**RANDOM LAW UPDATES – EVIDENCE ISSUES- EPISODE NOTES**

As we mentioned in a prior episode, we recently attended the summer conference for Superior Court judges. One of our talented presenters was Mr. Parag Shah, a has-been lawyer and current CEO of Miles Mediation. He provided a very informative session dealing with evidence law.

To be fair, Parag tried a very long trial before me back when I was a judge of the Augusta Circuit and I noted then that he was a very talented lawyer with a great appreciation for the rules of evidence. Although that trial caused him to quit the practice of law, Parag has continued to remain abreast of the latest evidence topics and does a great job presenting.

Today’s episode is dedicated to some recent developments in evidence law that we think may prove valuable to judges and others involved in the trial of cases throughout Georgia.

We will do our best to separate out the topics as we proceed today

**CONSCIOUSNESS OF GUILT – THE “NO INNCOCENT MAN FLEES” EVIDENCE**

*Harris v. State*, 313 Ga. 225 (2022) – evidence is relevant under Rule 401, a fact we all know well. In this felony murder case, there was evidence that the defendant was eventually located by law enforcement officers after the shooting and, when he was found, he barricaded himself in a room, armed with several weapons. That evidence was admitted at trial with the trial court reasoning that the circumstances of the defendant’s arrest, including evidence of guns and ammunition, were relevant to the defendant’s flight, his consciousness of guilt and “arm himself for the encounter with law enforcement.”

The Ga. Supreme Court noted, “the Eleventh Circuit has explained 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.” *United States v. Borders*, 693 F.2d 1318, 1324 (11th Cir. 1982) (citation and punctuation omitted). See also *Rowland v. State*, 306 Ga. 59, 65 n.4, 829 S.E.2d 81 (2019).”

*NOTE-that does not mean you get a jury charge on flight. See Renner v. State*, 260 Ga. 515, 518 (1990)(“ Hereafter, while the state may offer evidence of and argue flight, it shall be error for a trial court in a criminal case to charge the jury on flight.”)

“Here, the evidence related to Harris's attempt to evade arrest by barricading himself  in a room—evidence that included the handgun and ammunition that was found near Harris at the time of his arrest—had probative value because it suggested that Harris had a reason to evade law enforcement officers and therefore demonstrated Harris's consciousness of guilt. And 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 Harris's guilt.” *Harris*, at 232.

**RETURN TO 404(B) – KNOWLEDGE**

We have recorded episodes dealing with 404(B) and have more episodes planned in the future. But we have a case that we think bears some isolated discussion.

Rule 404(b) provides, “Evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident....”

Too often, evidence of extrinsic acts is offered in criminal trials and the prosecutor argues that the evidence should be admissible to prove [insert laundry list here]

We have discussed these exceptions to the rule against allowing character evidence in prior episodes so we will not restate all of those here. But the recent case of *Wright v. State*, 362 Ga. App. 867 (2022) made an observation that we thought might prove helpful when the evidence of other crimes is offered to prove “knowledge.”

Prior cases have noted that the “knowledge” exception really only applies to unique skills such as safe-cracking, bomb-making, etc. However, the “knowledge exception” is also applicable when specific factual knowledge is relevant in the case. For example, where a defendant claims that he/she did not know that he/she were not allowed on the premises, evidence of a prior conviction for criminal trespass or burglary may well be admissible. Same is true when a defendant is charged with reckless conduct and proof of the defendant’s HIV status is in question. *Green v. State*, 352 Ga. App. 284, 289 (2019).

The *Wright* case added one additional circumstance when evidence of prior acts might be admissible under the knowledge exception. Where the defendant alleges he was unaware that a crime was being committed, the knowledge exception may well apply. “Where NO special knowledge or talent is required to commit the charged crime, however, other acts should not be admitted simply to show that the defendant is “CAPABLE” of committing the charged offense.” In *Wright*, the defendant denied ownership of the bag which contained a large amount of drugs – he didn’t deny knowing that drugs were inside the bag. Instead, he denied knowing anything about the bag at all. The Court of Appeals held in *Wright* that because the defendant denied ownership of the subject bag, that his prior conviction for drug possession was inadmissible in this drug possession case under the knowledge exception of Rule 404(b). **REVERSED.**

**WHAT MUST BE SHOWN TO INTRODUCE EVIDENCE THAT SOMEBODY ELSE DID IT? (a/k/a reverse 404(b) evidence?)**

Here at the Good Judge-Ment Podcast, we are big fans of podcasts in general, especially those real crime podcasts. Often, they discuss trials and note that the trial judge did not allow evidence that someone other than the defendant committed the crime during their criminal trial. We have often wondered if Georgia had similar law and, lo and behold, we have an answer.

In *Hounkpatin v. State*, \_\_ Ga. \_\_, 873 S.E.2d 201 (2022), the Ga. Supreme Court held that before a defendant can offer evidence that a third party committed the crime, two things must be shown:

1. The proffered evidence must raise a reasonable inference of the defendant’s innocence, AND

2. Must directly connect the other person with the corpus delicti, OR show that the other person has recently committed a crime of the same or similar nature.

In *Hounkpatin*, the defendant was charged with killing a child by essentially squeezing the child to death. At trial, the defendant wanted to introduce evidence that the other children had abused the deceased child. (There was pretrial notice). The trial court allowed the defendant to testify about other incidents between the children but did not allow DFCS records which allegedly recounted objective findings of acts by the other children against the deceased. The appellate court noted that none of the incidents recounted in the DFCS records were remotely similar to the acts that gave rise to the victim’s death and none of the incidents included in the records occurred near in time to the child’s death.

**IMPEACHMENT OF DEFENDANT WITH PRIOR CONVICTIONS – THE DIFFERENCE BETWEEN RULE 609(a)(1) and (a)(2).**

O.C.G.A. § 24-6-609(a)(1) begins by noting that evidence of prior convictions can be used to impeach any witness EXCEPT THE ACCUSED IN A CRIMINAL CASE. The rule then goes on to note that the trial court must perform a Rule 403 analysis and sets forth additional parameters concerning the use of prior convictions to impeach a witness.

Rule 609(a)(2) says that any witness (including the accused) can be impeached by a criminal conviction involving a crime of dishonesty.

Not to get sidetracked, both subsections require a 403 analysis and have time constraints.

We recently had a whole episode on impeachment and you may be asking yourself why we are revisiting this issue? Well, the holding in *Robinson v. State*, 359 Ga. App. 38 (2022) made us want to stress a point.

In *Robinson*, the state wanted to impeach the defendant with evidence that he previously was convicted of the crime of burglary. The prosecutor argued that it was offered under subsection (a)(2) as a crime of dishonesty. In so doing, the trial court did not perform the required balancing test mandated for any impeachment evidence offered under subsection (a)(1). Instead, the trial judge agreed that burglary qualified as a crime of dishonesty and allowed the evidence. **REVERSED.**

There was no evidence at trial that the prior burglary involved in this case was accomplished with the use of deceit or false statements and, as a general rule, burglary is not a crime of dishonesty.

For those interested in what balancing test is required to admit a prior conviction for impeachment when the witness to be impeached is the defendant on trial, the *Robinson* court set out the test in plain terms:

1. Kind of felony and its impeachment value
2. Time of conviction and defendant’s subsequent history
3. Similarity between past crime and charged crime
4. Importance of defendant’s testimony
5. Centrality of the credibility issue.

**LAY WITNESS OPINION AS TO AUTHENTICITY OF WRITING**

In *Spillers v. Brinson*, 361 Ga. App. 771 (2021), there was a will contest, contesting the authenticity of the decedent’s signature. In opposition to summary judgment, the sister of the deceased testator testified that the signature on the document was not the signature of her sister. In a lengthy opinion discussing Rule 701 and 901, the Court of Appeals noted that Rule 701 allows non-expert testimony on material facts. In discussing Rule 901, the Court of Appeals noted that non-expert testimony is admissible on the issue of genuineness of handwriting, based upon familiarity not acquired for purposes of litigation. We have included this case in today’s episode because of an interesting observation in this decision.

Remember, the evidence was offered by the decedent’s sister to refute her deceased sister’s signature on a change of beneficiary form. The Court of Appeals noted, “the lay opinion testimony in this case is not being offered to authenticate a piece of evidence. It is being offered to *challenge* the authenticity of a document relied upon by the estate — the change-of-beneficiary form. But it is not apparent from the plain language of OCGA § 24-9-901 that that Code Section governs the admissibility of evidence offered to challenge a document's authenticity.”

Turning now to our favorite evidence issue – HEARSAY.

**HEARSAY – CO-CONSPIRATOR STATEMENTS**

There have been a number of recent decisions dealing with hearsay and we are not going to plow the same ground as has been plowed by prior episodes but we did want to share a couple of reminders.

Remember that the statement of a co-conspirator is NOT a hearsay exception. Instead, those statements are specifically excluded from the definition of hearsay – in other words, proper co-conspirator statements do not meet the definition of hearsay.

The recent case of *Stafford v. State*, 312 Ga. 811 (2021) reinforced a basic principle associated with co-conspirator statements. To be admissible as a co-conspirator statement, the statement had to be made in furtherance of the conspiracy. Statements which are essentially confessions of the crime or merely “spill-the-beans” as to the crime are NOT co-conspirator statements and, therefore, are not admissible.

**RULE 804- UNAVAILABLE WITNESSES**

We do not see many cases involving Rule 804 because to admit hearsay due to the declarant’s unavailability requires proof that is somewhat difficult to obtain. The case of *Morrell v. State*, 313 Ga. 247 (2022) reiterated that in order to have hearsay admitted under an exception found in Rule 804, the evidence must show that reasonable, good-faith efforts were made to procure the witness’ attendance.

**RESIDUAL EXCEPTION**

Once upon a time, we had an “exception” to the hearsay rule (prior to 2013 evidence code rewrite) that was called the “necessity exception.” This exception got so twisted up that the exception swallowed the rule. Recently, the appellate courts reminded us that the appellate decisions dealing with the old necessity exception are not applicable to the “residual exception” found in Rule 807. *Ash v. State*, 312 Ga. 771 (2022). Additionally, under the proper “residual exception” (Rule 807), “Statements admissible under 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.” *Ward v. State*, 313 Ga. 265 (2022).

That’s all for our discussion of some of the recent evidence decisions in Georgia.

Shout out for the shameless plagiarism we have committed from our buddy, Parag Shah.

The outline is full of statutory and case citations and that outline can be found at **goodjudgepod.com**.

Reach out to us on goodjudgepod@gmail.com with all of your podcast topic ideas

**I’m Wade Padgett**

*And I’m Tain Kell… [insert funny thing]*