

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JANUARY 20, 2017

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## THIS WEEK:

• **Prior Acts Evidence; O.C.G.A. § 24-4-413**

### **Prior Acts Evidence; O.C.G.A. § 24-4-413**

*Kritlow v. State, A16A1093 (11/9/16)*

Appellant was convicted of aggravated sodomy, aggravated sexual battery, aggravated assault, false imprisonment, and sexual battery. The evidence showed that appellant was working as a mover in the victim's house. Appellant forced the victim into an upstairs bathroom where he assaulted her.

Appellant contended that the trial court erred in admitting the evidence of his two prior sexual assaults. The Court noted that the new evidence code provides that “[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.” O.C.G.A. § 24-4-413(a). The language of this provision was intended to create a “rule of inclusion,” with a strong presumption in favor of admissibility as it provides that such evidence “shall be admissible.”

Here, the State sought to introduce the prior sex crimes evidence for purposes of showing appellant’s intent and lustful disposition. O.C.G.A. § 24-4-401 deems evidence relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. With regard to intent, a defendant who enters a not guilty plea makes intent a material issue. Moreover, evidence

that an accused committed an intentional act generally is relevant to show — the evidence, in other words, has some tendency to make more or less probable — that the same defendant committed a similar act with the same sort of intent, especially when the acts were committed close in time and in similar circumstances. Thus, the trial court correctly ruled that the prior sex crimes evidence was relevant to the issue of intent.

As for lustful disposition, the Court stated that although it is not one of the purposes specifically set out in O.C.G.A. § 24-4-404(b) for the admission of other acts, O.C.G.A. § 24-4-413 provides an exception to the general rule in sexual assault cases and allows the admission of such propensity evidence. Thus, the provisions of O.C.G.A. § 24-4-413(a) supersede the provisions of O.C.G.A. § 24-4-404(b) in sexual assault cases.

Moreover, the Court noted, appellant claimed that the victim was not credible, that her testimony was inconsistent with other evidence, and that she fabricated the assault. Accordingly, the evidence that appellant had committed similar sexual assaults was relevant because 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 appellant preyed on women in the victim’s circumstance of being in a place where appellant could force them into a smaller room and bar a door preventing escape. Thus, the evidence satisfied O.C.G.A. § 24-4-413’s relevance threshold.

Nevertheless, appellant argued, the prior acts evidence must be excluded because under O.C.G.A. § 24-4-403, relevant evidence may be excluded where its probative value is

substantially outweighed by the danger of unfair prejudice. But, the Court found, it did not in this case need to decide whether that provision of O.C.G.A. § 24-4-403 applied to evidence admissible under O.C.G.A. § 24-4-413(a) because even if it assumed, without deciding, that it did apply, given the circumstances of this case, the trial court did not abuse its discretion in finding that the probative value of the evidence of appellant's prior crimes was not substantially outweighed by its prejudicial effect and in admitting the evidence of appellant's two prior guilty pleas.