Mercer Law Review

Volume 69
Number 1 *Annual Survey of Georgia Law*

Article 10

12-2017

Evidence

John E. Hall Jr.

W. Scott Henwood

L. Witt Carmon II

Evidence

by John E. Hall, Jr.*

W. Scott Henwood**

and L. Whit Carmon II***

I. INTRODUCTION

Following the adjustments to Georgia's Evidence Code on January 1, 2013, Georgia courts have developed significant case law interpreting various changes from the old code.[1] This year's survey period marks the fourth year since the landmark alterations to the Georgia Evidence Code, Official Code of Georgia Annotated (O.C.G.A.) Title 24[2] took effect. Addressed in this year's Article are cases spanning from June 1, 2016 to May 31, 2017.[3] Specifically, this Article addresses the following: (1) Significant developments regarding the admissibility of evidence ascertained by or maintained through technology; (2) Special rules of admissibility tied to crimes of sexual misconduct or prior violent bad acts; and (3) Exercises of the exemptions to the hearsay rule.

---

*Founding Partner in the firm of Hall Booth Smith, P.C., Atlanta, Georgia. Mercer University (B.A., 1981); Mercer University School of Law (J.D., 1984). Member, Mercer Law Review (1982–1984); Student Writing Editor (1983–1984). Member, State Bar of Georgia.

**Of Counsel in the firm of Hall Booth Smith, P.C., Atlanta, Georgia. Georgia State University (B.B.A., 1976); Woodrow Wilson College of Law (J.D., 1978). Former Reporter of Decisions for the Georgia Supreme Court and the Georgia Court of Appeals. Member, State Bar of Georgia.

***Associate in the firm of Hall Booth Smith, P.C., Atlanta, Georgia. University of Georgia (B.A., 2013); Mercer University School of Law (J.D., 2016). Member, Mercer Law Review (2014–2016). Member, State Bar of Georgia.

1. Ga. H.R. Bill 24, Reg. Sess., 2011 Ga. Laws 52 (codified at O.C.G.A. tit. 24).

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

3. 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*, 67 MERCER L. REV. 63 (2016). Special thanks to Will Story for his research assistance with this year's Article.

II. TECHNOLOGY

In the era of continuous self-documentation, the advent of ever-advancing, smaller, increasingly more user-friendly recording devices has given rise to large gaps in the law. There is an enormous need for legal authority interpreting the use and admissibility of recorded statements, events, and circumstantial evidence procured by or maintained through contemporary technology. In this survey period, Georgia courts addressed several pertinent points of law regarding the intersection of evidence and technology.

A. Authentication of Evidence Maintained as Video Recording

In *State v. Smith*,[4] the defendant sought to exclude a video recording of his statement in a pretrial motion. In the hearing on the motion, an investigator acknowledged the disc housing the alleged statement had no identifying markers on it that would confirm it was the video taken on the day of the crime, and further testified he was not present when the disc in question was created. In addressing the authentication of the video, the Decatur County Superior County stated, "[T]he State must show [the recording] is a fair representation of the statement, and may authenticate the recording by any witness familiar with the subject depicted on the recording, as is the case with any other video recording presented as evidence at a criminal trial."[5] The Georgia Supreme Court upheld the trial court's decision to exclude the video recording of the defendant's confession because, "Given the equivocal testimony of the investigator with respect to whether the video disc being offered into evidence was one he had reviewed, the State failed to carry its burden of proving the video recording was a fair representation of defendant's interview."[6]

B. Necessity of Preserving All Components of Recorded Video Evidence

In *State v. Hall*,[7] the Georgia Court of Appeals held that the State failed to prove a cell phone video contradicted a defendant police officer's version of the events such that it did not resolve a conflict in evidence where the video contained no audio recording component of the incident in question.[8] Hall, a Clayton County police officer, was indicted for simple battery based on his use of force during an encounter with a homeowner

4. 299 Ga. 901, 792 S.E.2d 677 (2016).
5. *Id.* at 903, 792 S.E.2d at 678.
6. *Id.* at 903, 792 S.E.2d at 678–79.
7. 339 Ga. App. 237, 793 S.E.2d 522 (2016).
8. *Id.* at 245, 793 S.E.2d at 528.

whom he believed might be a burglar. At trial, Hall filed a motion seeking immunity from prosecution under O.C.G.A. § 16-3-24.2,[9] wherein he argued that "his use of force was reasonable and justified in light of the homeowner's resistance to being handcuffed and detained."[10] After an evidentiary hearing that included witness testimony and cell phone video footage of most of the incident, the trial court granted Hall's motion for immunity. Subsequently, the State appealed.[11]

On appeal from the trial court's grant of denial of immunity under O.C.G.A. § 16-3-24.2, the court of appeals viewed the evidence in the light most favorable to the trial court's ruling.[12] The immunity statute in question provides law enforcement with immunity if the officer's conduct is justified.[13] The statute states that, "A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself or herself or a third person against such other's imminent use of unlawful force."[14]

The court of appeals held that the State's argument that the suspect did not resist was not supported by the footage contained on the cell phone.[15] Additionally, as there was no audio component included in the video, the evidence did not resolve the conflicting testimony regarding whether the suspect was argumentative and belligerent towards Hall and the other officers, nor did the video resolve the conflicting testimony whether the defendant requested that the suspect put his arms behind his back before the suspect was handcuffed.[16]

This case clearly illustrates the importance of preserving all facets of multimedia recordings, and demonstrates that Georgia courts will take a multi-layered approach to reviewing such recordings. Here, as demonstrated in Judge Peterson's concurrence, the court demonstrates the importance of preserving a complete audio-visual file:

> The video [was] not clear enough for [the Court] to determine with confidence which disputed set of facts are true. If it was, [the Court] would owe no deference to the trial court's factual findings . . . regardless of whether they were based in part on resolving conflicting witness testimony. But [the Court does] owe deference [in this case]

9. O.C.G.A. § 16-3-24.2 (2017).
10. *Hall*, 339 Ga. App. at 245, 793 S.E.2d at 528.
11. *Id.* at 237–38, 793 S.E.2d at 523.
12. *Id.*
13. O.C.G.A. § 16-3-24.2.
14. O.C.G.A. § 16-3-21 (2017).
15. *See Hall*, 339 Ga. App. at 245, 793 S.E.2d at 528.
16. *Id.*

> because the video alone does not resolve the factual dispute, and the trial court had to resolve conflicting witness testimony to decide the matter.[17]

Obviously, the Georgia Court of Appeals recognizes the powerful impact that contemporaneous cell phone recordings have on circumstances such as this where there is a "central factual dispute" and only conflicting witness testimony available to resolve it.[18] However, as this case also demonstrates, where a multimedia recording does not capture every element of the event in question, courts are less likely to defer to the recording over other available evidence.[19]

C. Recorded Phone Call Does Not Violate Sixth Amendment Right of Confrontation

In *Jones v. State*,[20] the defendant was convicted of possessing a controlled substance outside of its original container, trafficking in heroin, and possessing heroin with the intent to distribute. The defendant argued that the trial court erred in permitting the State to play a recording of a monitored phone call between an informant and Jones when the informant did not testify at trial. The Clarke County Superior Court admitted the recording because it found the informant's statements were admissible to provide context for the defendant's responses to the informant's statements and were not admitted to prove the truth of the matter asserted. As for the defendant's own statements, the trial court determined those were admissible as admissions of a party opponent.[21] The court of appeals cited United States Court of Appeals for the Eleventh Circuit precedent that "statements offered by a non-testifying speaker are not hearsay and do not violate the Confrontation Clause when the statements are 'not offered for their truth, but only to place . . . [the defendant's] statements in context.'"[22] Thus, the trial court did not err in admitting the recording.[23]

---

17. *Id.* at 245–46, 793 S.E.2d at 528–29 (Peterson, J., concurring).

18. *Id.* at 245, 793 S.E.2d at 528; *see* Vergara v. State, 283 Ga. 175, 178, 657 S.E.2d 863, 867 (2008) ("where controlling facts are not in dispute, . . . such as those facts discernible from a videotape, our review is de novo").

19. *See Hall*, 339 Ga. App. at 245–46, 793 S.E.2d at 528–29.

20. 339 Ga. App. 95, 791 S.E.2d 625 (2016).

21. *Id.* at 102, 791 S.E.2d at 632.

22. *Id.* (quoting United States v. Makarenkov, 401 Fed. App'x 442, 445 (11th Cir. 2010)).

23. *Id.* at 103, 791 S.E.2d at 632; *see also* United States v. Taylor, No. 16-10638, 2017 U.S. App. LEXIS 7990 (11th Cir. May 5, 2017) (holding a district court's admission of muted video clip recording of an alleged illegal drug transaction between defendant and the

III. ADMISSION OF PRIOR BAD ACTS EVIDENCE—SEXUAL MISCONDUCT AND DOMESTIC VIOLENCE

Georgia law has demonstrated, time and again, that crimes linked to domestic abuse and sexual violence receive close attention by the courts. This survey period illustrated several instances wherein the special rules that apply to the admissibility of evidence in these types of cases resulted in admission of evidence that might have otherwise been excluded. It bears emphasizing that the primary motivation for these special evidentiary rules is a clear public policy in favor of preventing these types of particularly heinous offenses.

A. Domestic Violence—Admission of Prior Bad Acts as Evidence of Motive

In *Harris v. State*,[24] the defendant was convicted of family violence battery under O.C.G.A. § 16-5-23.1(f)(2).[25] The defendant appealed, arguing the Newton County Superior Court improperly admitted evidence of his prior convictions for family violence battery and simple battery. Here, the defendant was alleged to have physically abused his girlfriend's aunt's twenty-year-old daughter because she allegedly refused his sexual advances. The prior conviction in question occurred when the defendant was found guilty of another act of family violence battery and a simple battery in 2009 against his estranged wife and her sister.[26]

The State averred that the evidence was permissible to show motive, specifically that the defendant uses physical violence to control women who have denied him something he desires.[27] Even though motive was not an element of the charged offense, the Georgia Court of Appeals upheld the admission because,

> the other acts evidence was relevant to shed light on why Harris reacted as he did when the victim did not acquiesce to his sexual advances. . . . Accordingly, the evidence was relevant for the permissible purpose of showing the impetus behind [the defendant's]

---

confidential informant did not violate the Confrontation Clause because, even if muted video could be deemed testimonial for confrontation purposes, the video was not offered for its truth, but only to place the investigation and the footage of defendant in context).

24. 338 Ga. App. 778, 792 S.E.2d 409 (2016).

25. O.C.G.A. § 16-5-23.1(f)(2) (2012). This code section was amended in 2016 by Senate Bill 193. Ga. S. Bill 193, Reg. Sess., 2016 Ga. Laws 518 (codified as amended at O.C.G.A. § 16-5-23.1 (2017)).

26. *Harris*, 338 Ga. App. at 778–79, 792 S.E.2d at 410–11.

27. *Id.* at 779, 792 S.E.2d at 411.

> action of punching the victim in the face when she did not willingly agree to be his sexual partner.[28]

In *Smart v. State*,[29] the defendant was convicted of malice murder and related offenses in connection with the beating of his wife. The defendant argued the Chatham County Superior Court erred in allowing the defendant's ex-wife's sister, Katie Tucker, to testify about the relationship the defendant had with his ex-wife and the abuse his ex-wife suffered during the course of their relationship.[30] The Georgia Supreme Court upheld the trial court's admission of the testimony because, although Tucker's testimony referenced specific acts of domestic violence, "her testimony also revealed the impetus behind that violence: control."[31]

In balancing that evidence under the Federal Rule of Evidence 403[32] test, the court held, "Tucker's testimony was not elicited merely to show that Appellant had engaged in prior acts of domestic violence, but, instead, it demonstrated that the violence was a mechanism for control of his intimate partners,"[33] thus affirming the trial court's decision to allow Tucker's testimony.[34] Clearly, this is a very nuanced interpretation of the prohibition against admitting evidence of a person's "character or a trait of character [that] shall not be admissible for the purpose of proving action in conformity therewith on a particular occasion."[35]

The court explained that the evidence in question was not admitted to show that the defendant acted in conformity with a character trait (a propensity for domestic violence) but was, rather, admitted to show a reoccurring motive for committing similar acts of violence.[36] Parsing the difference between allowing the evidence to show "motive" as opposed to withholding it where it only demonstrates the propensity to act in conformity is no easy task. One can attempt to distinguish the two on the basis that motive involves a seemingly conscious acknowledgment of a pattern of behavior by the actor whereas the prohibition against "propensity evidence" seeks to avoid admitting evidence that allows jurors to consider evidence that suggests an individual was unconsciously predisposed to certain bad acts based on a pattern of previous behavior.[37]

---

28. *Id.* at 781, 792 S.E.2d at 413.
29. 299 Ga. 414, 788 S.E.2d 442 (2016).
30. *Id.* at 416, 788 S.E.2d at 446.
31. *Id.* at 418, 788 S.E.2d at 447.
32. FED. R. EVID. 403.
33. *Smart*, 299 Ga. at 419, 788 S.E.2d at 448.
34. *Id.*
35. O.C.G.A. § 24-4-404(a) (2017).
36. *Smart*, 299 Ga. at 418, 788 S.E.2d at 447.
37. *Id.* at 417–18, 778 S.E.2d at 447.

There is a fairly apparent similar policy motivation for admitting evidence of prior acts of family violence and admitting prior acts of sexual violence—both attempt to protect a distinct class of particularly vulnerable individuals. In any event, this survey period's case law lends further support to those who seek a finessed method of admitting what otherwise might be considered inadmissible "propensity evidence" under O.C.G.A. § 24-4-404.[38]

For perspective, compare the above holdings to *Parks v. State*,[39] where the defendant was convicted of malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony. Thereafter, the defendant appealed his conviction on the basis that his prior 1990 conviction for aggravated assault should have been inadmissible.[40] After noting that the Georgia Supreme Court has adopted the Eleventh Circuit's three-part test for admissibility under Rule 404(b)[41] along with the balancing test under Rule 403,[42] the court held the trial court erred when it admitted the defendant's 1990 conviction.[43] The 1990 conviction stemmed from the defendant pleading guilty to an aggravated assault charge where he participated in a shooting that occurred in the parking lot of an apartment complex using a 9mm handgun. The State contended this evidence was admissible to show motive, intent, knowledge, identity, and the absence of mistake or accident.[44] The supreme court rejected these contentions, holding the defendant's knowledge was not at issue where the defense was justification, and that the defendant had made no claim that he accidentally or mistakenly shot the victim.[45]

Furthermore, the Rule 404(b) evidence consisted of testimony from two victims who stated that they were shot during the incident in 1990, which involved a dispute over drugs and money; the investigating officer's testimony that defendant and one other person were the main shooters during the 1990 incident; and a certified copy of the conviction which showed that the defendant pled guilty to the crime.[46] As such, the court

38. O.C.G.A. § 24-4-404 (2017). *Compare Harris*, 338 Ga. App. 778, 792 S.E.2d 409 *and Smart*, 299 Ga. 414, 788 S.E.2d 445 *with* Parks v. State, 300 Ga. 303, 794 S.E.2d 623 (2016) (holding evidence not admissible to show motive and *modus operandi* where crime involved murder and violence but not domestic abuse or sexual violence).

39. 300 Ga. 303, 794 S.E.2d 623 (2016).

40. *Id.* at 306, 794 S.E.2d at 627.

41. FED. R. EVID. 404(b).

42. FED. R. EVID. 403.

43. *Parks*, 300 Ga. at 305–06, 794 S.E.2d at 627–28.

44. *Id.* at 306, 794 S.E.2d at 627.

45. *Id.* at 306, 794 S.E.2d at 628.

46. *Id.*

also rejected the State's argument that the evidence presented was used to prove identity and motive, holding that identity and motive were inapplicable.[47] In conclusion, the court held the evidence had no purpose other than to show the appellant's propensity towards violence; therefore, the admission of evidence of the other acts under the circumstances constituted an error.[48] Here, however, the error was harmless where the defendant had opened fire eighteen times and was relying on the claim of self-defense.[49]

B. Similar Transaction Evidence of Prior Acts of Child Molestation (O.C.G.A. § 24-4-414(a) and O.C.G.A. § 24-4-413(a))

In *State v. McPherson*,[50] the State appealed from an order excluding similar transaction evidence of prior acts of child molestation allegedly committed by the defendant. The similar transaction in dispute involved a separate alleged victim who contacted law enforcement after the current child molestation charges came to light, alleging the defendant had also molested him when he was in elementary school. The charges the defendant faced included child molestation.[51] The Georgia Court of Appeals reversed the trial court's decision to exclude evidence of the similar transaction, holding, "[g]iven the express direction that evidence of prior sexual offenses committed by the defendant 'shall be admissible,' OCGA § 24-4-414(a) and two related statutes, OCGA §§ 24-4-413(a) and 24-4-415(a), have been construed as creating 'a rule of inclusion, with a strong presumption in favor of admissibility.'"[52] Furthermore, the court stressed that evidence admitted under these provisions is not subject to the limits of O.C.G.A. § 24-4-404(b),[53] but instead may be considered for any matter to which it is relevant, including whether the evidence demonstrates that the defendant had a propensity to engage in certain sexual offenses.[54] The court of appeals also noted the fact that the prior acts were committed thirty-five years prior to the incident in question did not necessitate exclusion where there had been no showing that the

47. *Id.*

48. *Id.* at 308, 794 S.E.2d at 628.

49. *Id.* at 308, 794 S.E.2d at 628–29.

50. 341 Ga. App. 871, 800 S.E.2d 389 (2017).

51. *Id.* at 871, 800 S.E.2d at 390.

52. *Id.* at 873, 800 S.E.2d at 391–92 (quoting Steele v. State, 337 Ga. App. 562, 566, 788 S.E.2d 145, 149 (2016)).

53. O.C.G.A. § 24-4-404(b) (2017).

54. *McPherson*, 341 Ga. App. at 873, 800 S.E.2d at 392.

potential witness' memory as to the alleged incidents had become impaired or was otherwise patently unreliable.[55]

In *Dixon v. State*,[56] the defendant appealed his convictions of child molestation alleging the Fulton County Superior Court erred in admitting evidence qualifying as "another offense of sexual assault" under O.C.G.A. § 24-4-413[57] or, pursuant to O.C.G.A. § 24-4-414,[58] "another offense of child molestation."[59] The court held the State's need for this evidence was great based upon the defendant's attacks on the victim's credibility, the lack of any physical evidence, and the delayed nature of the victim's outcry.[60] Each of defendant's past acts involved inappropriate sexual contact between the defendant and children, all of whom were of a similar age to the victim in the case at bar, which the defendant gained access to through a relationship with the child's mother.[61] The fact that the victims were different genders was irrelevant for the court's determination because, as the court explained, "[t]he sexual abuse of young children, regardless of the sex of the victims or the nomenclature or type of acts or other conduct perpetrated upon them, is of sufficient similarity to make the evidence admissible."[62] This is due to the fact that "sex crimes against children require a unique bent of mind."[63] The court noted here, as in *McPherson*, the passing of time (in this case seven to thirteen years) between the molestation of the previous victims and current victim did not mandate a prejudicial finding under the balancing test in O.C.G.A. § 24-4-403.[64]

In *Kritlow v. State*,[65] after the defendant was convicted of aggravated sodomy, aggravated sexual battery, aggravated assault, false imprisonment, and sexual battery, the defendant appealed the admission of evidence of his prior sex offenses.[66] The State sought to introduce evidence of prior sex crimes for purposes of showing the defendant's intent and lustful disposition.[67] In this case, the Catoosa County Superior

55. *Id.* at 876, 800 S.E.2d at 394.

56. 341 Ga. App. 255, 800 S.E.2d 11 (2017).

57. O.C.G.A. § 24-4-413 (2017).

58. O.C.G.A. § 24-4-414 (2017).

59. 341 Ga. App. at 255, 800 S.E.2d at 13.

60. *Id.* at 262, 800 S.E.2d at 17.

61. *Id.*

62. *Id.*

63. *Id.* (quoting Gunn v. State, 300 Ga. App. 229, 232, 684 S.E.2d 380, 383 (2009)).

64. *Id.* at 262, 800 S.E.2d at 17; *see also McPherson*, 341 Ga. App. at 876, 800 S.E.2d at 394.

65. 339 Ga. App. 353, 793 S.E.2d 560 (2016).

66. *Id.* at 353, 793 S.E.2d at 562.

67. *Id.* at 355, 793 S.E.2d at 563.

Court held that the provisions of O.C.G.A. § 24-4-413(a) supersede the provisions of O.C.G.A. § 24-4-404(b) for the admission of propensity evidence in sexual assault cases.[68] Furthermore, the court found the evidence that the defendant had committed similar sexual assaults was relevant as it,

> had the tendency to bolster the credibility of the victim by demonstrating that her circumstances were not unique. Indeed, it had the tendency to disprove a claim of fabrication by showing that [Kritlow] preyed on women in the victim's . . . circumstance [of being in a place where Kritlow could force them into a smaller room and bar a door preventing escape]. Thus, the evidence satisfied OCGA § 24-4-413's relevance threshold.[69]

Similarly, in *Taylor v. State*, [70] the defendant was convicted of two counts of child molestation, two counts of aggravated child molestation, two counts of statutory rape, one count of rape, and one count of influencing a witness. The defendant appealed, arguing the trial court erred by allowing testimony about an allegedly similar transaction because there were no similarities between the testimony and the acts alleged by the victims.[71] As a general rule, the sexual molestation of young children or teenagers, regardless of the type of act, is sufficiently similar to be admissible as similar transaction evidence.[72] In *Taylor*, the defendant's sister testified about an incident that occurred when she was nine or ten where defendant had her and her cousins play "mommies and daddies," a game that involved "sexual contact," like "touching and feeling," kissing on the mouth and touching private parts.[73]

The State argued the testimony was admissible because it tended to show the defendant's lustful disposition toward young girls.[74] Even though the defendant only touched his sister's arm during that game, the evidence was still admissible, despite it occurring fifteen years prior to the crime at issue: "Where, as here, the similar transaction evidence is otherwise admissible, a time lapse such as this one goes to the weight and credibility of the evidence and does not demand its exclusion."[75]

---

68. *Id.*

69. *Id.* at 356, 793 S.E.2d at 563 (alteration in the original) (quoting Marlow v. State, 337 Ga. App. 1, 4, 785 S.E.2d 583, 586 (2016)).

70. 339 Ga. App. 321, 793 S.E.2d 198 (2016).

71. *Id.* at 321–23, 793 S.E.2d at 199–200.

72. *Id.* at 323, 793 S.E.2d at 200.

73. *Id.*

74. *Id.*

75. *Id.* at 323–24, 793 S.E.2d at 200; *see also* United States v. Gaskins, 849 F.3d 1345 (11th Cir. 2017) (holding evidence of defendant's prior interactions with two minors, whom

IV. HEARSAY EXCEPTIONS

Courts during this survey period provided further guidance regarding two important exceptions to the hearsay rule: the excited utterance exception as well as the residual exception. Further, the courts also shed light on an important distinction regarding the exception for party admissions as they relate to admissions made through text messages.

A. Excited Utterances

In *Akintoye v. State*,[76] the defendant was convicted of theft by taking, theft by deception, exploitation of an elder person, violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), and money laundering.[77] The defendant contended the trial court erred in admitting the victim's grandson's testimony on the ground that it constituted inadmissible hearsay.[78] In *Akintoye*, the evidence showed the victim made the statements in question to his grandson immediately after learning that he had been scammed into wiring more than six thousand dollars into a bank account by a man who falsely posed as his grandson, and when the victim made the statements, he was confused and very distraught.[79] The court found that "[u]nder the totality of the circumstances, these statements were made under the stress of excitement caused by a startling event and the statements related to the startling event," and thus upheld the admissibility of the testimony of the grandson under the excited utterance exception to the hearsay rule.[80]

B. Residual Exception

Aside from admitting the testimony under the excited utterance exception, the court in *Akintoye* also admitted the evidence under the residual exception to the hearsay rule.[81] Again, the defendant in this action contended that the victim's grandson's testimony was

---

the defendant drove to meet clients for prostitution and later discovered to be minors was admissible as other acts evidence, in prosecution of the defendant for sex trafficking of a minor; the evidence was highly probative as the charged offense and defendant's interactions with two minors were close both in nature and in time, the nature of evidence was no more inflammatory or emotionally charged than the crime for which defendant was tried, furthermore, the district court provided two limiting instructions at trial, and as a result, the risk of prejudice was minimized).

76. 340 Ga. App. 777, 798 S.E.2d 720 (2017).

77. *Id.* at 777, 798 S.E.2d at 722–23.

78. *Id.* at 785, 798 S.E.2d at 727.

79. *Id.* at 786, 798 S.E.2d at 727.

80. *Id.* at 786, 798 S.E.2d at 727–28.

81. *Id.* at 786, 798 S.E.2d at 728.

inadmissible under the residual exception to the hearsay rule.[82] After setting forth the residual exception statute, the court cited six requirements for admitting evidence under the residual hearsay rule:

> (1) The hearsay declarant is unavailable as a witness; (2) The statement is evidence of a material fact; (3) No comparable evidence is available to the proponent through reasonable efforts; (4) The statement shows circumstantial guarantees of trustworthiness; (5) The proponent provides pre-trial notice of intent to offer the statement under this exception; and, (6) The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.[83]

As applied to *Akintoye*, the declarant was no longer living (thus making him unavailable) and his statements to his grandson provided evidence of a material fact—that he wired money under false pretenses. The circumstances surrounding the statements provided sufficient guarantees of trustworthiness given the close relationship between the victim and his grandson. The State gave notice of its intent to offer the grandson's statements before trial, and the general purposes of the evidence rules and interests of justice were best served by admitting the grandson's statements because, otherwise, the State could not prosecute the crime.[84] Finally, the court held that the grandson's statements were more probative than any other available evidence as the State had no other evidence to demonstrate why the victim transferred the funds into the defendant's account.[85] Therefore, the court held that the grandson's testimony regarding the victim's statements was admissible under the residual exception to the hearsay rule.[86]

The courts in this survey period have also provided litigators with evidence of statements that fall outside the residual exception. In *Wilson v. State*, [87] the Georgia Supreme Court ruled that, where a defendant could not affirmatively show that excluding a certain witness's statement probably affected the outcome of trial, given the overwhelming evidence of guilt, the trial court properly excluded the statement.[88] Following the partial denial of his motion for new trial, the defendant appealed his convictions and sentences for malice murder and other crimes in

82. *Id.* at 786, 798 S.E.2d at 727.
83. *Id.* at 786, 798 S.E.2d at 728.
84. *Id.*
85. *Id.*
86. *Id.*
87. 301 Ga. 83, 799 S.E.2d 757 (2017).
88. *Id.* at 89, 799 S.E.2d at 762.

connection with the robbery of Cassandra James in November 2009 and her fatal stabbing the following December. The defendant's sole charge was that the trial court erroneously excluded an out-of-court declaration that would ostensibly explain why his footprint was found on the victim's door shortly before she was found murdered inside her apartment.[89] In its opening statement at trial, the defense counsel informed the jury that it would hear from the victim's property manager who would testify that, a few days prior to her death, she reported an incident to him when someone allegedly kicked in her door.[90]

Following opening statements, the State raised an objection to the anticipated statements, arguing that its admissibility would have to be considered, if at all, under the residual exception to the hearsay rule.[91] As the trial progressed, the State informed the trial court that the manager had been contacted, and the State took the position that the alleged statement by the victim would be inadmissible under the residual exception to the hearsay rule. The statement failed to meet the requirement of trustworthiness or reliability because the victim and the property manager hardly knew each other, and the manager denied that the victim ever notified him that her apartment door had been kicked in.[92] The court reiterated the principal that the exception is one which is "to be used very rarely, and only in exceptional circumstances . . . when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present."[93] Furthermore, the court went on to emphasize that,

> Such guarantees must be equivalent to cross-examined former testimony, statements under a belief of impending death, statements against interest, and statements of personal or family history. These categories of hearsay have attributes of trustworthiness not possessed by the general run of hearsay statements that tip the balance in favor of introducing the information if the declarant is unavailable to testify. And they are all considered sufficiently trustworthy not because of the credibility of the witness reporting them in court, but because of the circumstances under which they were originally made.[94]

89. *Id.* at 83, 799 S.E.2d at 758.
90. *Id.* at 86–87, 799 S.E.2d at 760.
91. *Id.*; *see also* O.C.G.A. § 24-8-807 (2017).
92. *Wilson*, 301 Ga. at 87, 799 S.E.2d at 761.
93. *Id.* at 89, 799 S.E.2d at 762.
94. *Id.* (citations omitted) (quoting *Smart*, 299 Ga. at 421–22, 788 S.E.2d at 449–50).

Clearly, this was not an instance where such guarantees were met—given the witness who was alleged to have witnessed the statement in question denied that the statement had ever been made.[95]

C. Differences in Incoming and Outgoing Text Messages for Purposes of Meeting the Hearsay Exception of an Admission by a Party Opponent

In *Glispie v. State*, [96] the defendant was convicted of violating the Georgia Controlled Substance Act[97] for possession with intent to distribute drugs, obstruction of a law enforcement officer, fleeing and attempting to elude, failure to stop at a stop sign, and driving an unsafe or improperly equipped vehicle.[98] The case was appealed to the Georgia Court of Appeals, and Judge Doyle authored an opinion on the matter.[99] Thereafter, the Georgia Supreme Court granted certiorari to address two questions:

> (1) Did the Court of Appeals err in concluding that text messages sent to the cell phone found in [defendant's] possession were admissible as party admissions? (2) Did the Court of Appeals err in concluding that the trial court did not err in denying [defendant's] motion in limine to exclude the text messages?[100]

The text messages in question were extracted from the defendant's cell phone and reflected several conversations between the defendant and potential drug buyers. Both at trial and in the defendant's appeal to the court of appeals, the defendant contended that all of the text messages from his cell phone constituted inadmissible hearsay.[101] The court clarified that,

> An admission is a statement offered against a party which is . . . [t]he party's own statement . . . Therefore, the outgoing text messages on the cell phone may be considered [defendant's] own statements, as the facts of this case indicate that [defendant] sent the messages. The

95. *Id.* at 87, 799 S.E.2d at 761.
96. 300 Ga. 128, 793 S.E.2d 381 (2016).
97. O.C.G.A. §§ 16-13-20–56.1 (2017).
98. *Glispie*, 300 Ga. at 133, 793 S.E.2d at 385.
99. Glispie v. State, 335 Ga. App. 177, 177, 779 S.E.2d 767, 770 (2015).
100. *Glispie*, 300 Ga. at 128, 793 S.E.2d at 382.
101. *Id.* at 131, 793 S.E.2d at 384.

> incoming text messages, however, are not statements by [defendant]. As such, they do not fall under this hearsay exception.[102]

Therefore, where there is a sufficient argument as to the authenticity of the author of the text messages sent, there is precedent to admit correspondence sent from any number of different modes of electronic media under the hearsay exception for party admissions.[103]

D. Solicitation of Evidence that Opens the Door for Hearsay Exceptions Prevents Subsequent Claims of Error Based on the Admissibility of the Testimony in Question

In *Adkins v. State*, [104] the defendant was convicted of felony murder, possession of a firearm during the commission of a felony, aggravated assault, and possession of a firearm by a convicted felon and was subsequently sentenced to life imprisonment. His conviction stemmed from the murder of Frederick Early and the non-fatal shootings of Briona Moore and Pamphylia Baynes.[105]

On the date in question, Briona Moore and Pamphylia Baynes attempted to take a bus so Baynes could retrieve her disability check. They met Early, also known as "Smurf," who had agreed to give Moore money for bus fare. The three talked for about ten minutes on a street corner before a car drove by and a passenger opened fire on the group. Baynes and Moore were shot but survived. Early died of multiple gunshot wounds.[106]

When interviewed while at the hospital after the shooting, neither Moore nor Baynes could identify the shooter by name. Moore added that the shooter was wearing a ski mask that encumbered her ability to identify the individual. Yet, at trial, both Baynes and Moore identified Adkins as the shooter. Rosalee Smith, another eyewitness to the shooting, together with Moore, testified that Adkins went by the name "Fly Monkey"; further, Baynes testified that Adkins went by the alias "Fly."[107]

On cross-examination, Baynes testified that she heard Early say, "Fly, Fly, Fly," after he was shot just before his death. Adkins claimed this was a case of mistaken identity, and his counsel stressed in closing argument that there was no physical evidence linking Adkins to the shootings and

---

102. *Id.*
103. *Id.*
104. 301 Ga. 153, 800 S.E.2d 341 (2017).
105. *Id.* at 154, 800 S.E.2d at 343.
106. *Id.*
107. *Id.*

emphasized the inconsistent statements of both Baynes and Moore. Nevertheless, the jury found Adkins guilty on all counts.[108]

On appeal, Adkins argued that the trial court erred by permitting the State to introduce Early's purported dying declaration in exception to the hearsay rule.[109] The court of appeals held that Adkins could not obtain reversal on this basis because his counsel elicited the testimony in question.[110] In so holding, the court made it clear that,

> The State argues that any error in the admission of Early's statement through Baynes's testimony was induced, as the testimony was elicited by defense counsel. A defendant generally cannot complain on appeal about the admission of evidence that he introduced himself, even when he does so after the trial court has overruled his objection to the admissibility of that evidence.[111]

The court's ruling places defense counsel in a difficult position when deciding on how to proceed where there are serious concerns regarding the admissibility of certain testimony that is unsolicited from opposing counsel but is, all the same, placed in front of the jury and is damaging to the defense. Essentially, the defendant's counsel must choose one of two tactics. First, the defense can take the approach of "getting in front of the testimony" by attacking it on cross and, thus, risk losing the ability to appeal the admission of the evidence. Second, counsel can choose to try and re-direct the case to de-emphasize the importance of the testimony at issue in hopes of subsequently attacking the admission of the evidence on appeal. As such, *Adkins* demonstrates that there is significant value to the prosecution leading a witness to recognize the value in certain testimony and get them to offer it at trial without any solicitation on the State's part.

V. CONCLUSION

This year's survey period produced a wide variety of decisions that lend support to litigators who continue to adjust to the influence of the federal rules following the changes made in 2013. Certainly, this period continues to provide greater guidance for some of evidence law's most nuanced and nascent areas.

---

108. *Id.*
109. *Id.* at 154, 800 S.E.2d at 344.
110. *Id.*
111. *Id.* at 156, 800 S.E.2d at 344.