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THE Georgia FAMILY VIOLENCE Resource Newsletter

A PUBLICATION OF THE PROSECUTING ATTORNEYS' COUNCIL OF GEORGIA DOMESTIC VIOLENCE AND SEXUAL ASSAULT PROGRAM
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Our Mission

The goal of PAC's Domestic Violence and Sexual Assault Program is to effectively assist and be a resource to prosecutors, law enforcement and victim advocates across Georgia; to improve the effective adjudication of domestic and sexual violence cases; and to reduce such crimes across our state.

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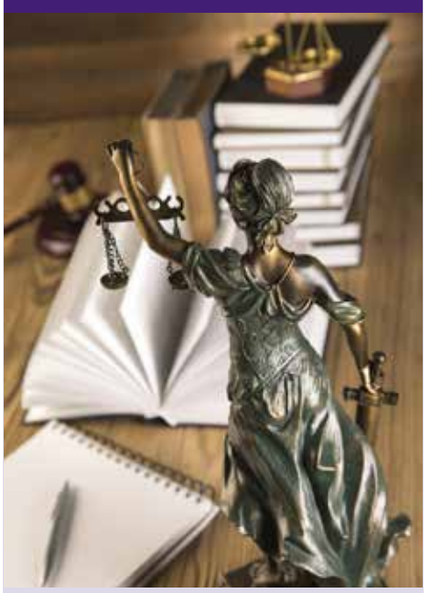

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The Residual Exception

By Tarrea Williams, Legal Intern
Prosecuting Attorneys' Council of Georgia

From 2003 – 2015, at least 1,550 Georgia citizens died as a result of domestic violence, and in 2016, there were 141 deaths, an increase of 17.5% from the previous year.[1] Although those victims are no longer here to testify regarding their abuse, their testimony may still be used to convict their abusers. The State has tools in its toolbox that can be used to secure a conviction against the defendant. In certain situations, the State can use the hearsay statements of their victim to tell the victim's story when the victim is unwilling to or unable to tell it themselves.

The Residual Exception Under Georgia Law

The Residual Exception, formally known as the necessity exception, was codified in the new Evidence Code in 2013. It expanded the admission requirements of the old necessity exception to include the requirement that the proponent of the statement provide notice. See O.C.G.A. 24-8-807. The Court of Appeals upheld the admission of such non-testimonial hearsay evidence in *Sneiderman v. State, 336 GA. App.153, 164 -165 (2016).* In *Sneiderman*, the State admitted the non-testimonial statements of the defendant made to his real estate agent about his developing romantic relationship with Andrea Neuman in order to establish the defendant's motive for killing the victim.

Non-testimonial hearsay evidence may be admitted under the Residual Exception set forth in O.C.G.A § 24-8-807, as follows:

A statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule, if the court determines that: the statement is offered as evidence of a material fact; the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this Code section unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer statement and the particulars of it, including the name and address of the declarant.[2]

In order to establish "particular guarantees of trustworthiness", the proponent must demonstrate that, the declarant's truthfulness is *so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility*." [3] Trustworthiness is assessed under the totality of the circumstances, including any motives the declarant may have had to be untruthful in making the statement, the consistency of the statement with other statements made by the declarant; and the extent to which the declarant enjoyed a relationship of confidence with the witness.

Residual Exception Cases

In determining whether hearsay evidence should be admitted under the necessity or residual exception, the most contested element has been the circumstantial guarantees of trustworthiness. In *Rai v. State*, 297 Ga. 472 (2015), the appellant was convicted of the murder of his daughter-in-law because he disapproved of his son's marriage outside the native Punjabi culture.[4] The State offered testimony made by the victim to her aunt, grandmother, and sister regarding Rai's disapproval of the victim's relationship with his son due to racial and cultural differences, and that the couple moved to Atlanta in order "to get away from" the Rais.[5] The Court held that the statements bore sufficient indicia of trustworthiness, because they were made to family members who shared a close and confidential relationship with the victim. The Court added, "that supportive of the statements' reliability is the fact that the statements to all three witnesses were consistent with one another and there was no evidence that the victim ever contradicted herself in speaking of her relationship with the appellant or recanted or refined her views on this issue over time."[6]

This newsletter is a publication of the Prosecuting Attorneys' Council of Georgia and was made possible by a Grant from the Criminal Justice Coordinating Council. PAC encourages readers to share varying viewpoints on current topics of interest. We invite law enforcement, prosecutors and victim advocates to write an article for publication. The views expressed in this publication are those of the authors and not necessarily of the State of Georgia, PAC or the Council staff. Please send comments, suggestions or articles to Sharla Jackson at sdjackson@pacga.org.

In *McNaughton v. State,* 290 Ga. 894 (2012), appellant fatally stabbed his wife in the office of their home.[7] The Court examined the testimony of multiple witnesses, which included the victim's daughters, sister, hairstylist, mental health nurse, sister-in-law, and co-workers. The testimony consisted of statements made by the victim concerning appellant's abuse of her and her desire to divorce appellant. The Court found that the testimony of the victim's daughters was admissible, since it exhibited particularized guarantees of trustworthiness because the evidence showed these witnesses had close familial relationship with the victim and she regularly confided in them about personal matters.[8] The testimony by the hairstylist was admitted because the hearsay testimony by close personal friends of the victim with whom the she shared personal confidences is admissible under the necessity exception.[9] Even though the victim was not particularly close to her mental health nurse or her supervisor at work, the statements were part of spontaneous exchanges for which she had no reason to lie, and the statements corroborated her visible injuries. Therefore, considering the totality of the circumstances the Court found no abuse of discretion by the trial court's admission of the hearsay testimony.[10]

In *Gibson v. State*, 290 Ga. 6 (2011), appellant shot his wife and announced she was dead while speaking to the man he believed to be having an affair with his wife. The victim's friend and co-worker testified about the appellant bleaching the victim's clothes while holding her at gunpoint and the victim's intent to divorce the appellant.[11] While the witness and the victim only knew each other for six months, they regularly confided in each other about personal matters. The victim had no reason to lie to the witness and the statements were made during routine conversations regarding the victim's personal matters.[12] The Court held that, the trial court did not abuse its discretion by holding that the testimony bore sufficient indicia of trustworthiness.[13]

In *Watson v. State,* 278 Ga. 763 (2004), a case decided under the old Evidence Code the appellant murdered his wife and reported her missing to the police. The victim's partial skeletal remains were found in a wooded area two years after her disappearance. The Court held that based on the totality of the circumstances, the admission of hearsay testimony was proper.[14] In this case, the trial court conducted a two-day pre-trial hearing evaluating the credibility of the victim's friends, who testified to the victim's statements regarding episodes of physical and mental abuse; and threats made by the appellant. The Court noted that, it had consistently held that hearsay testimony by close, personal friends of an unavailable declarant is admissible under the necessity exception, citing numerous cases.[15] The Court further found sufficient indicia of reliability, finding that the witnesses were longtime friends with the victims and they regularly confided in each other about personal matters. Therefore, the trial court was authorized to find that the statements that were made to these witnesses contained particularized guarantees of trustworthiness.[16]

In *Williams v. State*, 299 Ga. 209 (2016), trial court allowed a witness to testify about a conversation the victim had with appellant, in which the victim told the witness that, "appellant thought the victim was messing around with [appellant's] girlfriend, and it made him feel weird, that he really didn't want to be around [appellant], … he just didn't feel safe around him."[17] The Court found, "the witness statement was relevant to the material fact of the motive for shooting the victim – his belief that the victim was involved with [appellant's] girlfriend. The statement was more probative on this point than other available evidence. There is no indication that the State could have procured other evidence on this point; and the testimony at trial indicated that no witness heard the relevant portion of the conversation between appellant and victim at the party."[18] Furthermore, Court found that the witness' statement bore significant indicia of trustworthiness because the witness was the victim's cousin for whom he had "close feelings"; victim had no apparent motive to fabricate the statement; and the victim told the witness shortly after the conversation with the appellant.[19].

In *Smart v. State*, 299 Ga. 414 (2016), appellant beat his wife to death. trial court admitted hearsay evidence under the residual exception. The evidence admitted included the victim's statements to her friends, the victim's "letters to God", and the victim's text messages to friends and family. Witnesses testified that the appellant slashed the victim's tire and beat the victim with a suitcase when she announced her intention to leave the marriage.[20] The Court upheld the admission of the statements, finding that found that any error in admitting those statements was neither clear nor obvious.

> We cannot say that statements from a wife to her friends or family, or her own writings, which describe acts of domestic violence, do not, in fact, bear an increased level of trustworthiness. Likewise in light of the often-secretive nature of domestic violence, we can also envision that such statements might be highly probative.[21]

These cases clearly demonstrate that in family violence cases, the residual exception is an important tool that is especially useful in establishing key facts supporting domestic violence charges, when the victim is unwilling or unavailable to testify about the abuse. The residual exception allows the victim to speak through family, friends, co-workers, or others, with whom the victim had a close relationship and shared personal matters. The Court looks at the totality of the circumstances when such evidence is offered through witnesses who did not have a close, personal relationship with the victim.

Preparing The Residual Exception Case; Where to Look for Evidence

The Office of Violence Against Women defines domestic violence as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner."[22] When prosecuting domestic violence cases, it is important to consider that the victim may have been living with this abuse long-term. Thus, a prosecutor should: First, identify friends or family members that may be effective State's witnesses as they are often the best source of information about the effect of the defendant's influence over the victim. It is not unusual for these witnesses to be aware of possible statements made by the victim or other evidence helpful to the case. Second, identify neighbors, work supervisors or colleagues. While the relationship between them and the victim may not be as close, the routine manner in which they discuss their personal lives may provide sufficient indicia of reliability to make the evidence admissible.[23] Next, locate and document all reported and unreported incidents of abuse between the defendant and the victim that may show an ongoing pattern of abuse. Finally, consider other sources of evidence such as jail calls, letter, threats, violation of protective orders (even if the victim participates in the violation). If these incidents are not admitted under the Residual Exception, they may still be admitted as prior difficulties[24] under O.C.G.A. § 24-4-404(b) or used as evidence of consciousness of guilt, motive or intent.

The Procedure

In order for witness statements to be admissible under O.C.G.A § 24-8-807 a prosecutor must file written notice to the adverse party that the State wishes to admit hearsay evidence. The notice must be filed sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the State's intention to offer the statement and the particulars of it, including the name and address of the declarant.[25]

Conclusion

In 2014, Georgia law enforcement officers responded to over 65 thousand family violence incidents. In Federal fiscal year 2015, there were over 44,000 crisis calls to Georgia's certified domestic violence agencies.[26] The statistics are alarming; however, the residual exception is a valuable tool to address this crisis by providing prosecutors additional means of going forward with domestic violence cases without the victim. GFV

Don't forget to visit our Training Web page to register for our family violence-related conferences and training courses.

Endnotes

1. *Georgia Commission on Family Violence 2016 Fact Sheet*, See https://gcfv.georgia.gov/annual-stats-facts
2. *Id.*
3. Chapel v. State, 270 Ga. 151, 155-156 (1998)
4. *Rai*, at 134.
5. *Rai*, at 135.
6. *Id.*
7. McNaughton, at 900
8. *Watson*, at 898.
9. *Watson*, at 899.
10. *Id.*
11. *Gibson*, at 8.
12. *Id.*
13. *Gibson*, at 9.
14. *Watson,* at 765.
15. *Id.*
16. *Id.* at 766.
17. *Williams*, at 5.
18. *Williams*, at 6.
19. *Williams*, at 7.
20. *Smart*, at 11
21. *Smart*, at 15.
22. *Georgia Commission on Family Violence 2016 Fact Sheet* See https://gcfv.georgia.gov/annual-stats-facts
23. See *Faircloth v. State* 293 Ga. 134, 138 (2013).
24. *See Lopez v. State, 332 Ga. App. 518 (2015)*
25. O.C.G.A § 24-8-807
26. *Georgia Commission on Family Violence 2016 Fact Sheet* See https://gcfv.georgia.gov/annual-stats-facts

UPCOMING TRAINING EVENTS

April 7, 2017
Court School - Newnan
Coweta Justice Center, Cranford Hall
72 Greenville Street
Newnan, GA 30263

April 26-28, 2017
VWAP Conference
Callaway Gardens
Pine Mountain, GA 31822

May 5, 2017
Family Violence - Ringgold
Walker Co. Housing Authority Meeting Room
300 Oak Street
LaFayette, GA 30728

May 12, 2017
Family Violence - Ellijay
Gilmer County Courthouse
Jury Assembly Room
1 Broad Street, Suite 101
Ellijay, GA 30540

June 16, 2017
Family Violence - Thomson
McDuffie County Government Complex
Commissioners' Meeting Room
210 Railroad Street
Thomson, GA 30824

July 14, 2017
Family Violence - Ashburn
Turner County Sheriff's Department
1301 Industrial Drive
Ashburn, GA 31714

July 16-19, 2017
2017 Summer Conference
Jekyll Island Convention Center
75 Beachview Drive
Jekyll Island, GA 31527

CaseLaw Update

By Sharla D. Jackson, Domestic Violence and Sexual Assault Resource Prosecutor
Prosecuting Attorneys' Council of Georgia

Franklin v. State, A15A2180 (2/2/16)

Appellant was convicted of rape, aggravated sodomy, aggravated assault, aggravated battery, false imprisonment, and the false report of a crime. The evidence, briefly stated, showed that appellant was estranged from his wife. Appellant lured her to a rental home that was a subject of a dispute between them. Appellant then viciously attacked her. At some point after appellant had severely beaten the victim and bound her to the bed, she decided to stop resisting in an effort to calm appellant and persuade him to untie her. She first asked him to untie one of her arms that had become numb and swollen, and then she requested that he untie her legs under the guise that intercourse would "be easier." Over the course of the day, appellant began to suggest that the two of them should again be together as a couple, to which the victim—who was panicking because she had lost a lot of blood from a gash in her head—agreed. She then requested that appellant administer medical aid and agreed to go along with a home-invasion story that appellant concocted in order to receive treatment for her injuries.

Appellant argued that the trial court erred in failing to sua sponte give an instruction on mistake of fact. The Court disagreed. The Court noted that it is true that the trial court must charge the jury on the defendant's sole defense, even without a written request, if there is some evidence to support the charge. And with respect to "mistake of fact," which is an affirmative defense, a person shall not be found guilty of a crime if the act or omission to act constituting the crime was induced by a misapprehension of fact which, if true, would have justified the act or omission. Additionally, because mistake of fact is an affirmative defense, even if it was not appellant's sole defense, if the defense was raised by the evidence, the trial court would have been required to present the affirmative defense to the jury as part of the case in its charge, even absent a request. The affirmative defense, however, would not have to be specifically charged if the case as a whole had been fairly presented to the jury. Moreover, in cases in which a jury finds a defendant guilty of forcible rape after proper instruction, the element of force negates any possible mistake as to consent, such that the court does not err by failing to charge on mistake of fact.

Here, the Court found, the defense of mistake of fact was not reasonably (or even remotely) raised by the evidence when the victim's physical resistance ended and her demeanor changed after being brutally beaten with a baseball bat, threatened at gunpoint, dragged bleeding through a house, ruthlessly bound to a bed, beaten with the bat again after resisting, and lacerated with a box cutter while her clothes were forcibly removed, all while appellant kept a handgun nearby and repeatedly verbally berated the victim. Indeed, a lack of resistance that is induced by fear is not legally cognizable consent but instead constitutes force. And here, because the jury was otherwise properly instructed, and found appellant guilty of forcible rape and forcible aggravated sodomy, the element of force negated any possible mistake of fact as to consent.

Clough v. State, S15A1708 (3/7/16)

Appellant was convicted of malice murder, felony murder (aggravated assault), felony murder (burglary) and numerous other crimes. The evidence, briefly stated, showed that appellant and his wife were separated. Appellant drove by his mother-in-law's home. He banged on the window of the home at 2 a.m. Sometime later, appellant broke into the house and attacked his wife and Watkins, the man she was sleeping with. He stabbed Watkins to death, attacked his wife and mother-in-law, and then fled.

Appellant contended that the trial court erred in refusing to give his requested charge on voluntary manslaughter. The trial court declined to give the charge because appellant entered his mother-in-law's house, a place appellant had no lawful right to be. The Court first found that there was slight evidence that appellant acted out of irresistible passion. The record showed that when appellant came upon his wife and her paramour, appellant stabbed him while yelling "This is what you get for f***ing somebody's wife." Evidence of adulterous conduct can be evidence of "serious" provocation warranting the trial court giving a charge on voluntary manslaughter. What transpired up to the point of the murder of Watkins, including appellant's possible prior knowledge that his wife was having an affair, appellant's possible prior knowledge of Watkins' identity, the parties' separation after fifteen years of marriage, appellant's observing unfamiliar vehicles at his mother-in-law's home, and appellant's unlawful entry in to his mother-in-law's house all go to the sufficiency of the provocation which would excite a reasonable person. When there is evidence of alleged provocation, the sufficiency of the provocation is generally for the jury to weigh and decide, not the trial court.

But here, the Court noted, the trial court stated that the only reason it did not give a charge on voluntary manslaughter was because appellant was at his mother-in-law's house where he had no right to be. Presumably, had the same facts played out at the marital

home, the trial court would have given the charge as requested. This reasoning, the Court found, was an overreach by the trial court. First, O.C.G.A. § 16-5-2(a) does not place such territorial restrictions on its application. Secondly, the trial court's conclusion was essentially a decision about the sufficiency of the provocation, rather than a decision about whether there is any evidence of voluntary manslaughter. Thus, under the circumstances of this case, the trial court should have given the charge as requested and its failure to do so was reversible error.

Accordingly, appellant's conviction and sentence for malice murder was reversed. And, because the malice murder conviction was now reversed, appellant's convictions for felony murder (aggravated assault of Watkins) and felony murder (burglary) were no longer vacated as a matter of law. However, because of the failure to give the charge on voluntary manslaughter, appellant's conviction for felony murder (aggravated assault of Watkins) was also reversed.

Gilreath v. State, S15A1512 (3/21/16)

Appellant was convicted of malice murder and associated crimes in connection with the beating death of two-year-old Joshua Pinckney, the son of his live-in-girlfriend, Miriam Pinckney ("Pinckney"). The evidence, briefly stated, showed that Pinckney had two young children, Joshua and Maria, both of whom were adopted from Guatemala; Pinckney and her children were living with appellant at the time of Joshua's death. Appellant was left to care for the children while Pinckney was at work. However, Pinckney came home at lunch at appellant's request, noticed nothing wrong and went back to work. Pinckney also came home after work and noticed a slight bruise on Joshua's cheek, but still left him in the care of appellant. The next morning, Joshua was found to be unresponsive and the medical examiner determined that Joshua had been severely beaten, sustaining injuries equal to that expected from a car accident, and died as a result of severe trauma to the head. The medical examiner opined that Joshua died somewhere between four and twelve hours before he was found, though eight-to-ten hours was most likely; the medical examiner also opined that Joshua sustained his injuries somewhere between four and fifteen hours before he died, though eight-to-twelve hours was most likely.

The State moved the trial court to prohibit appellant from eliciting testimony from Pinckney's ex-husband, who testified as a witness for the State, that Pinckney had a history of threatening both children. The State's motion in limine was granted. Appellant made an offer of proof, and the trial court reaffirmed its ruling. Appellant contended that the trial court abused its discretion and the Court agreed.

The Court stated that this case was similar to *Scott v. State*, 281 Ga. 373 (1) (2006), in which the Court held that the trial court prevented the defendant from presenting a complete defense. Here, the Court found, Pinckney's ex-husband, an attorney, would have testified that: he observed Pinckney slap then-infant Maria in the face for refusing to eat breakfast and that he considered reporting the incident to the Department of Human Resources; Pinckney would cuss at the infant children or threaten the children with beatings (though the children were too young to understand); Pinckney had indicated that she wanted to send the children back to Guatemala; and Pinckney had a history of engaging in this type of behavior when she was feeling stressed or angry. This evidence, the Court found, like the evidence in *Scott*, raised a reasonable inference of appellant's innocence and, like in *Scott*, Pinckney's presence in the residence on the day of the murder connected her with the corpus delicti.

The Court further determined that the exclusion of this evidence was not harmless. Thus, the Court found, the State elicited testimony from a variety of witnesses portraying Pinckney as a caring and capable mother. The trial court's ruling not only hamstrung the defense from rebutting testimony that Pinckney was a good mother, but the ruling also prevented appellant, like the defendant in *Scott*, from presenting evidence that the only other person in the house at the time had a history of cruel treatment towards her own children. Therefore, the Court held, the trial court's ruling constituted reversible error. Accordingly, appellant's convictions for malice murder, and count six, cruelty to children in the first degree (premised on cruel and excessive physical pain caused by bruising) were reversed.

State v. Dowdell, A15A2308 (2/23/16)

Dowdell was charged with forcible rape of an adult woman in 2012. Pursuant to O.C.G.A. § 24-4-413, the State sought to admit other acts evidence to show that Dowdell is a sexual deviant. First, in 2002, the State alleged that 18-year-old Dowdell had intercourse with a 13-year-old middle school student on two separate occasions. Dowdell was indicted for child molestation, but he entered an *Alford* plea to the offense of sexual battery. Second, in 2003, Dowdell allegedly molested the 13-year-old sister of one of his friends by touching the girl's vaginal area with his hand and later, during a sleep-over party, by touching her breasts and buttocks with a knife. The State indicted Dowdell for child molestation; however, he ultimately entered a guilty plea to misdemeanor simple battery. The trial court ruled that while the conduct was relevant to show that Dowdell was a sexual deviant, the prejudice of admitting the evidence outweighed its probative value. The State appealed.

First, the State argued that under O.C.G.A. § 24-4-413, the court failed to recognize that the proffered other acts evidence "shall be admissible" because it was relevant to show that Dowdell was a sexual deviant with a lustful disposition and that he was predisposed to commit acts of sexual assault. But, the Court found, even if the court had expressly determined that the evidence met all the requirements for admission pursuant to §24-4-413, the court still had the discretion to exclude it pursuant to O.C.G.A. § 24-4-403.

Second, the State argued, the trial court's application of O.C.G.A. § 24-4-403 to the facts of this case constituted an abuse of discretion because the court applied "the wrong legal standard." Specifically, it contended, the exclusion of the evidence is an extraordinary remedy to be used sparingly. The Court disagreed. The Court found that the trial court believed that the State was attempting to compensate for a weak case by "piling on" bad character evidence of scant probative value in an effort to undermine the presumption of innocence. Moreover, the trial court was clearly concerned that the admission of the other acts would transform what should be a straightforward case into "a trial involving three separate incidents," distracting the jury from the issues central to the crime charged. Therefore, the Court found that the State failed to carry its burden of demonstrating that the court was unaware that excluding evidence under O.C.G.A. § 24-4-403 was an extraordinary remedy that should be applied sparingly or that it misapplied the law to the facts of this case.

Next, the State argued that the trial court erred by stating in its order that it "must" exclude other acts evidence if it finds that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. The State argued that because O.C.G.A. § 24-4-403 provides that a court "may" exclude such evidence, the court failed to recognize that, even if the prerequisites of O.C.G.A. § 24-4-403 are present, then it is permissible, but not mandated, that the evidence may be excluded. But, the Court found, read in context, the trial court, by using the word "must" in its order, was simply recognizing that, although its discretion to exclude evidence under O.C.G.A. § 24-4-403 was narrowly circumscribed, its broad discretion to admit other acts evidence was not absolute.

Finally, the State argued that in conducting its analysis under O.C.G.A. § 24-4-403, the court failed to consider the "prosecutorial need" for the evidence. Again, the Court disagreed. The Court stated that there is no doubt that probative value is, in part, a function of the prosecution's need for the evidence in making its case. But it is also true that the probative value of the extrinsic offense correlates positively with its likeness to the offense charged. Likewise, the more

time separating the charged and prior offense, the less probative value can be assigned the extrinsic evidence. And here, the Court found, the trial court simply disagreed that the other acts evidence was especially probative of those matters, given the lack of similarity between those acts and the charged offense, the decade separating the other acts from the charged offense, and the defendant's immaturity at the time the other acts were committed. On the other hand, the court believed that, under the circumstances, admitting extrinsic evidence of acts of alleged child molestation would lure the jury into finding Dowdell guilty based on proof that was not specific to the crime charged, thereby infecting the proceedings with unfair prejudice and undermining the presumption of innocence. Given that the record supported the court's findings, the Court found no clear abuse of discretion.

Anthony v. State, S16A0059 (4/4/16)

Appellant was convicted of murder. The evidence, very briefly stated, showed that appellant got into a confrontation with the victim, who was having an affair with appellant's estranged wife. When the victim allegedly hit appellant in the head, appellant pulled out a gun he was carrying and shot the victim. Before trial, appellant filed a motion under O.C.G.A. § 16-3-24.2 for immunity from prosecution. Following a hearing, the trial court denied the motion. Appellant argued that the trial court erred when it determined that his justification defense was not strong enough to afford him immunity from prosecution.

The Court noted that the burden in a pretrial immunity hearing is on the defendant to show that he or she is entitled to immunity by a preponderance of the evidence. Here, the Court noted, defense counsel presented the testimony of several witnesses regarding the victim's reputation for violence and a prior threat against appellant, and those witnesses were cross-examined. Defense counsel then stated in his place what he expected that the testimony of appellant and the victim's wife would show about the confrontation between appellant and the victim. The prosecutor then explained what she anticipated would be shown by the State's evidence. She also did not call any witnesses and objected to any ruling on immunity based on defense statements made without any evidence.

The Court noted that attorneys are officers of the court and a statement to the court in their place is prima facie true and needs no further verification unless the same is required by the court or the opposite party. Here, the statements-in-place by appellant's lawyer were not a proper substitute for evidence at the hearing on the motion for immunity because the State did not accept those proffers but rather insisted that appellant prove his immunity with traditional evidence. But, even assuming that the statements-in-place of appellant's lawyer could be considered, there would be no reason why the trial court could not also consider the prosecuting attorney's statements about the confrontation between appellant and the victim. And, the Court found, because the statements of appellant's lawyer and the prosecuting attorney were consistent with the evidence subsequently presented at trial, the trial court certainly was authorized to find that the appellant failed to show self-defense by a preponderance of the evidence. Accordingly, the Court held, appellant failed to meet his burden of showing that he was entitled to immunity under O.C.G.A. § 16-3-24.2.

Goodrum v. State, A15A2007 (2/25/16)

Appellant was convicted of aggravated assault. The evidence showed that he choked the victim. He contended that he should not have been indicted for aggravated assault because the statutory language in effect at the time of his 2013 offense did not prohibit "choking." The Court disagreed. In 2014, the Legislature amended O.C.G.A. § 16-5-21 to specifically provide that aggravated assault occurs when a person assaults "[w]ith any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in strangulation." The former version of the statute contained no reference to strangulation. But, the Court stated, this does not mean that prior to 2014, choking or strangulation could not support an aggravated assault conviction and, it noted, it has consistently held that it could.

Appellant also contended that because his indictment mentioned "choking," the jury was unable to find him guilty of any lesser included offense. The Court again disagreed. The indictment charged that appellant committed aggravated assault "with [his] hands, an object which when used offensively against a person is likely to result in serious bodily injury by choking said person." The trial court read the indictment to the jury. It then defined aggravated assault, extensively discussing the necessary elements of the crime. It further instructed the jury on the lesser offenses of simple assault and battery. Thus, the Court noted, fully apprised of its options, the jury could have determined that appellant was guilty only of a lesser offense. It did not do so, however, and the evidence supported its conclusion. Accordingly, there was no error.

Ferguson v. State, A15A1818 (3/1/16)

Appellant was convicted of trafficking a person for sexual servitude, two counts of attempting to commit that offense, pimping for a person less than 18 years of age, two counts of conspiring to commit that offense, enticing a child under the age of 16 years for indecent purposes, and nine counts of conspiring to commit sexual exploitation of a child. He contended that the trial court erred in denying his motion to dismiss the indictment. The Court disagreed.

First, he argues that Counts 1, 2, and 3 failed to allege facts of sexually explicit conduct, as required for trafficking a person for sexual servitude, and Counts 6 and 7 failed to allege facts that the two underage victims, K. P. or K. L., engaged in any acts of prostitution. But, the Court found, by virtue of the statutory definition of trafficking another person for sexual servitude, an indictment that alleges a violation of O.C.G.A. § 16-5-46(c) necessarily incorporates an allegation that the trafficking conduct by the accused involved sexually explicit conduct by the victim. In addition, Counts 6 and 7 alleged that appellant engaged in a conspiracy to commit the offense of pimping by having K. P. and K. L. distribute business cards in order to solicit men to buy sexual services from them. These Counts included facts showing that appellant, in concert with others, aided and abetted K. P. and K. L. in acts of prostitution, which offense comprises, not only performing sexual acts for money, but offering or consenting to perform sexual acts for money.

Appellant also contended that Counts 9 through 16 of the indictment were flawed in alleging in one indictment both a conspiracy (to commit sexual exploitation of children) and, as the substantive step taken in furtherance of the conspiracy, the underlying substantive act (sexual exploitation of children by possessing photographs depicting the lewd exhibition of children's genitals). But, the Court stated, although a conviction for conspiring to commit an offense merges into a conviction for the completed offense for sentencing, appellant did not identify any authority for his position that an indictment is void if it alleges a conspiracy that achieved its object. Indeed, the Criminal Code provides that "[a] person may be convicted of the offense of conspiracy to commit a crime . . . even if the crime which was the objective of the conspiracy was actually committed or completed in pursuance of the conspiracy, but such person may not be convicted of both conspiracy to commit a crime and the completed crime." O.C.G.A. § 16-4-8.1. Accordingly, the trial court did not err in denying appellant's motion to dismiss the indictment. GFV

DOMESTIC VIOLENCE BENCHBOOK

The 10th edition of the Georgia Domestic Violence Benchbook can be accessed at:

http://icje.uga.edu/documents/10thDVBB.pdf

Statewide Domestic Violence Hotline

1-800-33-HAVEN (voice/TTY & Spanish)

The Georgia domestic violence hotline is an extensive telephone routing system to Criminal Justice Coordinating Council (CJCC) certified shelters. Calls to the hotline are automatically connected to the caller's nearest certified shelter based on the caller's telephone number exchange. Calls may be made 24 hours a day from anywhere in the state as well as from outside of Georgia from any phone line. Programs accepting calls have access to language interperter services.

GCADV coordinates marketing efforts related to the hotline that include print and broadcast strategies. GCADV maintains a stock of print materials and promotional items advertising the hotline number that are distributed free of charge to domestic violence agencies and other organizations throughout the state.

If you are interested in obtaining promotional information, contact GCADV (https://gcadv.org/contact-us/).

RESOURCES:

Domestic Violence and Sexual Assault Resources for Prosecutors

24/7 Domestic Violence Hotline:
1 (800) 33 HAVEN
1 (800) 334-2836 (V/TTY)

GA Criminal Justice Coordinating Council:
www.cjcc.georgia.gov

GA Cares:
www.gacares.org

GA Network to End Sexual Assault:
www.gnesa.org

Battered Women's Justice Project:
www.bwjp.org

GA Commission on Family Violence:
Provides Georgia domestic violence statistics, domestic violence protocols.
www.gcfv.org

GA Coalition Against Domestic Violence:
www.gcadv.org

Forensic Healthcare Online:
Provides links to studies on intimate partner violence and sexual assault
www.forensichealth.com

AEquitas: The Prosecutors Resource on Violence Against Women
Provides information on complex topic areas, emerging issues, and promising practices related to the prosecution of violence against women cases
www.aequitasresource.org

The Women's Legal Defense and Education Fund
www.legalmomentum.org

End Violence Against Women International
www.evawintl.org

National Sexual Violence Resource Center
www.nsvrc.org

THE *Georgia* FAMILY VIOLENCE Prosecutor Resource Newsletter

A PUBLICATION OF THE PROSECUTING ATTORNEYS' COUNCIL OF GEORGIA DOMESTIC VIOLENCE AND SEXUAL ASSAULT PROGRAM
WITH FUNDING FROM THE CRIMINAL JUSTICE COORDINATING COUNCIL
Prosecuting Attorneys' Council of Georgia, 1590 Adamson Parkway, Fourth Floor, Morrow, Georgia 30260-1755

GEORGIA DOMESTIC VIOLENCE AND SEXUAL ASSAULT RESOURCE PROGRAM

Sharla D. Jackson
Domestic Violence and Sexual Assault Resource Prosecutor
(770) 282-6300
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Did you know?

In Georgia, "Family Violence" also known as Domestic Violence is defined as: "the occurrence of one or more of the following acts between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living or formerly living in the same household: (1) Any felony; or (2) Commission of offenses of battery, simple battery, simple assault, assault, stalking, criminal damage to property, unlawful restraint, or criminal trespass. The term "family violence" shall not be deemed to include reasonable discipline administered by a parent to a child in the form of corporal punishment, restraint, or detention."

Statistics from 2012 Georgia Domestic Violence Fatality Review Annual Report
courtesy Georgia Coalition Against Domestic Violence (www.gcadv.org) and Georgia Commission on Family Violence (www.gcfv.org)