Mercer Law Review

Volume 68
Number 1 *Annual Survey of Georgia Law*

Article 10

12-2016

Evidence

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Recommended Citation

Hall, John E. Jr.; Henwood, W. Scott; and Clarke, Jacque Smith (2016) "Evidence," *Mercer Law Review*: Vol. 68 : No. 1 , Article 10.
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol68/iss1/10

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Evidence

by John E. Hall, Jr.*

W. Scott Henwood**

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I. INTRODUCTION

This year represents the third full survey period during which the "new" Georgia Evidence Code, Official Code of Georgia Annotated (O.C.G.A.) title 24,[1] is in effect. These new rules took effect on January 1, 2013.[2] The rules conform in large part to the Federal Rules of Evidence and have continued to change the face of evidence law in Georgia, which continues to develop from last year.[3] This Survey highlights cases decided by the Georgia Court of Appeals and Georgia Supreme Court between June 1, 2015 and May 31, 2016 that have made an impact on evidence law in Georgia. This year's Article provides insight into the courts' findings, particularly regarding spoliation, similar transaction evidence, business records, and the best evidence rule. The Case Law Update also provides an interesting update from last year's case law.

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1. O.C.G.A. tit. 24 (2013).

2. Ga. H.R. Bill 24, Reg. Sess., 2011 Ga. Laws 99 (codified at O.C.G.A. tit. 24).

3. John E. Hall, Jr., W. Scott Henwood & Jacque Smith Clarke, *Evidence, Annual Survey of Georgia Law*, 67 MERCER L. REV. 63 (2015). Special thanks to Blake McLemore for his great research assistance with this year's Article.

II. CASE LAW UPDATE

A review of last year's Survey shows some interesting appellate history. Last year's Survey discussed a similar transaction evidence case regarding prior DUI convictions called *Frost v. State*.[4] That case was reversed by the Georgia Supreme Court in *State v. Frost*.[5] The defendant, Gary Frost, was charged with DUI less safe under O.C.G.A. § 40-6-391(a)(1).[6] The events leading up to the arrest are interesting. Frost, attempting to drive through the entrance of a Cobb County apartment complex early in the morning, struck the entry gate. Police arrived and found Frost sitting in his vehicle—engine on and music blasting—drinking out of a bottle of wine.[7]

At the time of his arrest, Frost refused to submit to a breath test. Thus, at trial, the State had no evidence concerning his Blood Alcohol Content (BAC).[8] To prove Frost had knowledge, "[t]he State proposed to present evidence at trial that Frost had driven under the influence of alcohol in Cobb County on two occasions in 2009."[9] The supreme court, upholding the trial court's decision to admit this evidence and reversing the court of appeals decision to exclude it, held that this specific situation is governed by the plain language of O.C.G.A. § 24-4-417.[10] The court determined that the court of appeals defined the provision too narrowly, and that this rule is a "rule of inclusion."[11] Importantly, the court emphasized:

> Rule 417 was not borrowed from the Federal Rules of Evidence, and it was not carried over from our old Evidence Code. It is an original creation of the new Evidence Code, and to understand its meaning . . . we must fall back upon the usual principles that inform our consideration of statutory meaning.[12]

The court then went on to interpret the plain language of the statute, citing several reasons for its holding.[13] No other new cases cited in last year's Survey were reversed or questioned. New case law is organized below by topic.

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4. 328 Ga. App. 337, 761 S.E.2d 875 (2014).
5. 297 Ga. 296, 773 S.E.2d 700 (2015).
6. O.C.G.A. § 40-6-391(a)(1) (2013).
7. *Frost*, 297 Ga. at 297-98, 773, S.E.2d at 701.
8. *Id.* at 297-98, 773 S.E.2d at 701.
9. *Id.* at 298, 773 S.E.2d at 701.
10. *Id.* at 305-06, 773 S.E.2d at 706; O.C.G.A. § 24-4-417 (2013).
11. *Frost*, 297 Ga. at 300, 773 S.E.2d at 702.
12. *Id.* at 299, 773 S.E.2d at 702.
13. *Id.* at 303-06, 773 S.E.2d at 704-06.

III. SPOLIATION

This period has provided new guidance on spoliation. In *Phillips v. Harmon*,[14] the Georgia Supreme Court vetoed the bright line test that has been used to determine when the duty to preserve evidence starts.[15] The duty now starts when litigation is pending or "reasonably foreseeable to that party."[16] In this case, the plaintiff claimed medical malpractice against several health care providers after her son experienced oxygen deprivation during her labor. The defendants obtained a defense verdict, and the trial court denied a motion for new trial. The court of appeals reversed, and the defendants sought certiorari.[17]

The specific evidence for which the plaintiffs claimed spoliation was the printed paper strips recording the results of electronic monitoring of the child's heart rate. Though the hospital's regular practice was to maintain the record electronically along with nurses' notes, the strips themselves were only maintained for thirty days. The plaintiffs contended there were nursing notations on the strips that were not part of the electronic record and requested the jury be instructed that the plaintiffs were entitled to a presumption that the strips contained information prejudicial to the defendants.[18] The trial court denied this instruction, and the court of appeals reversed. The Georgia Supreme Court explained its reasoning regarding foreseeability by explaining that it may matter "what the defendant did or did not do in response to the injury, including . . . investigation, the reasons for any notification of counsel and insurers, and any expression by the defendant that it was acting in anticipation of litigation."[19] This decision means practitioners need to be proactive even earlier to prevent spoliation claims.

IV. SIMILAR TRANSACTION EVIDENCE

A. The Bradshaw Test, Interpreted

This survey period presented multiple cases interpreting the *Bradshaw*[20] test when determining the admissibility of other acts evidence. Under *Bradshaw*, the State must show (1) evidence of extrinsic acts is

14. 297 Ga. 386, 774 S.E.2d 596 (2015).
15. *Id.* at 397-98, 774 S.E.2d at 605-06.
16. *Id.* at 396, 774 S.E.2d at 604.
17. *Id.* at 386-87, 774 S.E.2d at 598-99.
18. *Id.* at 394-95, 774 S.E.2d at 603.
19. *Id.* at 397, 774 S.E.2d at 605.
20. Bradshaw v. State, 296 Ga. 650, 769 S.E.2d 892 (2015).

relevant to an issue other than the defendant's character; (2) the probative value of the other acts evidence is not substantially outweighed by unfair prejudice; and (3) there is sufficient proof that the jury could find the defendant committed the act in question.[21] In *State v. Jones*,[22] the defendant was charged with DUI per se, DUI less safe, and speeding.[23] The State sought to introduce evidence of the defendant's prior conviction of DUI less safe, asserting that this evidence was relevant to show the defendant's intent and knowledge. The Georgia Supreme Court applied the *Bradshaw* test to determine the admissibility of prior acts evidence.[24] Overruling the court of appeals, the court concluded that the evidence of the defendant's prior DUI conviction was relevant to prove his intent "because [the evidence] had a tendency to make the existence of his general intent to drive under the influence more probable and would authorize a jury to logically infer that [the defendant] was voluntarily driving while under the influence."[25] This ruling satisfies the first prong of the *Bradshaw* test. The court then remanded the case to the court of appeals to consider the trial court's determination under Rule 403.[26] Importantly, the court explained that "Rule 404(b) . . . is, on its face, an evidentiary rule of *inclusion* which contains a non-exhaustive list of purposes other than bad character for which other acts evidence is deemed relevant and may be properly offered. . . ."[27]

Importantly, this case settled the dispute over which law governs when interpreting the new evidence rules. Thus, the federal interpretation of this rule of *inclusion* prevails, and admission will be fairly liberal so long as the purpose for admission is not character propensity-based. However, as highlighted in the case, Rule 403 acts as a backstop, and courts can use their discretion when determining the admissibility of prejudicial evidence.[28]

21. *Id.* at 656, 769 S.E.2d at 896.

22. 297 Ga. 156, 773 S.E.2d 170 (2015).

23. *Id.* at 157, 773 S.E.2d at 171.

24. *Id.* at 158, 773 S.E.2d at 172.

25. *Id.* at 163, 773 S.E.2d at 175.

26. *Id.* at 164, 773 S.E.2d at 176.

27. *Id.* at 159, 773 S.E.2d at 173 (emphasis added).

28. *Id.* at 163, 773 S.E.2d at 175. For more on this holding, *see* D. Victor Reynolds, *Georgia Indebted to Its Supreme Court for Evidence Decision*, FULTON COUNTY DAILY REP., July 16, 2015.

B. Other Acts Evidence, a Reversed Murder Conviction, and State of Mind Analysis

A very interesting case from the survey period involves a murder conviction that was reversed due to the trial court's error in admitting other acts evidence.[29] The appellant was charged and convicted of malice murder in connection with the death of a security guard at a Hormel meat packing plant in 1976.[30] The appellant shot the victim in the back seven times after binding him down with belts and a shirt. At trial, the State sought to introduce evidence showing that the appellant and an accomplice murdered a Mississippi state trooper in 1983, claiming this evidence was admissible to prove identity, motive, and course of conduct. The trial court agreed and admitted the evidence.[31]

The Georgia Supreme Court cited *Jones* and *Bradshaw*, infra, ruling that the State must satisfy the three-prong test (articulated above) to determine whether the other acts evidence is admissible.[32] Prong three was satisfied by the appellant's guilty plea. The key issue involved relevance of the other acts evidence, and the court broke down each reason for admission asserted by the State individually.[33] To admit for purposes of *identity* under the new Georgia Evidence Code, the State must show that the extrinsic act was a "signature crime," involving acts so similar that they are classified as the "handiwork of the appellant."[34]

The court explained that when examining other acts evidence, it must consider both the similarities and dissimilarities.[35] Here, the crimes were too dissimilar to allow admission of the prior murder evidence, and the evidence was also not admissible to show motive (this was very straightforward reasoning).[36] The court then emphasized a key difference between our old evidence law and the new Evidence Code, explaining that the "'course of conduct' and 'bent-of-mind' exceptions . . . have been eliminated from the new Evidence Code."[37] Ultimately, the court ruled that the trial court's error in admitting this other acts evidence was extremely

29. Brooks v. State, 298 Ga. 722, 783 S.E.2d 895 (2016).
30. *Id.* at 722, 783 S.E.2d at 897.
31. *Id.* at 723-24, 783 S.E.2d at 898.
32. *Id.* at 724, 783 S.E.2d at 898.
33. *Id.*
34. *Id.* at 725, 783 S.E.2d at 899.
35. *Id.*
36. *Id.* at 726-27, 783 S.E.2d at 900.
37. *Id.* at 727, 783 S.E.2d at 900.

prejudicial and not harmless, justifying reversal of the appellant's murder conviction.[38] Interestingly, the court did not specifically examine the "course of conduct" argument and only stated that it was left out of the new Code,[39] though the new Code does allow other acts evidence for "other purposes"—a sort of catchall provision—and explicitly states that the reasons listed in the rule are not exclusive.[40]

Another very interesting case from this survey period also addressed evidence of other acts. *State v. Brown*[41] involved the court of appeals vacating trial court verdicts of acquittal for the defendants on charges of trafficking in cocaine, possession of marijuana with intent to distribute, and other violations.[42] Importantly, this court vacated the exclusion of evidence of other crimes and remanded the issue back to the trial court because the trial court failed to exercise its discretion when considering the purpose for admission of the other crimes evidence.[43] The other crimes at issue involved a 2005 incident in which both defendants were seen by a police officer cutting crack cocaine, and officers eventually seized 137 grams of crack cocaine and 11 grams of marijuana.[44] The other incident occurred in 2009, where officers found 8.1 grams of marijuana on the person of the defendant, Brown.[45]

The trial court erred in excluding this evidence, which the State argued was admissible to show intent, because the trial court failed to consider and compare the relevant states of mind involved with the extrinsic acts and the act at issue.[46] Essentially, the court explains the standard under the new evidence code that a trial court must use when considering extrinsic offense evidence offered to show intent.[47] The most interesting part of this case is the concurrence written by Judge McFadden.[48] He stated: "I write separately to lament the ease with which this spectacle—an unauthorized criminal trial that the prosecutor was compelled to boycott leading to ineffective acquittals that an appellate court must unwind—could have been avoided."[49] In short, the court of appeals seems to

38. *Id.* at 727-28, 783 S.E.2d at 900.
39. *Id.* at 727, 783 S.E.2d at 900.
40. O.C.G.A. § 24-4-404 (2013).
41. 333 Ga. App. 643, 777 S.E.2d 27 (2015).
42. *Id.* at 643, 777 S.E.2d at 29.
43. *Id.* at 656, 657, 777 S.E.2d at 37, 39.
44. *Id.* at 654, 777 S.E.2d at 36.
45. *Id.*
46. *Id.* at 656-57, 777 S.E.2d at 37-38.
47. *Id.* at 655, 777 S.E.2d at 37.
48. *Id.* at 658, 777 S.E.2d at 39.
49. *Id.*

be clearly articulating how the trial courts must apply the new Evidence Code—particularly the state of mind of the defendant when considering whether to admit evidence of extrinsic acts.

C. The Importance of Truthfulness Analysis in Other Acts Admissibility

In *Gaskin v. State*,[50] the court of appeals clarified that evidence of prior arrests is properly admitted to rebut character testimony only when those prior arrests involve an element of truthfulness.[51] This case involved a defendant's motion for a new trial following a conviction of two counts of child molestation being denied by the trial court, and the court of appeals reversed because the trial court improperly admitted evidence of the defendant's prior arrests.[52]

The key issue addressed by the court of appeals involved the State's method of attacking the credibility of the defense witness, the victim's mother.[53] The witness testified to the defendant's reputation in the community as truthful, which was proper reputation testimony.[54] The trial court then allowed the State, on cross-examination of the defense witness, to inquire into the witness's knowledge regarding the defendant's prior arrests.[55] This court ruled that the trial court erred in allowing inquiry into these specific acts because the new Code requires this type of attack to involve specific instances that are probative of *truthfulness or untruthfulness*.[56]

The prior arrests included possession, manufacturing, or distribution of marijuana; simple battery; criminal damage to property; and obstruction of a person making a 911 call.[57] The court of appeals explained that none of these specific instances were probative of truthfulness because these crimes do not involve acts of truthfulness or untruthfulness (unlike, for example, perjury, forgery, and fraud).[58] The court continued, stating, "the State's questions regarding the specific crimes involved in the arrests constituted an improper attempt to use impeachment as a guise for presenting otherwise inadmissible evidence to the jury."[59] The error in

50. 334 Ga. App. 758, 780 S.E.2d 426 (2015).
51. *Id.* at 761-62, 780 S.E.2d at 429.
52. *Id.* at 758, 780 S.E.2d at 427.
53. *Id.* at 760, 780 S.E.2d at 428.
54. *Id.*
55. *Id.* at 761, 780 S.E.2d at 429.
56. *Id.* at 763, 780 S.E.2d at 430.
57. *Id.* at 761, 780 S.E.2d at 429.
58. *Id.* at 763, 780 S.E.2d at 430.
59. *Id.*

allowing this evidence to be presented to the jury was not harmless; thus, the denial of the defendant's motion for new trial was reversed.[60]

D. Evidence of Other Sex Crimes Continues to be Admissible

Evidence of other sex crimes has been, and continues to be, admissible under Georgia law, and thus, sex crimes are an exception to the traditional other acts analysis. The statute provides, "[i]n a criminal proceeding in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense of sexual assault shall be admissible and may be considered for its bearing on any matter to which it is relevant."[61] In *Edmonson v. State*,[62] the defendant was convicted of false imprisonment and aggravated sodomy, and the issue on appeal concerned the admission of evidence of the defendant's prior sexual conduct.[63] This case involved sexual misconduct by the defendant with a minor (the details are shocking), and the prior conduct involved sexual acts with another minor.[64] The State sought to introduce this evidence to show the defendant's intent or plan "to seek out vulnerable young women, who are medium-to-short-build African–Americans who are slightly overweight, and exploit them in sexual ways."[65] This court did not even address whether the trial court erred in admitting the other sexual misconduct evidence, reasoning that any error was harmless because of the great amount of evidence against the defendant.[66] The court did, however, note that this evidence may have been admissible under another evidence statute, O.C.G.A. § 24-4-413,[67] which would make the challenge to the trial court's admission of this evidence moot.[68]

V. BUSINESS RECORDS

An interesting case from the survey period articulated some business records admissibility guidelines. In *Ciras, LLC v. Hydrajet Technology, LLC*,[69] the court of appeals reversed a trial court's exclusion of business

60. *Id.* at 763-64, 780 S.E.2d at 430-31.
61. O.C.G.A. § 24-4-413 (2013).
62. 336 Ga. App. 621, 785 S.E.2d 563 (2016).
63. *Id.* at 621, 785 S.E.2d at 564.
64. *Id.* at 621-22, 785 S.E.2d at 564-65.
65. *Id.* at 623, 785 S.E.2d at 565.
66. *Id.* at 623-24, 785 S.E.2d at 565-66.
67. O.C.G.A. § 24-4-413.
68. *Edmonson*, 336 Ga. App. at 626, 785 S.E.2d at 567.
69. 333 Ga. App. 498, 773 S.E.2d 800 (2015).

records at trial.[70] Plaintiff sought to prove damages by offering an affidavit to authenticate bank records regarding the pertinent loan account.[71] The court followed federal precedent, noting that "[i]t is not necessary that the person who actually prepared the business record testify, nor that the document be prepared by the business which has custody of it, so long as other circumstantial evidence suggests the trustworthiness of the record."[72]

VI. HEARSAY

A. Prior Consistent Statements

This period also gave some guidance on hearsay in the prior consistent statements realm. In *Walters v. State*,[73] the defendant was charged with aggravated assault and possession of a knife during the commission of a felony.[74] The evidence at issue involved the testimony of the responding police officer who testified about the victim's statements to him regarding the incident.[75] The court provided an explanation of how the new Georgia Code provides a statute governing the admission of prior consistent statements, which was not so prior to the adoption of the new Code.[76] The defendant argued that the evidence constituted improper bolstering; thus, the court began comparing the old rules developed through case law with the new Code regarding this issue.[77] Essentially, the inquiry on whether to admit prior consistent statements no longer ends after determining whether a defendant impugned a witness's credibility by charging her with recent fabrication or improper influence or motive.[78] Instead, the court must consider whether the witness's credibility was attacked on other grounds.[79] Here is a great quote summarizing the court's perspective:

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70. *Id.* at 498, 773 S.E.2d at 802.

71. *Id.* at 498, 773 S.E.2d at 801.

72. *Id.* at 500, 773 S.E.2d at 802 (quoting United States v. Hawkins, 905 F.2d 1489, 1494 (11th Cir. 1990)). *See also* Triple T-Bar, LLC v. DDR Se. Springfield, 330 Ga. App. 847, 769 S.E.2d 586 (2015) (holding that business records were properly authenticated by a representative of a successor company).

73. 335 Ga. App. 12, 780 S.E.2d 720 (2015).

74. *Id.* at 12, 780 S.E.2d at 721.

75. *Id.* at 13, 780 S.E.2d at 722.

76. *Id.* at 14, 780 S.E.2d at 723.

77. *Id.* at 15-16, 780 S.E.2d at 724.

78. *Id.* at 14, 780 S.E.2d at 723.

79. *Id.*

> According to its plain terms, this new rule allows the admission of prior consistent statements if they logically rebut any attack on a witness's credibility, except for attacks upon his character for truthfulness or evidence of his prior convictions. Accordingly, our inquiry is not limited to asking whether [the defendant] impugned [the victim's] credibility by charging her with recent fabrication or improper influence or motive. We must also consider whether [the defendant] attacked [the victim's] credibility on other grounds. Pre–OCGA § 24–6–613 precedent is of little help in addressing this question because our definition of what constituted an attack on credibility was narrower then. We therefore turn to federal law. ("[W]here the new Georgia rules mirror their federal counterparts, it is clear that the General Assembly intended for Georgia courts to look to the federal rules and how federal appellate courts have interpreted those rules for guidance.")[80]

Ultimately, the victim's credibility was attacked because the defense counsel "suggest[ed] that she had misidentified [the defendant's] weapon during her 911 call and that her account of the events was not believable due to her heightened emotional state."[81] Thus, the victim's prior consistent statements were admissible because they logically rebutted this attack.[82] On a side note, the court broke down the victim's testimony into portions and ultimately ruled that one portion was admissible, while the other portion was left unaddressed because the admission, if error, would have been harmless.[83]

VII. BEST EVIDENCE RULE

An interesting case from the survey period demonstrates a contemporary application of the best evidence rule. In *Patch v. State*,[84] Phillip Patch appealed his convictions for three counts of computer or electronic pornography and child exploitation, arguing, among other things, that the trial court erred by allowing testimony of a police officer who identified Patch as the person responsible for using the Yahoo! account at issue.[85] This case involved a police officer, Stephen Land, who was investigating internet crimes against children by creating a Yahoo! profile posing as a fourteen-year-old girl.[86] Another account, allegedly operated

80. *Id.* at 14-15, 780 S.E.2d at 723 (quoting Parker v. State, 296 Ga. 586, 592, 769 S.E.2d 329, 333 (2015) (internal citations omitted)).

81. *Id.* at 17, 780 S.E.2d at 724.

82. *Id.* at 17, 780 S.E.2d at 725.

83. *See id.* at 17-18, 780 S.E.2d at 725.

84. 337 Ga. App. 233, 786 S.E.2d 882 (2016).

85. *Id.* at 233, 238, 786 S.E.2d at 883, 887.

86. *Id.* at 233, 786 S.E.2d at 884.

by Patch, contacted Land's fake account and began sending sexual messages and revealing himself to Land's account via webcam. Importantly, Patch, or whoever was using the account to contact Land, was told that the girl on the other end was fourteen.[87] Patch never showed his face in the webcam videos.[88] In order to identify Patch as the account user, the State introduced testimony of another officer, Richard Peluso, who conducted a similar operation involving sexual internet misbehavior by Patch, directed towards another account posing as that of a thirteen-year-old girl.[89] Patch actually showed his face on the webcam during this investigation.[90]

Patch argued that Peluso's testimony on this other incident was inadmissible because it only established a fact an average juror could decide.[91] The Georgia Court of Appeals went into an analysis of the new Georgia Evidence Code and the new statutes governing the best evidence rule. Ultimately, the court ruled that this secondary evidence fit squarely within the exception requiring the original webcam videos and photos, because those videos were destroyed due to a hard drive malfunction, and not by any bad faith on the part of the State.[92] Thus, the secondary evidence, Peluso's testimony, was admissible, and the originals were not required.[93] Further, both parties relied on old Georgia case law when making their arguments, and the court highlighted that this was improper and the new Code applied.[94]

VIII. CONCLUSION

This survey period, once again, produced interesting decisions that continue to shape the state of evidence law in Georgia. Appellate decisions continue to show how the new provisions apply, and appellate courts are regularly holding attorneys to the new rules. The courts have, once again, actively changed and shaped the admissibility standards in multiple categories of evidence law during this period.

87. *Id.* at 233-34, 786 S.E.2d at 884.
88. *Id.*
89. *Id.* at 238-39, 786 S.E.2d at 887.
90. *Id.* at 239, 786 S.E.2d at 887.
91. *Id.* at 240, 786 S.E.2d at 888.
92. *Id.*
93. *Id.*
94. *Id.* at 240-41, 786 S.E.2d at 888-89.