Mercer Law Review

Volume 67
Number 1 *Annual Survey of Georgia Law*

Article 8

12-2015

Evidence

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I. INTRODUCTION

This year represents only the second full survey period[1] in which the "new" Georgia Evidence Code, Official Code of Georgia Annotated (O.C.G.A.) title 24, takes effect. These new rules took effect on January 1, 2013. The rules conform in large part to the Federal Rules of Evidence and continue to change the face of evidence law in Georgia. This Survey highlights cases decided by the Georgia Court of Appeals and the Georgia Supreme Court between June 1, 2014 and May 31, 2015 that have made an impact on evidence law in Georgia. This year's Article provides insight into the courts' findings, particularly regarding similar transaction evidence and multiple varieties of hearsay exceptions. Changes evidenced by new case law are outlined below and organized by topic.

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1. For an analysis of evidence during the prior survey period, see John E. Hall, Jr., W. Scott Henwood & Jacque Smith Clarke, *Evidence, Annual Survey of Georgia Law*, 66 MERCER L. REV. 81 (2014). Special thanks to Whit Carmon for his research assistance with this year's Article.

II. SIMILAR TRANSACTION EVIDENCE

This survey period illustrated some confirmation of consistencies amongst the new and old rules regarding similar transaction evidence alongside accomplice corroboration. In *Bradshaw v. State*,[2] the Georgia Supreme Court reconfirmed the accomplice testimony rule as "virtually identical" to the corroboration provision in the old Evidence Code.[3] In *Bradshaw*, the defendant was convicted of malice murder for two shooting deaths along with an accomplice after the trials were severed. The crime involved two shootings after a marijuana deal went bad. The State introduced similar transaction evidence of a crime that had occurred six months before, where the defendant shot another individual in the head because he would not pay for drugs that the defendant's brother provided.[4]

The defendant argued on appeal that the similar transaction evidence was improperly admitted and that his accomplice's testimony was not properly corroborated.[5] The court found the evidence was properly admitted and the accomplice's testimony was also sufficient to sustain a felony conviction and, in its finding stated: "[T]o sustain a felony conviction, the testimony of an accomplice must be corroborated. This Code section is virtually identical to the corroboration provision in the old Evidence Code."[6]

The court continued, citing a case from the Eleventh Circuit Court of Appeals,[7] stating that "[t]he Federal Rules of Evidence contain no provision regarding accomplice testimony, and the uncorroborated testimony of an accomplice is sufficient to support a conviction in the Federal Courts if it is not on its face incredible or otherwise insubstantial."[8] The court explained that when the Federal Rules are silent and it is clear that the General Assembly did not intend to change Georgia's substantive law, the new provision is interpreted consistently with the old unless a new provision of the Evidence Code displaced the law.[9] Thus, in this survey period, the court continues to emphasize that the rules will not be changing due to the new Evidence Code unless they are actually statutorily replaced by a new provision.

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2. 296 Ga. 650, 769 S.E.2d 892 (2015).
3. *Id.* at 653, 769 S.E.2d at 895.
4. *Id.* at 650, 651-52, 652, 769 S.E.2d at 893, 893-94, 894.
5. *Id.* at 652-53, 769 S.E.2d at 894.
6. *Id.* at 653, 769 S.E.2d at 894-95 (footnote and citations omitted).
7. United States v. LeQuire, 943 F.2d 1554 (11th Cir. 1997).
8. 296 Ga. at 654, 769 S.E.2d at 895 (quoting *LeQuire*, 943 F.2d at 1562).
9. *Id.*

The following cases illustrate the boundaries of admissibility for similar transaction evidence. *Brittain v. State*,[10] later cited in this Article for its findings on hearsay evidence, exemplifies the court of appeals interpretation of similar transaction evidence in an aggravated assault, kidnapping, and burglary case.[11] In *Brittain*, the State filed notice of its intent to introduce similar transaction evidence regarding a 2006 murder, kidnapping, and aggravated assault indictment along with a 2007 breaking and entering conviction to show "course of conduct, bent of mind, plan, scheme, motive, identity, intent, and lack of mistake."[12] The court explained that under the old Code, similar transactions were admissible if the state showed that

> (1) it [sought] to introduce the evidence not to raise an improper inference as to the accused's character, but for some appropriate purpose which has been deemed to be an exception to the general rule of inadmissibility; (2) there [was] sufficient evidence to establish that the accused committed the independent offense or act; and (3) there [was] a sufficient connection or similarity between the independent offense or act and the crime charged so that proof of the former tends to prove the latter.[13]

The court then determined the evidence of the similar transactions was sufficiently similar to meet these elements, finding that both incidents involved persons known to the defendant, surreptitious entry into their houses in the early morning, and use of a handgun, and, thus, the trial court had not erred in admitting the similar transactions.[14]

In *Curry v. State*,[15] the court of appeals laid out the standard under the Federal Rules of Evidence[16] for the admission of similar transaction evidence.[17] The case involves disturbing facts regarding the defendant's exploitation of teenage girls for acts of prostitution, but the case shows how the court interpreted the allowance of similar transaction evidence to show intent.[18] The defendant argued on appeal that the trial court violated O.C.G.A. § 24-4-404(b)[19] by admitting testimonial evidence of a third woman who claimed the defendant sold her to men

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10. 329 Ga. App. 689, 766 S.E.2d 106 (2014).
11. *Id.* at 700-02, 766 S.E.2d at 116-17.
12. *Id.* at 700-01, 766 S.E.2d at 116.
13. *Id.* at 701, 766 S.E.2d at 116 (alterations in original) (quoting Matthews v. State, 294 Ga. 50, 52, 751 S.E.2d 78, 81 (2013)).
14. *Id.* at 702-03, 766 S.E.2d at 117-18.
15. 330 Ga. App. 610, 768 S.E.2d 791 (2015).
16. FED. R. EVID. 101-1103.
17. *Curry*, 330 Ga. App. at 613-16, 768 S.E.2d at 793-95.
18. *Id.* at 615 & n.11, 768 S.E.2d at 794 & n.11.
19. O.C.G.A. § 24-4-404(b) (2013).

as a prostitute.[20] The court of appeals disagreed, explaining that although evidence of other crimes, wrongs or acts "shall not be admissible to prove the character of a person in order to show action in conformity therewith," it may certainly be used for other purposes.[21] The court referenced the new Evidence Code in Georgia[22] and noted that the Code is comparable to the Federal Rules, and that the court gives consideration "and great weight to constructions placed on the Federal Rules by the federal courts."[23]

The court then applied the Eleventh Circuit's three-part test to the admissibility of similar transactions, which requires the following: (1) the evidence must be relevant to an issue other than the defendant's character; (2) there must be sufficient proof for a jury to find by a preponderance that the defendant committed the acts to be admitted; and (3) that under Federal Rule of Evidence 403,[24] the probative value outweighs any undue prejudice.[25] The court applied the test and found "striking similarities between [the] offenses" where the testimony to be admitted showed the victim was sold as a prostitute, held against her will, and required to solicit her own clients.[26] The defendant controlled the time, prices, and location for the sexual acts, exerted complete control over the victims, kept all monies received, and threatened the victims to keep them from leaving.[27] The defendant argued that course of conduct and bent of mind were not permissible reasons for admitting the similar transaction testimony.[28] The court agreed, but found the evidence was still admissible because it showed intent, which was a permissible reason for admission under the new rules.[29]

III. HEARSAY

A. Forfeiture by Wrongdoing

This survey period also showed developments in hearsay exclusions and exceptions. In *Brittain v. State*, previously mentioned in this

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20. *Curry*, 330 Ga. App. at 612, 768 S.E.2d at 793.
21. *Id.* at 612, 615, 768 S.E.2d at 793, 794.
22. O.C.G.A. tit. 24 (2013 & Supp. 2015).
23. *Curry*, 330 Ga. App. at 613, 768 S.E.2d at 793 (quoting Jones v. State, 326 Ga. App. 658, 660, 757 S.E.2d 261, 264 (2014), *cert. granted*, 2014 Ga. LEXIS 706 (2014)).
24. FED. R. EVID. 403.
25. *Curry*, 330 Ga. App. at 614, 768 S.E.2d at 794 (citing *Jones*, 326 Ga. App. at 660, 757 S.E.2d at 264).
26. *Id.* at 616, 768 S.E.2d at 795.
27. *Id.*
28. *Id.*
29. *Id.* at 614-15, 768 S.E.2d at 794.

Article, the court fleshed out the proper standard for admission of testimonial hearsay statements to law enforcement.[30] The defendant appealed convictions for aggravated assault, kidnapping, and burglary, arguing, among other alleged errors, the court erred in admitting hearsay evidence under the doctrine of forfeiture-by-wrongdoing.[31] The statements were non-testimonial hearsay statements the victim made to friends regarding her abduction by the defendant in 2007.[32] Though the trial took place before the effective date of the new evidence rules, the court assumed, without deciding, that the trial court admitted the hearsay under the forfeiture-by-wrongdoing doctrine and that the prior evidence code would not have permitted hearsay evidence to be admitted under this exception.[33] The court went on to state:

> [A]ny error in the admission of same does not justify reversal because the same evidence would be admissible at a second trial. Indeed, Georgia's new Evidence Code has codified the forfeiture-by-wrongdoing exception for hearsay evidence, providing that "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" shall not be excluded by the hearsay rule if the declarant is unavailable as a witness.[34]

Thus, this testimony was not admitted in error.[35] The defendant was in the unlucky position of arguing that there was an error because while it probably was erroneous during his first trial, the testimony would not be erroneous if he were retried.[36]

B. Hearsay Admissibility to Determine Attendance of Out-of-State Witnesses

A niche hearsay area was further developed over this survey period with a ruling from the Georgia Supreme Court on the admissibility of hearsay when determining whether an out-of-state person is a material witness to a Georgia criminal proceeding. In *Parker v. State*,[37] the Georgia Supreme Court granted certiorari to determine whether, under the new Evidence Code, a determination of attendance can be made for

30. 329 Ga. App. at 698, 766 S.E.2d at 114.
31. *Id.* at 689, 766 S.E.2d at 108.
32. *Id.* at 697, 766 S.E.2d at 114.
33. *Id.* at 698, 766 S.E.2d at 114.
34. *Id.* (second brackets in original) (quoting O.C.G.A. § 24-8-804(b)(5) (2013)).
35. *Id.* at 698-99, 766 S.E.2d at 114-15.
36. *Id.*
37. 296 Ga. 586, 769 S.E.2d 329 (2015).

a witness under Georgia's Uniform Act to Secure the Attendance of Witnesses from Without the State[38] based on hearsay evidence.[39]

The court held that the evidence rules apply to a proceeding on a motion to issue a material witness certificate because it is a fact-finding proceeding.[40] The court also detailed the exception scenarios and noted that in the underlying case, which was based on a DUI, an exception did apply.[41] The court noted the new Evidence Code states that it "shall apply to any motion made or hearing or trial commenced" after January 1, 2013.[42] In the trial court, the defendant moved for witness certificates to call the five witnesses from the Intoxilyzer 5000's manufacturer who resided in Kentucky. The defendant did not call any witnesses and only offered (1) the Intoxilyzer 5000 printout card with his results, including blood alcohol percentage readings of .158 and .157 and (2) a transcript of his expert witness's testimony on the faulty computer source code used in the breath alcohol testing machine in support of his motion. The state objected to the evidence as hearsay and the defendant argued the new rules of evidence—including hearsay rules—were not applicable. The trial court eventually ruled that hearsay was not allowed. The defendant was ultimately convicted, and the court of appeals sustained the conviction.[43]

In explaining the court's rationale, Justice Nahmias noted, "A party's ability to obtain a material witness certificate turns on the court's finding of certain facts."[44] The court then addressed whether the exceptions to O.C.G.A. § 24-1-2(b)[45] would apply.[46] The defendant creatively analogized his case with proceedings for extradition or rendition, in which the rules would not apply.[47] The court explained that where a provision of the new Evidence Code is different from the Federal Rule "as interpreted by federal courts" they are required to presume the Georgia General Assembly meant for Georgia's provision to be different.[48] The court further explained that exceptions provisions

38. O.C.G.A. § 24-13-90 (2013).
39. *Parker*, 296 Ga. at 586, 769 S.E.2d at 329.
40. *Id.* at 586, 769 S.E.2d at 329-30.
41. *Id.* at 586-87, 590 & n.6, 769 S.E.2d at 329-30, 332 & n.6.
42. *Id.* at 588, 769 S.E.2d at 331.
43. *Id.* at 587-88, 589, 769 S.E.2d at 330-31, 331, 331-32.
44. *Id.* at 591, 769 S.E.2d at 332.
45. O.C.G.A. § 24-1-2(b) (2013).
46. *Parker*, 296 Ga. at 591-96, 769 S.E.2d at 333-35; *see also* O.C.G.A. § 24-1-2(c), (d) (2013).
47. *Parker*, 296 Ga. at 591, 769 S.E.2d at 333.
48. *Id.* at 592, 769 S.E.2d at 333-34.

do largely overlap, but the Georgia provision, O.C.G.A. § 24-1-2,[49] does not have a catch-all exception like the Federal Rules.[50] The court concluded the omission was intentional to prevent Georgia courts from creating "patchwork exceptions to the applicability of the rules of evidence, which had been a criticism of the old code."[51] Thus, the Georgia Supreme Court ultimately enforced a strict interpretation of the Georgia rules that are slightly different from the Federal Rules.[52]

The court also acknowledged an exception the defendant properly relied on, found in O.C.G.A. §§ 24-1-2(c)(1) and 24-1-104,[53] which states the rules shall not apply to the "determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court," including "[p]reliminary questions concerning the qualification of a person to be a witness."[54] Thus, the trial court and court of appeals erred in rejecting the defendant's hearsay evidence because it fell within an enumerated exception under the Georgia rules, which are more limited than the Federal Rules.[55]

C. The Business Records Exception: Criminal and Civil Scenarios

There were two interesting cases from the court of appeals explaining the proper interpretation of the business records exception to hearsay under the new Evidence Code. In *Roberts v. Community Southern Bank*,[56] the court differentiated between two different business records that were both offered in support of a motion for summary judgment brought by the owner of a promissory note.[57] The guarantor appealed and the court of appeals affirmed on condition, explaining the applicability of the rules of evidence as related to the admissibility of evidence on motions for summary judgment.[58]

The court explained that "[a]ffidavits purporting to establish the amount of a debt without accompanying business records, where appropriate, are insufficient to sustain summary judgment."[59] The

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49. O.C.G.A. § 24-1-2 (2013).
50. *Parker*, 296 Ga. at 594, 769 S.E.2d at 334-35.
51. *Id.* at 594, 769 S.E.2d at 334.
52. *Id.* at 592, 769 S.E.2d at 333-34.
53. O.C.G.A. § 24-1-104 (2013).
54. *Parker*, 296 Ga. at 594-95, 769 S.E.2d at 335 (quoting O.C.G.A. § 24-1-104).
55. *Id.* at 596, 769 S.E.2d at 336.
56. 331 Ga. App. 364, 771 S.E.2d 68 (2015).
57. *Id.* at 368, 771 S.E.2d at 72-73.
58. *Id.* at 364, 368-69, 771 S.E.2d at 70, 73.
59. *Id.* at 368-69, 771 S.E.2d at 73 (quoting Walter R. Thomas Assocs. v. Media Dynamite, 284 Ga. App. 413, 415, 643 S.E.2d 883, 885 (2007)) (internal quotation marks omitted).

court then quoted O.C.G.A. § 24-8-803(6) of the new Evidence Code,[60] which creates an exception to the hearsay rule for business records:

> Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness . . . a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses [is admissible], if (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses; (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (C) kept in the course of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification . . . .[61]

As in the old code, the new Evidence Code gives the trial court discretion to determine if a proper foundation was laid for the admission of business records.[62]

The court also explained how summaries of voluminous business records would be admitted—noting these records were admissible under the old code, and the requirements were simply codified under the new Evidence Code.[63] Under the Code, voluminous records, "which cannot conveniently be examined in court," are permitted "in the form of a chart, summary, or calculation."[64] The court emphasized, citing a 2013 Georgia case[65] and a 1998 Sixth Circuit case,[66] that one of the requirements for the admission of a summary is that the records on which the summary is based are made available to the other parties to examine or copy, so that "the opposing party who desires to attack the authenticity or accuracy of [the] . . . summary" can do so or is able to otherwise offer rebuttal evidence.[67] Based on these standards, the court held that a loan history report was admissible in support of the note holder's motion for summary judgment as a business record, but explained that business records regarding secondary interest without sufficient availability of supporting documents were not admissible.[68]

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60. O.C.G.A. § 24-8-803 (2013).

61. *Roberts*, 331 Ga. App. at 369, 771 S.E.2d at 73 (alterations in original) (quoting O.C.G.A. § 24-8-803(6)).

62. *Id.*

63. *Id.* at 369 n.4, 771 S.E.2d at 73 n.4.

64. *Id.* at 369-70, 771 S.E.2d at 73 (quoting O.C.G.A. § 24-10-1006 (2013)).

65. *Id.* at 370, 771 S.E.2d at 73 (citing Hanna v. First Citizens Bank & Tr. Co., 323 Ga. App. 321, 744 S.E.2d 894 (2013), *cert. denied*, 2013 Ga. LEXIS 986 (2013)).

66. United States v. Bray, 139 F.3d 1104 (6th Cir. 1998).

67. *Roberts*, 331 Ga. App. at 370, 771 S.E.2d at 73 (quoting *Bray*, 139 F.3d at 1109).

68. *Id.* at 371, 372-73, 771 S.E.2d at 74, 75.

In an interesting case about shoplifting, the court held that a shoplifting report was admissible in a criminal case because it was not "made in anticipation of prosecution" and thus qualified as a business records exception to the hearsay rule.[69] In *Thompson v. State*,[70] the defendant was convicted of felony shoplifting, aggravated assault, and possession of methamphetamine after he entered a Costco in Catoosa County, picked up a camera and a video game console, removed them from their packaging, and placed them in his pants. He then hid the packaging, pushed the loss prevention officer over when he was confronted at the exit, brandished a razor knife, and ran across the parking lot in an attempt to escape. When he was apprehended by the police shortly thereafter, the lieutenant searched him and found a camera, a game console, a razor knife, a glass pipe containing methamphetamine, and various other drug paraphernalia in his pants. At trial, the State called the store's assistant manager and introduced, over an objection by the defense, a report prepared by the Costco loss prevention officer that included the details of the shoplifting.[71]

On appeal, the court determined the report was admissible because it did not indicate a lack of trustworthiness.[72] The court emphasized the report was not made at the request of the State and the officer who was on the scene testified that "he was not sure that Costco was 'familiar with what we needed for that criminal case.'"[73] The court relied on the fact that Costco prepares these reports every time there is an incident involving shoplifting, which makes the report reliable.[74]

The dissent, drafted by Justice Barnes and concurred with by Justice Miller, noted that this report should have been excluded.[75] The dissent explained that incident reports usually lack the reliability necessary for admission under the business records exception.[76] The dissent stated that the majority "place[d] undue emphasis on the fact that the store was not a party to the criminal prosecution" because "a business . . . still has an 'interest in seeing that a shoplifting suspect is prosecuted . . . .'"[77] The interesting views of the majority and the dissent on the

69. Thompson v. State, 332 Ga. App. 204, 208, 770 S.E.2d 369-70 (2015).

70. 332 Ga. App. 204, 770 S.E.2d 364 (2015), *cert. denied*, 2015 Ga. LEXIS 562 (2015).

71. *Id.* at 205-06, 770 S.E.2d at 367-68.

72. *Id.* at 210, 770 S.E.2d at 371.

73. *Id.* at 208, 770 S.E.2d at 369. The court also differentiated a federal case where the report was prepared at the request of the FBI in a robbery case. *Id.*; *see* United States v. Blackburn, 992 F.2d 666, 670 (7th Cir. 1993).

74. *Thompson*, 332 Ga. App. at 207-08, 770 S.E.2d at 364.

75. *Id.* at 216-17, 770 S.E.2d at 375 (Barnes, J., dissenting).

76. *Id.* at 217, 770 S.E.2d at 375.

77. *Id.* at 220, 770 S.E.2d at 377 (quoting the majority opinion).

admissibility of internal loss prevention documents creates an issue that has potential for reversal in the next survey period, especially considering the continuing reference to the other circuits' interpretations of the Federal Rules.

IV. CONCLUSION

This survey period produced novel and interesting decisions that continue to shape evidence law in Georgia. Appellate decisions are continuing to show how the new provisions apply, and the Georgia Supreme Court is articulating the differences that have been intentionally preserved. The courts have been especially active in their interpretations of similar transaction admissibility standards and the hearsay exceptions this period, both areas in which the rules in Georgia slightly differ from the Federal Rules—intentionally. It will be interesting to see what the next survey period focuses on and what federal case law works its way into the courts' future interpretations of our current Evidence Code.