

THIS WEEK:

- Rule 401; Rule 403
- Rule 807; Notice Requirements
- Forfeiture by Wrongdoing; Rule 404 (b)
- Statute of Limitation; Person-Unknown Exception
- Expert Testimony; Impeachment

Rule 401; Rule 403

Harris v. State, S21A1242 (2/15/22)

Appellant was convicted of felony murder and other crimes for his involvement in two drive-by shootings that injured Alexander and Boyd and resulted in the death of Bowden. The relevant evidence, very briefly stated, showed that on November 21, 2015, appellant was attacked by three members of a rival street gang. The attackers then ran to "Ms. Mary's house"—a nearby house used as a "hang out"—when the fight was over. On November 23, two days after appellant was attacked, he and others committed a drive-by shooting at Ms. Mary's house. The next day, appellant and others committed a second drive-by shooting at Ms. Mary's house.

Approximately three months later, after further investigation revealed appellant's possible location, a team of officers secured and executed a search warrant on a residence that belonged to two of appellant's friends. Once the officers entered the home, they learned that appellant was barricaded inside one of the bedrooms. Officers breached the door and took appellant into custody. Under the cushion of the sofa located in the room in which appellant barricaded himself, officers located a loaded Taurus .45-caliber handgun with an extended magazine, along with .223-caliber and .357-caliber ammunition. The handgun was not the same caliber as the weapons believed to be used in the November 23 and 24 shootings.

Appellant contended that the trial court erred by admitting evidence of the weapons and ammunition officers found at the time of appellant's arrest. Specifically, he argued that the trial court violated OCGA Rule 401 and Rule 403 by allowing admission of testimony about appellant's arrest as well as photographs of physical evidence taken at the time of his arrest, which was four months after the November 23 and 24 shootings

The Court found that the trial court did not abuse its discretion by concluding that the evidence the State presented about the handgun and ammunition found with appellant at the time of his arrest was relevant under Rule 401. Relying on Eleventh Circuit precedent, the Court stated that it is universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.

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Here, the evidence related to appellant's attempt to evade arrest by barricading himself in a room—evidence that included the handgun and ammunition that was found near appellant at the time of his arrest—had probative value because it suggested that appellant had a reason to evade law enforcement officers and therefore demonstrated appellant's consciousness of guilt. And the Court noted, in a circumstantial case like this one, the need for this type of evidence was greater because it provided an additional set of facts from which the jury was authorized to infer appellant's guilt.

Furthermore, the Court found, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence that was admitted. This was particularly true because the State did not argue that the gun and ammunition recovered during appellant's arrest were used in the November 23 or 24 shootings. And even though inculpatory evidence is inherently prejudicial in a criminal case, Rule 403 does not bar admission of such evidence merely because the defendant might suffer some amount of prejudice upon its introduction; it is only when unfair prejudice substantially outweighs probative value that the rule permits exclusion, and appellant failed to show that he suffered such prejudice. Accordingly, the Court concluded, the trial court did not abuse its discretion when it admitted evidence of the handgun and ammunition that were found with appellant when he was arrested.

Next, appellant contended that the trial court erred by admitting evidence of his Facebook posts. The evidence showed that about 15 minutes after he was attacked, appellant sent a Facebook message to a fellow gang member, Marshall, saying "Come get me blood, I just got jumped." As part of his exchange with Marshall, appellant messaged, "Everybody dies."

During Marshall's direct examination, the State attempted to introduce a series of message exchanges on Facebook between appellant and Marshall, which included a photograph appellant sent of an "XD Springfield 40"—a gun appellant claimed to possess. The State argued that the picture and messages were relevant because they were sent on November 14, 2015, ten days before Bowden's murder, and the gun pictured in appellant's Facebook messages was one of the types of guns that the State's expert testified could have fired the .40-caliber rounds found after both the November 23 and November 24 shootings. The trial court overruled appellant's objection, concluding that the photograph was relevant and that the evidence did not violate Rule 403.

The Court found that the trial court did not abuse its discretion in concluding that the photograph and messages in question were relevant. That appellant claimed to possess a gun that could have been used in the November 23 and 24 shootings—namely, the "XD Springfield 40" that is one of only three brands the State's ballistics expert said could have fired the .40-caliber rounds recovered from the scene of both shootings—is a "fact that is of consequence to the determination of the action," OCGA § 24-4-401, because it had a tendency to make it more probable that one of the weapons used in the shootings belonged to appellant.

The Court further found that the trial court did not abuse its discretion in concluding that the admission of the Facebook evidence did not violate Rule 403. Even to the extent the Facebook picture and messages were prejudicial to his defense, appellant failed to show that they were unfairly prejudicial. And any prejudicial effect appellant suffered because of the admission of that evidence was outweighed by its probative value, especially given that it was used to show—in a circumstantial case in which no murder weapon was found—that appellant had in his possession approximately one week prior to the shootings a type of gun that could have been used in those shootings.

Rule 807; Notice Requirements

Ward v. State, S21A1309 (2/15/22)

Appellant was convicted of malice murder and other offenses in connection with the shooting death of his on-again, off-again girlfriend. Appellant contended that the trial court erred in allowing six witnesses, who were the victim's close friends and family, to testify about his relationship problems with the victim. Appellant argued that the testimony was inappropriately admitted under Rule 807, the residual exception to the hearsay rule. Specifically, appellant contended that the State did not prove that the statements by the victim that these witnesses repeated had sufficient "guarantees of trustworthiness" and were "more probative" than other evidence that reasonably could have been procured, as Rule 807 requires.

The Court noted that statements admissible under Rule 807 are considered sufficiently trustworthy not because of the credibility of the witness reporting them in court, but because of the circumstances under which they were originally made. Here, the Court found, the circumstances of the victim's statements, namely that they were statements about abuse and problems in her romantic relationship made to close friends and family, demonstrated sufficient guarantees of trustworthiness under Rule 807. In addition, the witnesses' testimony about the victim and appellant's relationship troubles was highly probative as to his motive for shooting and killing his longtime girlfriend.

Nevertheless, appellant contended, the State could have used police reports and medical records, instead of the hearsay testimony, to prove that the victim miscarried, had an STD from appellant, and suffered abuse. But the Court stated, even assuming such evidence existed and would have been admissible, appellant did not show that it would have been as probative of the nature of the victim and appellant's relationship as the statements she made to her close confidants. For these reasons, the trial court did not abuse its discretion in admitting the challenged hearsay testimony — except perhaps for the testimony of Griffeth, one of the six witnesses.

Appellant argued that Griffeth's testimony should have been excluded because he was not given notice of it "in advance of the trial," as Rule 807 requires. The record showed that on the second day of trial, the State filed a supplemental notice to add the hearsay statements from Griffeth; she testified two days later, on the last day of trial.

The Court stated that premitting whether the trial court abused its discretion by admitting Griffeth's testimony because the State's notice was untimely, any such error was harmless. A nonconstitutional evidentiary error is harmless if it is highly probable that the error did not contribute to the verdict. Griffeth's testimony was largely cumulative of the properly admitted testimony of the other witnesses. And although Griffeth was the only one of the victim's confidants to testify that the victim said that appellant once "pulled [a gun] on her" back in college, the jury had already heard about at least two other incidents of appellant's violence against the victim, the jury had seen a video of appellant holding a gun around the time of the murder, and the overall evidence of appellant's guilt was strong. Thus, the Court concluded, it was highly probable that Griffeth's testimony did not contribute to the verdict.

Forfeiture by Wrongdoing; Rule 404 (b)

Morrell v. State, S21A1273 (2/15/22)

Appellant was indicted on 21 counts in connection with the murders of Scarver and Lang. Prior to trial, the trial court granted appellant's motion to sever the counts related to Scarver's murder from the counts that were related to Lang's. Following a jury trial, appellant was found guilty on all charges related to Scarver's murder.

Appellant argued that the trial court erred in admitting under the forfeiture-by-wrongdoing provisions of Rule 804 (b) (5) recorded out-of-court statements Jackson, an eyewitness to the Scarver shooting, made to police. Specifically, appellant contended, the State did not show what efforts were made to locate and produce Jackson prior to trial, failed to request a material-witness warrant prior to trial, and failed to establish that Jackson's unavailability was due to any wrongdoing by appellant. Appellant also argued that the admission of the hearsay statements violated his constitutional right to confrontation. The Court disagreed.

The Court found that the State carried its burden of proof in establishing that Jackson's unavailability was caused by appellant's wrongdoing. Regardless of whether the State produced sufficient evidence of its good-faith efforts to secure Jackson's testimony at the time the trial court ruled on the State's Rule 804 (b) (5) motion, the State did produce such evidence by the time Jackson's statements were introduced at trial. In particular, prior to introducing Jackson's statements through Detective Blaser, the State stated that one of its investigators had attempted to serve the material-witness warrant on Jackson and could not locate him. The State also submitted evidence that, after learning of the warrant, Jackson called the prosecutor's office and repeatedly said he would not appear in court and would not testify if he was brought to court, even after being told that there was a court order for him to do so. The Court concluded that this evidence was sufficient for the trial court to determine that Jackson was an unavailable witness.

The Court also found that the trial court did not clearly err when it found that appellant engaged in or acquiesced in wrongdoing intended to procure Jackson's unavailability. The State established that appellant tried to silence and intimidate witnesses in the Lang case, supporting an inference that he also was involved with the intimidation against Jackson in this case. The State played for the trial court recordings from the Lang case in which appellant talked about paying someone off and making a "b*tch" disappear, and the State presented evidence that the person in question was an eyewitness who had to be relocated for her safety after the police learned of appellant's statements.

Furthermore, the Court noted, the State showed that one of appellant's cousins, Gaines, posted to her Facebook page threats against witnesses in this case, whom she described as "snitches," and listed identifying information for those witnesses, including Jackson. Although the State did not show with direct evidence that appellant asked Gaines to post this information, there was sufficient evidence for the trial court to conclude that he did. The information used by Gaines to intimidate witnesses was not publicly available, appellant was one of the few people who had access to it, and there was no evidence the State provided this information to Gaines. The direct evidence of appellant's wanting to get rid of a witness in the Lang case further supported the trial court's finding that appellant participated in or acquiesced in a plan to prevent witnesses in this case, including Jackson, from testifying against him.

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Finally, the Court found, the trial court also did not clearly err in concluding that appellant's actions procured Jackson's unavailability. Appellant argued that Jackson only said he would not testify against his family. The Court noted that this was one reason given by Jackson, but it was not the only reason. When Jackson identified appellant as the shooter, he expressed concern about his name appearing in any police reports, indicating that he would encounter trouble. When he called the District Attorney's office months later, after Gaines's Facebook posts, he repeatedly expressed fear for his life if he testified and rebuffed the State's offer to try to keep him safe, insisting that the State could not protect him adequately. Given this evidence and the deference the Court affords the trial court's factual findings, the trial court did not abuse its discretion in admitting Jackson's statement under Rule 804 (b) (5). And the Court stated, because it affirmed the trial court's decision to admit Jackson's statements under Rule 804 (b) (5), there was no merit to appellant's argument that the admission of those statements violated his constitutional right of confrontation.

Next, appellant argued that the trial court erred in allowing the State to introduce under Rule 404 (b) other-acts evidence regarding the Lang case and the alleged acts of intimidation against witnesses in that case. The Court noted that a disputed issue in the case was whether appellant intimidated Jackson from testifying. There was no evidence that he threatened Jackson directly or attempted to do so, but there was evidence showing that Gaines did. For the evidence of Gaines's conduct to be admissible against appellant, the State had to present evidence showing that appellant was involved in Gaines's threats. The State argued that it did so because the other-acts evidence showed appellant's common plan to intimidate witnesses with respect to both sets of charges against him, both of which were proceeding at the same time. The Court agreed with the State.

Relying on *Heard v. State*, 309 Ga. 76, 87 (3) (e) (2020) and *United States v. O'Connor*, 580 F2d 38, 41-42 (2d Cir. 1978), the Court found no abuse of discretion in admitting the evidence under the unusual circumstances here. Appellant was facing charges for killing both Scarver and Lang. Appellant's attempts to obstruct justice by destroying evidence and intimidating witnesses in the Lang case and Gaines's Facebook post intimidating Scarver witnesses all occurred within the same short time span. Although appellant was not charged with witness tampering, the issue of whether he was part of a "conspiracy" or "plan" with Gaines to do so was relevant to establishing his consciousness of guilt, and the other-acts evidence occurring near in time helped establish the link necessary to tie Gaines's conduct to appellant.

Furthermore, the Court stated, under the facts of this case, its conclusion that the other-acts evidence was relevant for the purpose of establishing a "plan" does not draw on improper propensity inferences. The Court noted that the line between a proper purpose under Rule 404 (b) and improper propensity evidence is not always clear. And without some connection between the other-acts evidence and the proposition that the State sought to prove, the other-acts evidence could have had a tendency solely to prove appellant's propensity to commit a bad act. But, the Court found, the close timing here supported a logical inference that did not depend on appellant's bad character. Explained another way, it is improbable that, after his being charged with crimes against Lang and Scarver, appellant would personally participate in intimidating witnesses against him regarding crimes against Lang, and that — at about the same time — witnesses regarding the crimes against Scarver were intimidated (through the use of nonpublic information available to appellant) without his involvement or acquiescence. Appellant cited no case excluding other-acts evidence under these circumstances, and the Court concluded, the trial court did not abuse its discretion in determining that the other-acts evidence was relevant for a proper purpose and was not offered solely to prove appellant's bad character or propensity to commit a crime.

Statute of Limitation; Person-Unknown Exception

State v. McClendon, A21A1675 (1/20/22)

McClendon, an accountant, was indicted on 13 counts of theft by taking. She filed a plea in bar, contending that the charges were barred by the statute of limitation because the indictment issued more than four years after the alleged crimes were committed. The trial court granted the plea in bar, and the State appealed.

The record, briefly stated, showed that on November 13, 2020, McClendon, a certified public accountant, was charged with withdrawing funds, "unlawfully and in breach of her fiduciary obligation," from accounts belonging to John Bone and his company, Maritime Sales Leasing, Inc., over a period of a few months from March to July 2015. As to each count, the indictment alleged that "the statute of limitations . . . was tolled pursuant to OCGA § 17-3-2 (2) in that the person committing the crime was unknown until 2018." The evidence showed that Bone had questioned McClendon in July 2015 and was skeptical of her reasons for the withdrawals. In 2017 Bone hired attorney Mecklin to sue McClendon. Based on revelations that some of Bone's funds had ultimately been transferred into a personal account of McClendon, and based on other information gained during discovery, Mecklin reported the matter to law enforcement in October 2018.

The Court stated that in criminal cases, the statute of limitation runs from the time of the criminal act to the time of indictment. The State argued that the so-called "person-unknown" exception applied. The Court noted that this exception applies when the identity of the person who committed the crime is unknown, and it tolls the limitation period from the time the crime was committed until that person's identity becomes known to the State. To establish that the person-unknown exception applies, the State must show that the facts within its knowledge—including knowledge imputed from the victim—were not enough to lead a reasonably prudent person to identify the defendant as the perpetrator until a time that, relative to the indictment, was within the limitation period. Thus, it was incumbent on the State to show that Bone's knowledge as of July 2015 was not enough to support probable cause to arrest McClendon for the thefts. The trial court found that the State failed to meet its burden and the Court agreed.

The Court found that as of July 2015, Bone knew that nearly \$300,000 had been withdrawn from his accounts without his authorization or any documented business justification. The withdrawals had been accomplished with checks made out to McClendon, signed by McClendon, and deposited into her accounts. Although McClendon denied having known about the withdrawals and advanced the theory that one of her employees was to blame, a reasonably prudent person under those circumstances would have been justified in disbelieving McClendon's explanation and concluding that she was responsible for the thefts. Bone's email of July 21, 2015—in which he tells McClendon that her story "[d]oesn't make sense"—clearly reflected his skepticism about her explanation. While not dispositive, Bone's doubt about the truth of McClendon's denials supported the determination that a reasonably prudent person under the circumstances would have believed that it was probable—though not necessarily certain—that McClendon was the thief.

Nevertheless, the State argued, it lacked probable cause to arrest McClendon until 2018. The State pointed out that Bone continued to employ McClendon as his accountant beyond July 2015 and that Mecklin, a "legal technician," testified that he did not "[feel] comfortable in saying [McClendon] was the one" until he reviewed McClendon's previously undisclosed bank records in October 2018.

But, the Court stated, these facts did not undermine the trial court's finding of probable cause in July 2015. The fact that Bone did not immediately terminate McClendon's services does not prove that Bone did not believe McClendon was responsible for the thefts, much less that a reasonably prudent person would not have believed as much. And while Mecklin may not have "felt comfortable" reporting McClendon to police until October 2018, the standard of probable cause is an objective one, and the subjective thinking of those involved in a particular case is not important.

Therefore, the Court concluded, as of July 2015, the State was chargeable with knowledge of facts that gave rise to probable cause to arrest McClendon for the thefts. The four-year statute of limitation thus began to run in July 2015, and the operative November 2020 indictment issued well beyond the expiration of the limitation period. Accordingly, the plea in bar was properly granted.

Expert Testimony; Impeachment

Campbell v. State, A21A1812 (1/21/22)

Appellant was convicted of incest, rape, aggravated child molestation, child molestation, and reckless conduct. The victim was his then 14-year-old daughter. He contended that the trial court erred in rejecting his request to redact the portions of a video deposition regarding whether the victim was malingering and lying during the clinical tests, because the opinion went to the issue of the victim's truthfulness and constituted improper bolstering. The Court disagreed.

The Court stated that there is a world of legal difference between expert testimony that "in my opinion, the victim's psychological exam was consistent with sexual abuse," and expert testimony that "in my opinion, the victim was sexually abused." In the first situation, the expert leaves the ultimate issue/conclusion for the jury to decide; in the second, the weight of the expert is put behind a factual conclusion which invades the province of the jury by providing a direct answer to the ultimate issue: was the victim sexually abused? The Court also noted that it has consistently upheld testimony that the victim showed no signs of coaching, "red flags indicating deception or fabrication during the forensic interview," and no "particular actions or statements that indicated deception." However, the Court noted, it has rejected as inadmissible expert testimony where the expert testified that his evaluation "strongly suggest[ed] that [the victim] had been sexually abused as alleged."

And here, the Court found, the expert testified that she saw no signs of malingering during the psychological assessment. This testimony did not opine on the ultimate issue of whether appellant had sexually abused the victim but was instead testimony that the expert saw no signs indicating deception or fabrication during the interview, thereby leaving the issue of the victim's credibility in the exclusive province of the jury. Thus, the jury was permitted to draw for itself the final conclusion as to whether the victim had, in fact, been sexually abused. Accordingly, the Court concluded, the trial court did not abuse its discretion in admitting this testimony.

Appellant also contended that the trial court erred in excluding impeachment testimony about claims the victim made about her purported YouTube channel. During cross examination of the victim, she testified that that she went on YouTube a lot; she posted videos under a YouTube username and that she had thousands of online followers, but she quit YouTube a week before trial. Appellant attempted to introduce testimony from an investigator that the victim did not own the YouTube account in question. Appellant argued that he could impeach the victim on a collateral matter indirectly

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material to the issue in the case, and the matter was material because his theory of the defense was that the victim had fabricated the allegations in order to escape the squalid conditions in the home. The trial court declined to admit this testimony, ruling that it was inadmissible under OCGA § 24-6-608 as extrinsic evidence of untruthfulness, and that the evidence was not relevant under OCGA § 24-4-401.

The Court agreed with the trial court. Here, the connection between the victim 's sexual assault allegations and her testimony regarding her purported YouTube channel was extremely attenuated, and the trial court thus did not abuse its discretion in excluding appellant's extrinsic evidence on this issue as irrelevant and on a matter collateral to the issues at trial. Nor did the trial court abuse its discretion in excluding the testimony under OCGA § 24-6-608 (b). Trial court judges retain wide latitude to impose reasonable limitations on cross-examination or interrogation on issues that are only marginally relevant.