

CARLSONS' corner

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*Professor Ronald L. Carlson
University of Georgia
School of Law*



*Michael S. Carlson
Assistant District Attorney
Augusta Judicial Circuit*

Prior Bad Act Impeachment: Shielding the State's Witnesses from Improper Attack

By Ronald L. Carlson and Michael S. Carlson

As the level of civility in society at large unravels, it is no surprise that the politics of personal destruction have made their way into our courtrooms. "Attack your accuser," is customary strategy in election campaigns and in criminal courts. And, as has been demonstrated in both politics and high profile cases, the strategy is often quite effective. Accordingly, if a witness has a matter in his or her past which triggers a question that begins with the phrase, "Aren't you the same person who..." the State is looking at a problem.

When mud is slung at State witnesses, it is imperative that prosecutors have at their disposal the needed shields to protect their cases from damaging slings and arrows. Georgia law provides the materials to construct a protective web around State's witness. Unwarranted attacks can be diverted. It is up to the prosecutor, however, to impose barriers to improper impeachment.

"Specific Act" Impeachment Not Allowed

Suppose that in a murder trial a State's witness is asked on cross, "Are you the same John Jones who was arrested for criminal trespass in this county three years ago?" The best tool for deflecting such questions is Georgia's stringent rule against impeachment by specific incidents which did not result in a conviction. Specific prior bad acts are generally disallowed.¹

Similarly, Georgia's "rape shield" statute precludes individual instances of past sexual behavior of the victim from being introduced.² The exception to this under the statute is where the past conduct directly involved the accused and could have reasonably led to an impression of consent.³

The foregoing principles have been applied in a variety of contexts to prevent collateral attacks on witness credibility. In a battery prosecution, evidence that the victim had been involved in an affair nine years earlier, and had blackmailed the man involved, related strictly to specific bad acts, rather than general bad character, and was not allowed.⁴ Along those lines, the rape shield statute barred a defendant from cross-examining a thirteen year old victim concerning her past sexual activity with other males.⁵

Law Enforcement Officers

What if a defense lawyer waxes F. Lee Bailey-esque and decides to delve into purported acts of misconduct by the investigating officers? Can defense counsel defeat the State's case by ripping the police? What if an unrelated instance of officer misconduct appears in her personnel file? Will the defense be able to inject the issues of professional malfeasance?

Georgia law provides the same protection to members of law enforcement that it does other witnesses. Courts have ruled that impeachment by the way of information contained in an officer's personnel file is not allowed.⁶ This decision is hardly aberrational. Appellate court holdings preclude challenging an officer's credibility on the basis of unrelated alleged acts of misconduct⁷. They have disallowed questions concerning officer misconduct generally.⁸ Evidence of investigations into officer conduct are also generally irrelevant.⁹

The Statutory Parameters of Propriety

Georgia statutory law is clear that while a witness may be impeached concerning general bad character as it applies to believability, "particular transactions...shall not be inquired of."¹⁰ This code provision allows for an individual to take stand and say that Witness X has bad character generally, but precludes that same witness from getting into specifics that might support the conclusion.¹¹

Working hand in hand with the impeachment rules of O.C.G.A. § 24-9-84 is the Georgia law of relevance.¹² Those rules state the conduct in other matters of the parties to a case are generally irrelevant.¹³ Another Georgia statute commands that witnesses have the "right" to be examined only as to relevant matters.¹⁴ As indicated by the Georgia Supreme Court, trial judges are given considerable latitude in making determinations as to what is and is not relevant.¹⁵

Self Defense Cases

A defendant who claims he was defending himself must observe the general rules against specific bad act impeachment. For example, in

an assault case, the defense was not allowed to introduce testimony concerning prior bad acts of the victims.¹⁶ However, self defense cases provide an important exception to the “no specific acts to impeach” doctrine. The exception is narrow, but significant.

In self defense cases, the general reputation for violence on the part of a victim is only admissible if three elements are present: it is claimed that the victim was the assailant; that the victim assailed defendant; and that defendant was honestly seeking to defend himself.¹⁷ What about specific acts of violence on the victim’s part?

Specific acts of violence of the victim against the defendant are admissible to demonstrate the defendant was acting in self defense.¹⁸ Even attacks against third parties can be covered by this rule.¹⁹ The requirement is that the prior acts must be specific acts of violence against a human being. Brutality to animals, for instance, does not usually satisfy the standard.²⁰

Convictions Excepted

In one area, specific bad acts are regularly admissible. Particular instances of misconduct may be used to impeach a witness’ credibility if those acts resulted in a crime of moral turpitude.²¹ This requires the introduction of a certified copy of the witness’ conviction.²² Accordingly, an arrest or indictment alone will not suffice.²³ Similarly, a guilty plea with a first offender act disposition did not qualify as a conviction for general credibility impeachment purposes.²⁴ Juvenile court adjudications of delinquency also do not constitute impeachable convictions.²⁵

Interestingly, unless a there is an attempt to rehabilitate the witness who is impeached by a prior felony conviction, there can be no cross-examination concerning its underlying facts.²⁶

Other Charges Showing Bias

If a prosecution witness testifies while awaiting disposition of a pending criminal case, he can be asked: “Aren’t you the same John Jones who is facing charges for shoplifting, which crime occurred two months ago?” Note that the shoplifting case is current, and unresolved.

Charges against a witness can be admitted if they demonstrate some sort of bias on the witness’ part. A 1999 case illustrates. Where a question concerning a pending charge pertained to a possible motive to fabricate in order to receive favorable treatment from the State, the appellate court held that the trial court erred in refusing to allow the inquiry.²⁷

Notice Requirements

In order for the defense to enter evidence or testimony concerning a victim’s acts of violence against third parties, the Uniform Rules of Superior Court require service of notice upon the State.²⁸ Required is ten days written notice and details concerning the act, its date, county, and time, as well as the name, address and telephone number of any witnesses who will establish that the victim or witness committed the act. Failure to abide by these rules can lead to exclusion of the proffered testimony.²⁹ The fact that the State may or may not have

been aware of the acts in question does not eliminate the need for the defense to provide the required notice.³⁰

Under the rape shield statute, a hearing is required in order to determine if the proffered evidence pertaining to the victim’s past sexual conduct is highly material. The evidence usually must go to the issue of whether the previous acts could have led the accused to believe that the victim consented. There must be a finding that admission of the evidence is mandated by justice.³¹

Strategy

When counsel for the State anticipates that the defense intends to present prior bad acts evidence, a motion in limine to prevent the defense from doing so should be considered. A sample of such a motion is included in the forthcoming edition of *Trial Handbook for Georgia Lawyers*. Any judicial order which grants protection to the witness should preclude the use of the information at all stages of the trial—opening statements, evidentiary steps, and closing argument.

At a minimum, counsel should go to court with cases at the ready and poised to object.

Conclusion

Collateral attacks on witness credibility based on specific bad acts is attempted ever more frequently in criminal trials. However, the tactic can often be stymied with proper use of the protective measures existing in Georgia law.

Endnotes

¹ *Gordillo v. State*, 255 Ga. App. 73, 564 S.E. 2d 486 (2002).

² O.C.G.A. § 24-2-3.

³ *Brown v. State*, 260 Ga. App. 77, 579 S.E. 2d 87 (2003).

⁴ *Wetta v. State*, 217 Ga. App. 128, 456 S.E. 2d 696 (1995).

⁵ *Green v. State*, 221 Ga. App. 436, 472 S.E. 2d 1 (1996).

⁶ *Brooks v. State*, 182 Ga. App. 144, 355 S.E. 2d 435 (1987).

⁷ *Woods v. State*, 210 Ga. App. 172, 435 S.E. 2d 464 (1993).

⁸ *Gaston v. State*, 209 Ga. App. 477, 433 S.E. 2d 306 (1993).

⁹ *Chapman v. State*, 215 Ga. App. 340, 449 S.E. 2d 903 (1994).

¹⁰ O.C.G.A. § 24-9-84.

¹¹ *Johnson v. State*, 244 Ga. App. 128, 534 S.E. 2d 480 (2000).

¹² O.C.G.A. § 24-2-1.

¹³ O.C.G.A. § 24-2-2.

¹⁴ O.C.G.A. § 24-9-62.

¹⁵ See generally, *Sorrells v. State*, 267 Ga. 236, 476 S.E. 2d 571 (1996).

¹⁶ *Heaton v. State*, 214 Ga. App. 460, 448 S.E. 2d 49 (1994).

¹⁷ *Dubose v. State*, 187 Ga. App. 293, 369 S.E.2d 924 (1988).

¹⁸ *Joiner v. State*, 204 Ga. App. 592, 420 S.E.2d 73 (1992).

¹⁹ *Prather v. State*, 275 Ga. 268, 564 S.E.2d 447 (2002).

²⁰ *Marks v. State*, 210 Ga. App. 281, 435 S.E. 2d 703 (1993).

²¹ *Hawes v. State*, 266 Ga. 731, 470 S.E. 2d 664 (1996).

²² *Smith v. State*, 222 Ga. App. 366, 474 S.E.2d 272 (1996).

²³ *Syffrett v. State*, 210 Ga. App. 185, 435 S.E. 2d 470 (1993).

²⁴ *Matthews v. State*, 268 Ga. 798, 493 S.E. 2d 136 (1997).

²⁵ *Baynes v. State*, 218 Ga. App. 687, 463 S.E.2d 144 (1995).

²⁶ *Vincent v. State*, 264 Ga. 234, 442 S.E.2d 748 (1994).

²⁷ *Nealy v. State*, 239 Ga. App. 651, 522 S.E. 2d 34 (1999).

²⁸ U.S.C.R. 31.1 and 31.6.

²⁹ *Young v. State*, 228 Ga. App. 233, 491 S.E. 2d 404 (1997).

³⁰ *Johnson v. State*, 270 Ga. 234, 507 S.E. 2d 737 (1998).

³¹ *Brown v. State*, 214 Ga. App. 676, 448 S.E. 2d 723 (1994).