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Interpretations of Georgia's New Evidence Code – Hearsay and Character Evidence

by John Hadden

Georgia's new Evidence Code went into effect on Jan. 1, 2013, for all trials and proceedings held on or after that date. While the transition was immediate in the trial courts, the delay between trial court judgments and appellate review has meant that the appellate courts have continued to apply the prior Code in many cases decided before 2013 that are only now before them. Increasingly, however, the appellate courts have had the opportunity to address questions raised under the new Code. Two of the subjects receiving the most significant revisions under the new Code concern character evidence, particularly the new Code's treatment of certain "other acts" of parties (sometimes referred to as "prior bad acts" or "similar transactions"), and hearsay, including Sixth Amendment Confrontation Clause issues. This article will discuss a number of significant recent decisions of the Georgia Supreme Court and Court of Appeals analyzing these subjects.

Character Evidence – Other Acts of Defendants

A major revision to evidence law under the new Code concerns the introduction of evidence of other acts, predominantly in criminal cases. Previously, Georgia law permitted introduction of evidence of other acts if relevant to a party's "bent of mind" or "course of conduct," concepts subject to varying judicial interpretations that could leave substantial uncertainty for litigants, and which could, arguably, implicate the character of a party, despite general, though not absolute, prohibitions against that sort of evidence. The new Code, at O.C.G.A. § 24-4-404(b), does not list these two subjects as matters permitting the introduction of bad acts. Instead, the statute lists a non-exclusive list of proper bases for introducing such evidence: proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *Bradshaw v. State*,[1] the Supreme Court adopted the Eleventh Circuit's three-part test to determine admissibility of "other acts" evidence, citing *United States v. Ellisor*.[2] Under the *Bradshaw* test, in order for "other acts" evidence to be admitted under 404(b), the following conditions must be met: (1) the evidence must be relevant to an issue other than defendant's character; (2) the probative value must not be substantially outweighed by its undue prejudice; and (3) the government must offer sufficient proof so that the jury could find that defendant committed the act.

Although the test is a straightforward application of the statutory text of O.C.G.A. §§ 24-4-403[3] and 24-4-404, its formal articulation provides a specific framework for parties seeking to introduce or object to such evidence and for courts ruling on admission. As to the third prong, the Supreme Court noted that the State was required to show that a jury could have found that the defendant committed the other act by a preponderance of the evidence, again citing Eleventh Circuit authority.[4] A conviction or guilty plea is not required.

Shortly after its decision in *Bradshaw*, the Supreme Court further analyzed the admissibility of evidence under

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O.C.G.A. § 24-4-404(b) in the context of general intent crimes, in which the state is required to prove only intent to commit an act, and not the intent to commit the resulting crime. Driving under the influence (DUI), for example, is a general intent crime. Analyzing the issue in 2014 in the DUI context, the Court of Appeals held that other acts were not generally admissible under 404(b) with respect to general intent crimes, at least to the extent of proving intent or knowledge, because it found that no culpable mental state was required to commit the crimes, and the past DUI did not elucidate, in the case being prosecuted, whether the defendant committed the crime again.[5] The Supreme Court disagreed. In *State v. Jones*,[6] it held that O.C.G.A. § 24-4-404(b) was applicable to both general and specific intent offenses, and remanded the case to the Court of Appeals for analysis under the *Bradshaw* test. The Supreme Court noted that the defendant's intent to commit the act was placed in issue by virtue of his not guilty plea, and it concluded, under the first prong of *Bradshaw*, that such evidence could be relevant for a number of permissible purposes.

Finally, in *State v. Frost*,[7] the Supreme Court addressed a distinct aspect of admissibility of other DUI offenses. O.C.G.A. § 24-4-417 specifically provides for the admission of prior DUIs in cases where (1) the accused refuses to submit to, or provide an adequate breath sample for, the state-administered alcohol test, or (2) the identity of the driver is in dispute. The Court held that, as to the first category of cases (a refusal or inadequate sample), evidence of prior DUIs was generally admissible, and not limited to cases where the prior acts were relevant to issues related to the state-administered test. Taken together, *Jones* and *Frost* stand for the broad admissibility of other acts in DUIs as well as other general intent crimes, subject to the *Bradshaw* analysis set forth last year.

Hearsay and the Confrontation Clause

Another significant aspect of the 2013 Evidence Code concerns the admissibility of hearsay. As summarized below, the appellate courts have begun to address a number of issues related to hearsay, including application of the business records exception and consideration of Confrontation Clause issues when hearsay is offered against a criminal defendant.

Business records exception: Among the more widely-applicable changes to the Evidence Code were those related to the business records exception. The 2013 Code revised this exception in two key respects: business records can now contain opinions and diagnoses, strictly prohibited under older law, and the foundation for business records can be laid through a written certification (subject to quite specific requirements), instead of requiring testimony as before.[8] This means, as a practical matter, that medical records and other records are far more likely to be admitted due to the reduced cost and increased usability of records containing opinions.

Under pre-2013 law, the Courts had taken a relatively liberal view toward admission of business records that contained records of *other* businesses. Thus far, the appellate courts appear to have retained this approach, at least with respect to successor entities. In *Ware v. Multibank 2009-1 RES-ADC Venture, LLC*,[9] the Court of Appeals noted, citing federal authorities, that "bank records are particularly suitable for admission" under the business records exception, and permitted the records of a predecessor bank to be admitted as part of the successor's business records. This principle was reiterated in *Triple T-Bar, LLC v. DDR Southeast Springfield, LLC*,[10] also involving records from a predecessor. Notably, the Court also favorably quoted pre-2013 authority for the proposition that where "routine, factual documents made by one business are transmitted and delivered to a second business and there entered in the regular course of business of the receiving business," the records of the other business could properly be admitted as part of the business records of the second business. Although this issue was not squarely before the Court, it appears that prior law regarding non-predecessor, separate entities, may well continue to be admissible under the modified evidence rules.

Another recent case points to an important consideration regarding the admissibility of certain business records, particularly financial records. Financial institutions often store information in a format that permits production of a consolidated and simplified report based on the underlying data. In *Roberts v. Community & Southern Bank*,[11] the Court of Appeals rejected the argument that certain account information produced as a "loan history report" was a summary rather than an original business record. Although summaries of voluminous records are admissible under O.C.G.A. § 24-10-1006, the rule requires that the underlying records be made available or else the summary may be excluded.

With respect to banking records, the *Roberts* court held that the report was admissible, noting that it listed the entire history of a loan in detail prepared from records of a predecessor and therefore qualified as a business record in the form of a data compilation as permitted by O.C.G.A. § 24-8-803(6). The *Roberts* court distinguished this type of record from a mere summary, which had been excluded in the earlier case of *Capital City Developers LLC v. Bank of North Georgia*,[12] decided under prior (but similar) law, in which the Court excluded purported business records because "[t]hese printouts are not such records; they are summaries of such records." Because the distinction between summaries and record compilations may be unclear, where admission of business records are critical, litigants should ensure that the underlying records are available.

The Court of Appeals has also recently analyzed the application of the business records exception to a distinct type of record: a shoplifting report prepared by a store's loss-prevention manager. In *Thompson v. State*,[13] the Court of Appeals ruled, over a vigorous dissent, that the report could be admitted in a criminal prosecution. Although the majority agreed that a report prepared in anticipation of prosecution or litigation could not be admitted as a business record (citing the Supreme Court's earlier decisions in *Rackoff v. State*[14] and *Stewart v. State*[15]),

it held that the business was not a party to the prosecution and that, as to that business, the report was prepared in the regular course of business. The dissent disagreed, contending that the inquiry should instead be whether the activity recorded in the business record involved the systematic conduct of the business, citing the United States Supreme Court's decision in *Palmer v. Hoffman*.[16] Reports of extraordinary events that could lead to litigation, it argued, did not fall into this category and should be inadmissible. Despite the outcome of this decision, the Court's division suggests that interpretation of what constitutes the "regular course of business" may not be fully resolved.

Confrontation clause challenges: In criminal cases, admission of hearsay, even where an exception applies, raises the additional question of whether the evidence violates the defendant's Confrontation Clause rights when cross-examination is not available. In *Crawford v. Washington*,[17] the United States Supreme Court developed a new jurisprudential articulation of this issue, holding that such statements violate the Confrontation Clause to the extent that they are "testimonial" in nature. The Georgia Court of Appeals has addressed this issue in at least two contexts: under the doctrine of "forfeiture by wrongdoing" and under the present sense impression hearsay exception.

In *Brittain v. State*,[18] the Court of Appeals addressed the question of whether a statement admitted under the "forfeiture by wrongdoing" doctrine could be admitted. Under this doctrine, a witness's out-of-court statement may be used against a party where that party has procured the witness's absence. Although *Brittain* applied the pre-2013 Evidence Code, the Court expressly noted that the doctrine had been codified in the new Code at O.C.G.A. § 24-8-804(b)(5), and that testimony offered under this exception was admissible against an accused notwithstanding Sixth Amendment Confrontation Clause issues, consistent with prior United States Supreme Court precedent.[19]

In *Owens v. State*,[20] the Court held, citing pre-2013 authority, that statements made in the course of a 911 call could be deemed nontestimonial, and therefore proper evidence over a Confrontation Clause challenge, if "the telephone call is made to avert a crime in progress or to seek assistance in a situation involving immediate danger." Finding that the call also fell within the present sense impression hearsay exception codified at O.C.G.A. § 24-8-803(1) of the new Evidence Code, the Court affirmed admission of the hearsay statement.

Conclusion

Although we remain in the early days of the new Georgia Evidence Code, the decisions being issued from the appellate courts are likely to shape the state of evidence law for years to come. This is particularly true in areas such as those discussed in this article, where prior law underwent substantial changes. As more cases reach the appellate courts, litigants should be prepared to remain watchful for new decisions that may alter long-standing prior law in response to the new statutory rules.

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(Endnotes)

1 *Bradshaw v. State*, 296 Ga. 650, 769 S.E.2d 892 (2015). Cf. *Olds v. State*, 299 Ga. 65, 786 S.E.2d 633 (2016) (clarifying application of *Bradshaw* decision).

2 *United States v. Ellisor*, 522 F.3d 1255, 1267 (11th Cir. 2008). *Ellisor* addressed application of Federal Rule of Evidence 404(b) as it existed at the time, which was essentially identical to O.C.G.A. § 24-4-404(b). The Federal Rules were "restyled" in 2011 and no longer match verbatim the Georgia rules, but the changes did not alter the substance of the rules.

3 O.C.G.A. § 24-4-403 is simply the codification of Georgia's common-law "balancing test," which allows a court to exclude otherwise relevant evidence where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

4 *United States v. Edouard*, 485 F.3d 1324, 1345 (11th Cir. 2007).

5 *Jones v. State*, 326 Ga. App. 658, 757 S.E.2d 261 (2014).

6 *State v. Jones*, 297 Ga. 156, 773 S.E.2d 170 (2015). Cf. Olds v. State, 299 Ga. 65, 786 S.E.2d 633 (2016) (clarifying application of *Bradshaw* decision).

7 *State v. Frost*, 297 Ga. 296, 773 S.E.2d 700 (2015).

8 O.C.G.A. § 24-8-803(6); *see also* O.C.G.A. § 24-9-902(11, 12) (establishing authentication requirements for business records).

9 *Ware v. Multibank 2009-1 RES-ADC Venture, LLC*, 327 Ga. App. 245, 758 S.E.2d 145 (2014).

10 *Triple T-Bar, LLC v. DDR Southeast Springfield, LLC*, 330 Ga. App. 847, 769 S.E.2d 586 (2015).

11 *Roberts v. Community & Southern Bank*, 331 Ga. App. 364, 771 S.E.2d 68 (2015).

12 *Capital City Developers LLC v. Bank of North Georgia*, 316 Ga. App. 624, 730 S.E.2d 99 (2012).

13 *Thompson v. State*, 332 Ga. App. 204, 770 S.E.2d 364 (2015).

14 *Rackoff v. State*, 281 Ga. 306, 637 S.E.2d 706 (2006).

15 *Stewart v. State*, 246 Ga. 70, 268 S.E.2d 906 (1980).

16 *Palmer v. Hoffman*, 318 U.S. 109 (1943).

17 *Crawford v. Washington*, 541 U.S. 36 (2004).

18 *Brittain v. State*, 329 Ga. App. 689, 766 S.E.2d 689 (2014).

19 *See Giles v. California*, 554 U.S. 353 (2008).

20 *Owens v. State*, 329 Ga. App. 455, 765 S.E.2d 653 (2014).