

THIS WEEK:

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Sufficiency of the Evidence; Venue

Boyd v. State, A19A0381 (5/17/19)

Appellant was convicted of child molestation for having sexual intercourse with 14-year-old V. B. and for sexual exploitation of a child for knowingly possessing a digital image of V. B.'s genitals on his cellular phone. The evidence, briefly stated, showed that for several months in late 2014, appellant dated V. B.'s mother. During that time, appellant sometimes made suggestive comments to V. B., the two exchanged sexual messages over a messaging app on their cellular devices, and V. B. sent appellant some nude photographs of herself, including a photograph of her genitals. On December 15, 2014, V. B. spent the night at appellant's house and the two had sexual intercourse. In January 2015, after appellant and V. B.'s mother broke off their relationship, V. B. disclosed to her mother that appellant had molested her. Law enforcement officers arrested appellant at his workplace, and they recovered from his cellular phone nude photographs of V. B.

Appellant argued that the evidence was insufficient to show that his house was located in Coweta County, where he was indicted. Specifically, he contended that when asked the location of the house, V. B. first replied that it was in the city of Moreland. She was then asked, "Do you know what county that is?" She replied, "I *think* that's still in Coweta County." (Emphasis supplied).

The Court found that V. B.'s testimony authorized the jury to find that the act of child molestation occurred, as charged, in Coweta County. In so holding, the Court found no merit in appellant's argument that because V. B. prefaced her testimony with the phrase "I think," her testimony about the location of appellant's house was a lay opinion subject to the foundational requirements of OCGA § 24-7-701 (a). While the phrase "I think" may have raised a question about the certainty of V. B.'s testimony that the house was in Coweta County, it was for the jury as factfinder to determine whether to credit the testimony.

Appellant also argued that the evidence of venue as to the sexual exploitation conviction was insufficient because his workplace was located outside of Coweta County. The Court stated that while the State offered no direct evidence of this fact, the evidence authorized the jury to find the necessary venue. The evidence showed that the image was on appellant's cellular phone from November 2014, when he received it, through January 21, 2015, when he was apprehended and the phone seized from him while he was at work. The trial evidence also showed that appellant lived in Coweta County during this time frame. Like any other fact, venue may be proved by circumstantial evidence, and it is enough if the fact of venue is properly inferable from all the evidence. Therefore, the jury could properly infer from this evidence that appellant possessed his cellular phone, and thus possessed the image of V. B.'s genitals, in Coweta County on some date within the statute of limitation. Furthermore, the State was not required to prove that he possessed the image on the specific date that he was apprehended, because the indictment did not allege that the date of the offense was material. Accordingly, the Court affirmed his two convictions.

Search & Seizure; Common Authority over Property

Massey v. State, A19A0429 (5/21/19)

Appellant was convicted of two counts of child molestation, one count of invasion of privacy, numerous counts of sexual exploitation of children and other offenses. The evidence, briefly stated, showed that appellant was in jail or a probation violation when he called his then-wife and asked her to issue payroll checks for his business. Appellant told her to take the keys he had left at home when he was arrested, go to his place of business, and unlock his office desk to get the checks. She went to the business, unlocked the desk, and a manila envelope with pornographic pictures sticking out of one end, and a CD, both of which contained nude photos of her thirteen-year-old niece taken in the bathroom of the appellant's home. The wife called appellant and asked him for the password to his computer because "the guys needed to get on the computer to handle some accounts that were waiting — business related." Appellant gave her his password and on the computer she discovered "child porn" and additional photos of appellant with other women. The wife called the sheriff's office and spoke to an investigator who told her to bring the items to the police. The wife brought appellant's hard drive, a thumb drive, the CD, and the photos she found in appellant's desk to the sheriff's office and gave them permission to look through everything. The sheriff's office later asked the wife to bring them appellant's computer, which she did. The wife testified in the motion to suppress hearing that she was not involved in appellant's business.

Appellant contended that the trial court erred in denying his motion to suppress because it did not consider the scope of any purported third-party consent. Specifically, he argued that his wife's authority was limited to retrieving items to write payroll checks. The Court disagreed.

A search and seizure is reasonable if it is conducted pursuant to a valid search warrant or with consent from (1) the individual whose property is searched; (2) a third party who has common authority over the property; or (3) if a police officer could have reasonably believed that a third party had common authority over the property. Common authority rests on mutual use of the property by persons generally having joint access or control for most purposes. In some circumstances, a third party who purports to consent to a search lacks the actual authority to do so, but law enforcement may rely on that individual's apparent authority to give consent, if such reliance is reasonable. As with other factual determinations bearing upon search and seizure, determination of consent to search must be judged against an objective standard; would the facts available to the officer at the moment warrant a person of reasonable caution in the belief that

the consenting party had authority over the property? If not, then the warrantless search without further inquiry is unlawful unless authority actually exists. But if so, the search is valid.

And here, the Court noted, the trial court found that it was reasonable for the investigator to believe that the wife had the authority to give consent to search the computer items since she was married to appellant at the time and appellant had instructed her to go to his office. There was evidence presented at the suppression hearing that appellant had given the wife his computer password, thus giving her access to his computer and computer files, and that appellant had given her the password to access his computer for purposes other than payroll, because “business related” accounts were waiting. Because the wife told an investigator that appellant had instructed her to go to his office to take care of payroll and that he had given her his computer password without telling her that other portions of the computer were off-limits, it was not unreasonable for the investigator to believe that the wife had common authority over or other sufficient relationship with appellant's computer and electronic files.

As for appellant's contention that his wife's authority to search the computer was limited to retrieving items to write payroll checks, and that she therefore had no authority to consent to a search of other areas on appellant's computer, the Court declined to “engage in such metaphysical subtleties in judging the efficacy of [his wife's] consent” quoting *Frazier v. Cupp*, 394 U. S. 731, 740 (III) (89 SCt 1420, 22 LE2d 684) (1969). Thus, the Court concluded, the trial court correctly found that appellant's wife had apparent authority over his computer and electronic files such that she had the right to consent to their search.

Other Acts Evidence; Jury Charges

Dixon v. State, A19A0357 (5/23/19)

Appellant was convicted of aggravated child molestation, aggravated sexual battery, two counts of child molestation, and sexual battery against a child under the age of 16. The victim was appellant's great granddaughter. At trial, the court allowed other acts evidence that showed similar behavior against appellant's daughter and two step-daughters.

Appellant argued that the trial court erred by admitting the other acts evidence under OCGA §§ 24-4-413 (Rule 413) and 24-4-414 (Rule 414) because the court failed to determine that the evidence was relevant or to conduct the required balancing test under OCGA § 24-4-403 (“Rule 403”) prior to admitting the evidence. The Court disagreed.

Under Rule 413, “[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. Similarly, under Rule 414, “[i]n a criminal proceeding in which the accused is accused of an offense of child molestation, evidence of the accused's commission of another offense of child molestation shall be admissible and may be considered for its bearing on any matter to which it is relevant.” The Court stated that Rules 413 and 414 create a rule of inclusion, with a strong presumption in favor of admissibility, and the State can seek to admit evidence under these provisions for any relevant purpose, including propensity. Nevertheless, evidence that is admissible under these rules may still be excluded “if 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.” OCGA § 24-4-403.

The Court found that the trial court did not abuse its discretion in admitting the testimony regarding appellant's prior acts. First, the evidence was clearly relevant to appellant's intent, identity, and propensity to commit the crimes because the three other family members testified that appellant engaged in the same conduct of rubbing their genitals and inserting his finger into their vaginas when they were approximately the same age as the victim. Moreover, the testimony was relevant to show appellant's propensity to commit the crimes and that it was appellant who had molested the victim.

With regard to the balancing test under Rule 403, in ruling that the evidence was admissible, the trial court stated that it had reviewed the statutes and the relevant case law. Although the trial court did not explicitly mention Rule 403, absent some express showing that the trial court did not understand its obligation to conduct the balancing test, the Court stated it would not read such error into the trial court's ruling. Additionally, the trial court satisfies its obligation if the findings appear in the order denying the motion for new trial. Here, in denying the motion for new trial, the court recognized that Rule 403 applied and it explained that the parties had discussed the balancing test at the pre-trial hearing. The court further acknowledged that it had read and considered the relevant law, and that it was not required to conduct the balancing test on the record. Given the trial court's thorough review of the issues, along with its explanations and analysis in its order denying the motion for new trial, the Court found that appellant failed to show that the trial court did not perform its duty. Finally, the Court noted that it has never held that the trial court is required to *explicitly* analyze the balancing test on the record. Nevertheless, in its order denying the motion for new trial, the trial court addressed the probative value of the other women's testimony, the remoteness of the other acts evidence, the similarities between the allegations, and the relevance of the prior acts to show appellant's propensity to commit the crimes. Therefore, the Court concluded, the trial court fulfilled its duty to conduct the necessary balancing test when admitting the other acts evidence.

Appellant also argued that the trial court erred in instructing the jury using the pattern jury instruction for other acts evidence because doing so invited confusion among the jurors. Specifically, he contended that the instructions first told the jury they could consider the other acts evidence to show intent and identity, but later told them they could consider the evidence for any matter to which it was relevant.

The Court stated that when considering the jury instructions, it must read the jury instructions as a whole. Here, the Court found, although the instruction could be read to conflate the limited purpose of showing identity and intent with the evidence being admissible for any relevant purpose, the Court found no basis to overturn the verdict. First, the jury may consider other acts evidence under Rules 413 and 414 for any relevant purpose, including propensity to commit the crimes. Thus, the trial court's instruction was an accurate and correct statement of the law and presents no basis for reversal. Second, although the instructions given here were not ideal — the trial court at one point stated the evidence was admissible for a limited purpose, that it was admissible to show intent and identity, and then said it was admissible for any purpose for which it was relevant — any confusion did not contribute to the verdict. Here, the jury was authorized to consider the evidence for any relevant purpose, including intent, identity, and propensity. The jury heard appellant deny that he engaged in any improper conduct. The other acts evidence was relevant to show that it was, in fact, appellant who molested and assaulted the victim. Moreover, the other women testified as to the similarities between appellant's abuse of the victim and what he had done to them. One of the women testified that she remembered appellant's long finger nails, which was consistent with the victim's testimony as well as appellant's own admission that he always kept his nails long. Thus, any confusion in the instructions did not contribute to the verdict, and appellant failed to show that he was harmed by any alleged error in the jury instruction.

Sentencing; Rule of Lenity

Byson v. State, A19A0342 (5/23/10)

Appellant was convicted of two counts of aggravated child molestation, child molestation, incest, statutory rape, and cruelty to children in the first degree. He was sentenced as follows: Count 1 — Aggravated Child Molestation — 30 years, with 20 to serve and the remainder on probation; Count 2 — Aggravated Child Molestation — 30 years in confinement, consecutive to that portion of the sentence in Count 1 to be served in confinement; Count 3 — Child Molestation — 20 years in confinement, concurrent with Count 1; Count 4 — Incest — 20 years in confinement, concurrent with Count 1; Count 5 — Statutory Rape — 20 years in confinement, concurrent with Count 1; Count 6 — Cruelty to Children in the First Degree — 10 years in confinement, concurrent with Count 1.

Years after his conviction was affirmed on direct appeal, he filed a motion to vacate his allegedly void sentences. He argued that he should have been sentenced under the post-July 1, 2006 amended versions of OCGA §§ 16-6-4 (c), 17-10-6.1 (a) (5), and 17-10-6.2 (b), which he contended means he should have been sentenced to 25 years and life on probation on the aggravated child molestation charge in Count 1, and split sentences on the remainder of the sex offense counts.

The Court stated that a crime is to be construed and punished according to the provisions of the law existing at the time of its commission. As to each of the offenses here, the indictment, which was read to the jury at trial, charged that the acts of aggravated child molestation, child molestation, statutory rape, and incest occurred between January 1, 2005 and March 19, 2007, “the exact date of the offense being unknown.” It is well established that where a charge alleges a range of dates wherein the crime occurred without alleging that the dates are material averments, the State is not confined to proof of a single transaction, but may prove or attempt to prove any number of transactions of the nature charged within the period.

The Court found that the issue must be addressed under the analytical framework of the rule of lenity. Thus, the Court must compare the pre and post-2006 versions of the applicable statutes to determine which prescribes the lesser penalty. First, as to the offense of child molestation, among other changes, the post 2006 amendment eliminated the possibility that a person convicted of child molestation for the first time could receive a probated sentence, thus requiring anyone convicted of that crime to serve a mandatory minimum prison sentence of five years. Accordingly, appellant was properly sentenced under the pre-2006 amendment version of the statute for child molestation.

As to the offense of aggravated child molestation, the legislature increased the possible sentence range from a minimum of ten/maximum of thirty years to imprisonment for life or by a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by probation for life. Thus, appellant was incorrect that the post-2006 law “mandated” that he be sentenced to 25 years to serve and life on probation instead of the 30 years, 20 to serve sentence he received, since the post-2006 amendments would have authorized a harsher sentence of life in prison for that offense. Accordingly, appellant was also properly sentenced under the pre-2006 amended version of OCGA § 16-6-4 (d) (1) for aggravated child molestation.

For the crime of incest, the legislature also increased the possible sentence range of incest from a minimum of one/maximum of twenty to a minimum of ten/maximum of thirty and “imprisonment for not less than 25 years nor more

than 50 years” if the victim is less than 14 years of age. Thus, the rule of lenity would require that appellant be sentenced under the pre-amendment version of the statute since this was a crime that was clearly committed both before and after the amendment took effect.

Accordingly, the Court concluded, because appellant could have been subject to harsher penalties under the post-2006 versions of the applicable sentencing statutes, he was appropriately sentenced under the prior law on his convictions for child molestation, aggravated child molestation, and incest. Therefore, the Court affirmed the trial court's denial of appellant's motion to vacate his sentences as to his convictions for child molestation, aggravated child molestation, and incest.

However, the Court reached a different result on appellant's sentence for statutory rape. As to that crime, the minimum and maximum sentence range remained unchanged by the 2006 amendments, except the post-July 1, 2006 law required that the sentence include at least one year of probation. Because appellant was sentenced to the maximum of twenty years, his jail time would actually decrease under the post-2006 amendment since the maximum jail sentence the trial court could impose was 19 years to serve, followed by one year of probation, for a total of twenty years. Thus, because appellant could have been convicted of statutory rape based on acts that were committed both before or after the change in the law, appellant's sentence for statutory rape was vacated and the case remanded for resentencing pursuant to OCGA § 17-10-6.2.

Indictments; Fatal Variance

Fortner v. State, A19A0622 (5/23/19)

Appellant, the county coroner, was convicted of 18 counts of violation of oath by a public officer, and 11 counts of theft by deception. He argued that the trial court erred in denying his motion for directed verdict of acquittal because there was a fatal variance between the evidence at trial and the indictment. Specifically, he contended that the indictment charged him with submitting reimbursements for pronouncing a death, but there was no evidence he had done so. Instead, he had submitted reimbursement for conducting investigations.

The Court stated that our courts no longer employ an overly technical application of the fatal variance rule, focusing instead on materiality. The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused. It is the underlying reasons for the rule which must be served: 1) the allegations must definitely inform the accused as to the charges against him so as to enable him to present his defense and not to be taken by surprise, and 2) the allegations must be adequate to protect the accused against another prosecution for the same offense. Only if the allegations fail to meet these tests is the variance fatal.

Applying this two-part test here, the Court concluded that there was no fatal variance from the indictment, and thus the trial court properly denied the motion for a directed verdict of acquittal. Appellant was clearly on notice of the offenses he allegedly committed — seeking reimbursements he was not entitled to receive. Furthermore, the indictment identified the patients' names and gave the dates on which appellant received reimbursement. Appellant would have known that he submitted death investigation reports for those patients — and not pronouncements of death — and thus would have known that the charges related to those submissions. The Court stated that when it ignores the “pronouncement of death”

language in the indictment, the remainder sufficiently alerted appellant to the allegations against him. Appellant's defense at trial was that he had not pronounced any deaths, but had instead conducted investigations. However, there was sufficient evidence from which the jury could conclude that appellant did not actually conduct death investigations, and that by submitting invoices seeking reimbursement he violated his oath of office and committed theft. Finally, due to the nature of the indictment, which named the specific patients whose deaths were at issue, appellant was adequately protected against any further prosecution related to those submissions. Accordingly, the Court concluded that the "pronouncement of death" language was an unnecessary specification and its inclusion did not result in a fatal variance between the indictment and the proof at trial.

Jurisdiction; Final Judgments

Gresham v. State, A19A0754 (5/24/19)

Appellant was convicted of numerous charges, including armed robbery, kidnapping, aggravated assault, burglary, home invasion, and other offenses, and the trial court entered its final disposition. Appellant subsequently filed a motion and amended motion for new trial, which the trial court denied, except as to the second kidnapping count, which it granted. Appellant then filed a direct appeal from this order.

The Court stated that when the trial court grants a criminal defendant's motion for new trial, the case is not final for purposes of filing a direct appeal. Thus, because appellant's criminal case remains pending before the trial court, appellant was required to use the interlocutory appeal procedures - including obtaining a certificate of immediate review from the trial court - to appeal. Accordingly, the Court held, appellant's failure to do so deprived the Court of jurisdiction over the appeal, and it was dismissed.

Character Evidence; Jury Charges

Montgomery v. State, A19A1353 (5/24/19)

Appellant was indicted for rape, aggravated sodomy, false imprisonment, aggravated assault (two counts), and hindering an emergency telephone call. He elected to testify and denied that he ever physically or sexually assaulted the victim. He also called eleven character witnesses who testified about his reputation for honesty and/or their opinion that he was trustworthy. After one of the character witnesses testified more broadly that appellant was "to be admired," the trial court warned that the defense was getting close to the line of placing appellant's general character in issue. Ultimately, when one of the character witnesses testified on direct-examination that appellant was a "man of integrity," the trial court ruled that the defense had intentionally placed appellant's general character in issue and thus had opened the door to the State cross-examining the witness about whether the witness knew or had heard about appellant's drug, alcohol and driving-related arrests and convictions. Appellant was ultimately convicted of false imprisonment, aggravated assault, and hindering an emergency telephone call.

Appellant contended that the trial court erred in finding that he intentionally placed his general character in issue and, therefore, erred in permitting the State to cross-examine one of his character witnesses about his criminal history. Specifically, he argued that the character witness's testimony was nonresponsive to the question originally posed by defense counsel. The Court disagreed.

Under Georgia's new Evidence Code, the admissibility of evidence of a defendant's character is governed by OCGA §§ 24-4-404 and 24-4-405. As a general rule, evidence of a person's character is inadmissible. But, when a witness testifies about a defendant's good character, the State may cross-examine that witness about the defendant's prior misconduct in an attempt to undermine the witness's credibility. As part of the cross-examination of the character witness by the State, inquiry is allowable into relevant specific instances of conduct, including prior convictions or arrests of the accused.

If the defendant elicits testimony from a character witness regarding a specific character trait of the defendant, the State is limited to cross-examining the witness about specific instances of the defendant's conduct that are relevant to the trait of character about which the witness has testified. By contrast, if the defendant places his general character in issue through a character witness, the door is opened for the prosecution to cross-examine the witness about specific instances of the defendant's conduct reflecting bad character.

After reviewing the trial and motion for new trial transcripts, the Court found that although defense counsel may not have specifically aimed at eliciting the character witness's testimony that appellant was a "man of integrity," defense counsel did not object or move to strike the testimony as nonresponsive, and, in fact, it was the defense trial strategy to call multiple character witnesses with the understanding that as lay persons, they would most likely give nonresponsive answers reflective of appellant's general character. As defense counsel explained, "there was no way not to open up his character because that is essentially kind of a pillar of our defense," which was centered on proving that appellant was more credible than the victim and in having the jury see that appellant "had been essentially an upstanding person in [the character witnesses'] eyes." Indeed, even after defense counsel was warned that continuing to call character witnesses would likely lead to a finding that the defense had opened the door to general character evidence, the defense called eight more character witnesses, including the witness who referred to appellant as a "man of integrity." Under these circumstances, the Court found that the trial court did not abuse its discretion in finding that the defense intentionally placed appellant's general character, thus triggering the State's right to cross-examine the character witness about appellant's criminal history.

Appellant also argued that the trial court committed plain error in its instruction that it gave to the jury on character evidence. The Court again disagreed. The Court noted that the charge tracked the language of Georgia Suggested Pattern Jury Charge 1.37.10 and was tailored to include a reference to the defendant's character trait of truthfulness, referred to by multiple character witnesses called by appellant at trial. An instruction on a defendant's good character or pertinent character trait that tracks the current version of the pattern charge does not constitute plain error.

Nevertheless, appellant argued, the trial court's instruction on character evidence was plainly erroneous because it only made reference to the particular character trait of truthfulness. According to appellant, because the trial court found during the course of the trial that the defense had opened the door to evidence of his general good character, the court should have further instructed the jury on how it ought to consider evidence of a defendant's general good character. In essence, appellant contended that the trial court's jury instruction should have been expanded to read: "You have heard evidence of the character of the defendant and the character of the defendant for truthfulness. ..."

But, the Court found no plain error under the circumstances here. Premitting whether the jury instruction on character evidence should have included a reference to the general character of the defendant once appellant opened the door to such evidence and whether defense counsel induced the alleged error by requesting the instruction that was given, the Court

concluded that appellant could not affirmatively show that the alleged error probably affected the outcome of the case. Given that the character instruction given by the trial court fully and adequately explained to the jury how it ought to consider appellant's character trait of truthfulness, appellant failed to show that simply adding a reference to his general character would have likely affected the outcome of the trial court proceedings.

Statute of Limitations; Tolling

State v. Green, A19A0637 (5/24/19)

On February 28, 2013, the police executed a search warrant at Green's apartment and discovered "a very active identity fraud and theft operation," including "[a] huge amount of well organized evidence of Identity Fraud and other crimes[.]" The State indicted Green in 2014 on two counts of identity fraud, but those allegations were nolle prossed in 2016 pending "additional investigation[.]" The State re-indicted Green on February 14, 2017, charging him in a 33-count indictment with theft and identity fraud involving multiple victims. As the date for trial approached, however, the State determined that 18 of the 33 counts had been improperly worded. It thus indicted the case a third time on January 30, 2018, dropping the 18 improperly-worded counts and re-alleging the remaining 15 counts. The allegations set forth in the 2018 indictment were identical to the 15 properly-worded counts in the 2017 indictment.

Green filed a motion to dismiss the indictment as time-barred. He did not contest the State's assertion that if the 2017 indictment was timely filed on February 14, 2017, the 2018 indictment would relate back to that date for statute of limitation purposes under *State v. Outen*, 296 Ga. 40, 45 (3) (2014). He argued, however, that the statute of limitation expired before February 14, 2017, undermining any timeliness claim based on this relation-back date. The trial court held a hearing, but refused to allow the State to put up evidence. The court subsequently dismissed the indictment and the State appealed.

The Court stated that to properly analyze Green's statute of limitation claim, it must examine the 15 charges contained within the 2018 indictment individually. Dismissal of a multi-count indictment in its entirety as time-barred is proper only if the applicable statute of limitation bars *all* charges.

The Court first addressed the Identity Fraud in Counts 1, 5 through 7 and 9 through 15. The Court found that the indictment contended that Green violated OCGA § 16-9-121 (a) (1) on February 28, 2013, by possessing the victims' identifying information *on that day*. Thus, as alleged, such crimes occurred within four years of February 14, 2017, the relation-back date for the 2018 indictment. The trial court, therefore, erred in dismissing Counts 1, 5 through 7, and 9 through 15 as time barred.

Similarly, in Count 8 of the indictment, the State alleged that on February 28, 2013, Green "did unlawfully receive and retain stolen property, a 2010 Mercedes-Benz E550," in violation of OCGA § 16-8-8. By the indictment's clear terms, the State alleged that the crime occurred on February 28, 2013, within four years of the February 14, 2017 relation-back date. Accordingly, this charge was not barred by the statute of limitation, and the trial court erred in dismissing it too.

Next, the State alleged in Count 2 that Green committed identity fraud on November 7, 2012, by using a particular victim's identifying information to purchase items from a furniture store. Without dispute, the incident occurred over four

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years before February 14, 2017, the relation-back date for the 2018 indictment. But, the Court noted, Count 2 alleged that the crime was unknown until February 28, 2013, a date within the four-year limitation period. Pursuant to OCGA § 17-3-2 (2), the limitation period governing a prosecution “does not include any period in which . . . [t]he person committing the crime is unknown or the crime is unknown.” The State bears the burden of proving that an otherwise time-barred allegation falls within an exception to the statute of limitation. And when a defendant files a pre-trial motion to dismiss or plea in bar challenging the State's reliance on a tolling provision, the trial court should conduct an evidentiary hearing to resolve the tolling issue. Accordingly, because the trial court did not give the State an opportunity to present evidence, the Court vacated the order dismissing Count 2 and remanded the case with instruction that the trial court hold an evidentiary hearing on this issue.

Similarly, the State charged Green with Computer Theft (Count 3) and Theft by Taking (Count 4). The Court noted that both counts related to the November 7, 2012 incident involving the furniture store. Both counts also specified that the crimes occurred on November 7, 2012, but were unknown until February 28, 2013. Thus, because the trial court did not give the State an opportunity to present witness testimony or other evidence on when the victim (the furniture store) or authorities knew about these crimes, the Court remanded the case for an evidentiary hearing on Green's claim that the statute of limitation barred prosecution of these counts as well.