-defendants "because the alleged crimes were separate incidents and because the arrests occurred a day apart."[74] Undercover police had conducted an operation in which they posed as buyers looking for cocaine.[75] The police officers approached co-defendant Light, who directed them to Nazario. Nazario had returned to the officers with cocaine.[76] After arresting Nazario and co-defendant Light, the officers obtained a search warrant for the defendant's apartment in their effort to determine the source of the cocaine.[77] The defendant was arrested and charged with possession of cocaine and forgery due to the counterfeit $20 bill found in his apartment.[78]

The court held that the trial court did not abuse their discretion in denying the defendant's motion for severance.[79] The court reasoned that while the defendants were charged with separate offenses, because there were only two defendants jointly tried, "there was no danger of the jury being confused as the law and evidence applicable to each.[80] The defendant argued that there was a spillover effect in that the evidence against his co-defendant would "improperly prejudice" his case.[81] The court disagreed, and found that a joint trial was sufficient because "the overall criminal conduct for which they were accused involved the same general place of occurrence, the same general conduct, as well as the same undercover officers."[82] The court continued to reason that because there was no evidence admissible against the co-defendant that was not admissible against the defendant, there was no possibility of a "spillover effect."[83] The parties' defenses were not antagonistic as "neither attempted to implicate the other as the sole perpetrator for the crimes with each was charged" and because the defendant had the opportunity for cross-examination of the co-defendant.[84]

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[71] Id. at 592–93.
[72] Id.
[73] Id.
[74] Jones v. State, 277 Ga. App. 185, 186 (2006).
[75] Id. at 185.
[76] Id.
[77] Id. at 186.
[78] Id.
[79] Id.
[80] Id. at 187.
[81] Id.
[82] Id. (citing Stevens v. State, 210 Ga. App. 355, 356 (1993).
[83] Id.
[84] Id. at 187–88.

In *Brooks v. State*, three co-defendants appealed their convictions for malic murder, each contending that their motion for severance should have been granted the trial court.[85] The victim was found dead in a home where police were monitoring drug activity. Two witnesses testified that defendant Clark had told them that the defendants were attempting to rob the victim, and that he was killed in the struggle.[86] A third witness testified that defendant Brooks confessed his involvement to him while in jail.[87] A fourth witness testified that he "overheard" defendant Ball confess to killing the victim.[88] The court held that the trial court did not err by admitting hearsay statements made by co-defendants into evidence.[89] The court found that the defendants were involved in a conspiracy, and under O.C.G.A. § 24-3-5, "the declarations by any of the conspirators during the pendency of the criminal project shall be admissible against all."[90] The court noted that the admission of the hearsay statement did not violate the Confrontation Clause because there was a "sufficient indicia of reliability" to the admitted statements.[91] Further, because the co-conspirators' statements were not "testimonial in nature", the admission of the statements did not violate the Confrontation Clause under *Crawford v. Washington*.[92]

The court held that the trial court did not err in denying the defendants' motion for severance.[93] The court reasoned that because the statement were properly admitted, there was no merit to the argument that the admission of the statements "improperly implicated" the defendants.[94] Further, the court reasoned that there was no showing that a joint trial prejudiced the defendants and there was no showing their co-defendants had antagonistic defenses.[95]

In *Shelton v. State*, the defendant appealed his conviction of malice murder, arguing that the trial court erred in denying his motion to sever his trial from his co-defendant Crawford.[96] The defendant had strangled the victim with a belt while riding with the co-defendant and victim in the victim's car.[97] Later that day, the co-defendant confessed to Giles (friend of both defendants) while in the presence of the defendant.[98] Three days later, the defendant was involved in an accident in the victim's car, and upon learning of the incident, the co-defendant told two other individual about both of the defendants' roles in the killing.[99] The court held that the trial court did not abuse its discretion in denying the defendant's motion for severance.[100] The court reasoned that there was no danger of confusion by the jury because of the fact that

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[85] Brooks v. State, 281 Ga. 14 (2006).
[86] Id.
[87] Id.
[88] Id.
[89] Id. at 15.
[90] Id.
[91] Id. at 17. (citing Redwine v. State, 280 Ga. 58, 64 (2005))(quoting Neason v. State, 277 Ga. 789 (2004)).
[92] Id. at 18. (citing Crawford v. Washington, 542 U.S. 36, 38 (2004)(the admission of out-of-court statements that are testimonial in nature does not violate the *Confrontation Clause* when the declarant is unavailable and the defendant had a prior opportunity for cross-examination)).
[93] Id. at 19.
[94] Id. at 20.
[95] Id.
[96] Shelton v. State, 279 Ga. 161 (2005).
[97] Id.
[98] Id.
[99] Id.
[100] Id. at 162.

there were only two defendants who acted in concert.[101] The court continued by noting that the defendants did not present antagonistic defenses. Further, the defendant was not improperly prejudiced by a joint trial because similar evidence was admitted against both defendants and because the defendant's statements and actions were sufficient to implicate him to the crime.[102] The court noted that severance would not caused the co-defendant's statements implicating the defendant to become inadmissible, as they were statements of a co-conspirator.[103]

The court also found that the trial court did not err in allowing Giles to testify regarding the statements that the co-defendant made to her.[104] The court reasoned that that the statement was admissible under to co-conspirator exception.[105] The statement was made during the "concealment phase of the conspiracy [and] did not violate the *Confrontation Clause* because there was sufficient indicia of reliability."[106]

In *Howard v. State*, two defendants appealed their convictions for murder, kidnapping, armed robbery and burglary.[107] Defendant Durham argued that the trial court erred in failing to grant his motion to sever his trial from co-defendant Howard.[108] The defendants forced their way into a home that they planned to rob, where they stole a safe and killed one victim in the process.[109] A neighbor observed the men leaving the residence and heard one of the defendants say he "shot the motherfucker." Later in the day, defendant Howard told a friend about his involvement in the crime.[110] A victim at the residence and multiple accomplices identified the two defendants as the intruders.[111] The court held that the trial court did not abuse their discretion in denying defendant Durham's motion for severance.[112] The court reasoned that there was no likelihood of confusion because there were only two defendants and there was no admissible against one defendant that was no admissible against the other.[113] The defenses asserted by the defendants were not antagonistic.[114] While defendant Durham gave a custodial statement that implicated co-defendant Howard, all references to defendant Howard were redacted due to *Bruton* concerns.[115] Further, the court noted that even if the defenses presented were antagonistic, the defendant failed to show that a joint trial would cause prejudice to his case and a denial of due process.[116]

In *Collum v. State*, the defendant was convicted with for malice murder, felony murder, and cruelty to children relating to the beating and subsequent death of his girlfriend's and (co-

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[101] Id.
[102] Id.
[103] Id. at 162 (citing O.C.G.A. § 24-3-5 (2010); Neason v. State 277 Ga. 789 (2004)).
[104] Id. at 163.
[105] Id.
[106] Id. (citing Dutton v. Evans, 400 U.S. 74, 88–89 (1970)(plurality opinion); Copeland v. State 266 Ga. 664 (1996))
[107] Howard v. State, 279 Ga. 166 (2005).
[108] Id. at 171.
[109] Id. at 166.
[110] Id. at 167.
[111] Id.
[112] Id. at 171.
[113] Id.
[114] Id. at 171–72.
[115] Id. at 172 (citing Bruton v. United States, 391 U.S. 123 (1968)).
[116] Id.

defendant) son.[117] The trial court found that there was a pattern of abuse of the child by the defendant and his girlfriend, which was followed by little to no medical attention.[118] The trial court also found that the facts have showed that the child had not experienced any injuries consistent with abuse prior to the defendant moving in with his girlfriend.[119] The defendant's girlfriend did not testify at trial, but the jury viewed two videotape interviews of her by local police investigators.[120] Upon cross-examination by the girlfriend's counsel, the investigator said that the girlfriend admitted that her prior statements on video were a lie, and that she thought the defendant "got her out the house that evening, so that he could beat [the child]."[121] The defendant argued that the trial committed a reversible error by failing to grant his motion to sever his trial from his girlfriend, and that failing to grant his motion for severance the defendant's *Confrontation Clause* rights were violated.[122]

The court held that any *Confrontation Clause* error by the trial court was harmless, and the trial court did not err by denying the defendant's motion for severance.[123] The court reasoned that any *Confrontation Clause* violation that occurred from the admission by of the co-defendant statements were harmless because the other evidence against the defendant was "overwhelming" and the "prejudicial effect of [the co-defendant's] statement to investigators was insignificant by comparison.[124]

In *Livingston v. State*, the defendant appealed his conviction for murder, arguing that evidence against him was admitted erroneously by the trial court.[125] The defendant was prosecuted separately from two other individuals implicated to the murder of the victim.[126] The other two individuals were asked to testify against the defendant after they were convicted.[127] The State granted two individuals immunity under O.C.G.A. § 24-3-5 after both of the individuals chose to exercise their Fifth Amendment right against self-incrimination.[128] The individuals were threatened to be cited for contempt, but they still chose to remain silent after the grant of immunity.[129] The State instead entered in statements by the two individuals that were made to a police office.[130] The trial court allowed the admission of part of the statement under the co-conspirators exception to the hearsay rule, O.C.G.A. § 24-3-5, and other parts of the statement under the necessity exception to the hearsay rule, O.C.G.A. § 24-3-1(b).[131]

[117] Collum v. State, 281 Ga. 719 (2007).
[118] Id. at 720.
[119] Id.
[120] Id. at 721.
[121] Id.
[122] Id. at 722.
[123] Id.
[124] Id.
[125] Livingston v. State, 268 Ga. 205 (1997).
[126] Id.
[127] Id.
[128] Id.
[129] Id.
[130] Id.
[131] Id.

The Georgia Supreme Court held that the trial court improperly admitted the hearsay evidence by the police office recounting the statements of the two other individuals.[132] The court reasoned that the defendant's Sixth Amendment Confrontation rights were violated because he was unable to confront and cross-examine the two individuals due to their exercise of their Fifth Amendment rights.[133] The court found that the hearsay evidence "most clearly implicate[d]" the defendant.[134] The court continued that because the inadmissible hearsay evidence was also inadmissible at re-trial, the hearsay evidence could not be considered when examining whether the evidence was sufficient to warrant the guilty verdict.[135]

The court found that any error from the statements being admitted under the co-conspirator's exception to the hearsay rule was harmless because those statements did not inculpate the defendant.[136] The court found that the statements under the "necessity" exception were improperly admitted.[137] In noting that there was little case law to support the use of the "necessity" exception, the court reasoned that the defendant's Constitutional right to confront and cross-examine the two individuals was violated when the two individuals refused to testify.[138] The court also discussed the case of *Crawford v. State*, where the Georgia Court of Appeals found that the "necessity" exception to the hearsay rule cannot be used were the hearsay evidence was expressly barred under O.C.G.A. § 24-3-52.[139]

In *Parrot v. State*, the defendant appealed his the denial for his motion to a new trial, arguing that the trial court should have granted a new trial after the witness called by the State exercised his Fifth Amendment rights against self-incrimination.[140] The witness had testified on direct-examination that he gave a statement to authorities in Florida, but when asked to disclose the information from this statement, the witness stated that he would exercise his Fifth Amendment right.[141] The trial court dismissed the jury, and assessed whether the witness could assert his Fifth Amendment right. The trial court concluded that the witness could exercise the privilege, at which point the defendant cross-examined the witness on the topic that the witness asserted his Fifth Amendment right.[142] The defendant argued that the witness's use of his Fifth Amendment protection caused a violation of his Sixth Amendment right to confront and cross-examine the witness.[143]

The court held that the defendants Sixth Amendment Confrontation rights were not violated by the witness' exercise of his Fifth Amendment privilege.[144] The court reasoned that

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[132] Id. at 210–212. The court ultimately held that the error by the trial court in admitting the hearsay evidence was harmless because the other evidence admitted was sufficient for a rational trier of fact to find the defendant guilty. Id. at 212.
[133] Id.
[134] Id. at 209.
[135] Id.
[136] Id. at 210.
[137] Id. at 211.
[138] Id.
[139] Id.
[140] Parrot v. State, 206 Ga. App. 829, 831 (1992).
[141] Id. at 831.
[142] Id.
[143] Id.
[144] Id. at 832.

the court followed the proper procedure in holding a hearing and concluding that the witness could assert his Fifth Amendment right.[145] The court continued that the prosecutor did not continue ask leading questions once he knew that the witness would exercise his Fifth Amendment protection.[146] The court found that the damaging part of the witness's testimony was from his answers that were answered, and therefor the defendant could have cross-examined the witness on those subjects instead of cross-examining him on the subject for which he continued to exercise his Fifth Amendment protection.[147] The court noted that the witness's intention to exercise his Fifth Amendment right were made clear to the defendant and to the State, and yet the defendant did raise the issue to the trial court until the witness took the stand.[148] Therefore, the court concluded that the defendant "cannot be permitted to complain of a ruling that his own conduct aided in causing."[149]

In *Bacon v. State*, three defendants were jointly tried and convicted for malice murder.[150] While all three defendants argued that the evidence was insufficient to support their convictions, co-defendants Pryor and Jiles argued that his Confrontation rights were violated as a result of the prosecutor's closing argument.[151] Defendant Bacon had given a statement to police that implicated the other two defendants.[152] The statement was read to the jury, but the two other defendants' names (Pryor and Jiles) were redacted and replaced with "A" and "B".[153] During closing arguments, the prosecutor argued that "A" and "B" were in fact Pryor and Jiles.[154] Without reaching the issue of whether Pryor's and Jiles's Confrontation rights were violations, the court held that the evidence was insufficient to convict co-defendants Pryor and Jiles.[155] The court reasoned that because Bacon did not testify, his statement amounted to hearsay and could not be used in any manner to support the convictions of Pryor and Jiles.[156] After finding that Bacon's statement cannot be considered, the court reasoned that the other evidence would not have allows a rational trier of fact to find the Pryor and Jiles guilty for murder and kidnapping.[157]

In *Deloatch v. State*, the defendant appealed his conviction for aggravated assault and armed robbery, arguing that the trial court violated his Confrontation rights by allowing the testimony of a alleged witness and accomplice to two similar transactions.[158] The witness testified in prison garbs, and he was the only person to implicate the defendant in the two similar transactions.[159] During the State's examination, the witness repeatedly exercised his Fifth Amendment right to remain silent during the d, even though he had already been convicted for the crimes that he was questioned, and was instructed that his Fifth Amendment right against

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[145] Id.
[146] Id.
[147] Id.
[148] Id.
[149] Id. (*citing* Dobbs v. State, 200 Ga.App. 300, 301 (1991)).
[150] Bacon v. State, 267 Ga. 325 (1996).
[151] Id.
[152] Id.
[153] Id.
[154] Id. at 329.
[155] Id.
[156] Id.
[157] Id.
[158] Deloatch v. State, 296 Ga.App 65, 67 (2009).
[159] Id. at 69.

self-incrimination could not apply.[160] The court held that the trial court erred in allowing the testimony of the witness and that the defendant's Confrontation rights were violated.[161] The court reasoned that, while the testimony did not directly implicate the defendant, the defendant's Confrontation rights were violated in that he could not cross-examine the witness.[162] The court noted that the manner which the testimony was presented to the jury would allow the jury to infer that defendant committed armed robbery in this case because of his involvement in the two similar transactions for which the witness was questioned.[163] Even if limiting instructions were given, the court found that they would have been insufficient because "the admission of a nontestifying co-defendant's statement which inculpates the defendant by referring to the defendant's name or existence, regardless of the existence of limiting instructions."[164]

The court also found this error by the trial court was not harmless because the State could "not prove beyond a reasonable doubt that the error did not contribute to the verdict."[165] The court reasoned that witness's testimony regarding the two similar transactions and the resulting inference by the jury that the defendant had committed the armed robbery in this case, allowed the State to not be required to prove the defendant's involvement in the similar transactions and did not allow the defendant to rebut the witness's testimony.[166]

In *Avellaneda v. State*, the defendant Avellanenda appealed his conviction for drug trafficking and weapons charges.[167] The defendant argued that the trial court erred when after severing his trial from co-defendant Cancino; the court did not mandate that Cancino's trial occur before his own.[168] Prior to the trial court granting severance, the defendant argued that the trial should be severed because Cancino would provide exculpatory testimony that would not be available in a joint trial.[169] Avellanenda argued that if Cancino were tried first after a severance, it would act as "a nullity", because Cancino would exercise his Fifth Amendment right against self-incrimination if he was called to testify.[170] The trial court granted severance and the State proceeding to try Avellanenda prior to Cancino.[171] When Avellanenda called Cancino as a witness, he exercised his Fifth Amendment rights and refused to answer questions relating to any contested issues.[172] The court found that trial court did not err in allowing Avellanenda to be prosecuted first, and Avellanenda was not denied his constitutional right to a fair trial.[173] The court reasoned that "[u]nder O.C.G.A. § 17-8-4, when the trial court grants a severance motion, 'the defendants shall be tried in the order requested by the [S]tate.'[174] "The State has the sole authority to decide the order in which to try the co-defendants as long as it does not result in

[160] Id. at 66.
[161] Id. at 69.
[162] Id.
[163] Id.
[164] Id. (*citing* Collins v. State, 242 Ga.App. 450, 451–52 (2000).
[165] Id.
[166] Id.
[167] Avellaneda v. State, 261 Ga.App. 83 (2003).
[168] Id. at 85.
[169] Id.
[170] Id. at 86.
[171] Id.
[172] Id.
[173] Id at 87.
[174] Id.

actual prejudice to their rights to a fair trial."[175] Therefore the State was within the bounds of its statutory authority to prosecute Avellanenda before Cancino.[176]

The court addressed Avellanenda's argument that the trial court, in allowing the State to prosecute him first, nullified the grant of severance by analyzing the argument as if the severance motion had been denied.[177] The court found that the mere fact that a defendant sough testimony from a co-defendant that would be unavailable in a joint trial is insufficient to merit a severance.[178] The court continued that Avellanenda did not demonstrate that Cancino was more likely to testify and provide exculpatory evidence to Avellanenda if the cases were severed.[179] The court noted that because Avellanenda did not show that a severance was warranted, he therefore has not made any showing of prejudice that would entitled him to a new trial.[180]

In *Pullen v. State*, the defendant appealed the denial of his motion for a new trial, arguing that the trial court erred in allowing a witness for the prosecution to be asked leading questions.[181] The witness exercised his Fifth Amendment right against self-incrimination in response to the prosecution's leading questions.[182] The defendant argued that his inability to cross-examine the witness caused a violation of his Sixth Amendment Confrontation rights.[183] The court held that even if there was an error by the trial court, any error was harmless and a new trial is not warranted.[184] The court reasoned that other evidence, including testimony from other witnesses, was cumulative.[185]

[175] Id. (*citing* House v. State, 203 Ga.App. 55 (1992); Dixon v. State, 12 Ga.App. 17 (1912)).
[176] Id.
[177] Id. at 87.
[178] Id.
[179] Id.
[180] Id. at 88.
[181] Pullen v. State, 315 Ga.App. 125 (2012).
[182] Id. at 127.
[183] Id.
[184] Id. at 128.
[185] Id. at 128.