

Evidence Update:
Electronic Data as Evidence,
& Bent of Mind
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**ELECTRONIC EVIDENCE,
“BENT OF MIND”**

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ELECTRONIC EVIDENCE

A statement in an oral or written communication as to the identity of the source is hearsay.

The out-of-court statement: “I am Paul Milich” offered to prove that the speaker is Paul Milich is hearsay. *Price v. State*, 208 Ga. 695, 69 S.E.2d 253 (1952); *Paterson v. State*, 287 Ga. App. 100, 650 S.E.2d 770 (2007). *See also, Ross v. State*, 194 Ga. App. 464, 390 S.E.2d 671 (1990) (“Although the genuineness of a writing may be proved by circumstantial evidence, this cannot be done solely by the face of the letter itself.”); 2 McCormick on Evidence, § 226 (6th ed. 2006).

If the witness saw me as I made that statement and already knows who I am, there is no problem. The problem with written and electronic communications, of course, is that the witness cannot see the source but has to take the source’s word for it as to the source’s identity.

Telephones - easily used by non owners; no user name or password.

-- “Texting” - No opportunity for voice recognition. (What about idiosyncratic acronyms or expressions?)

Caller ID can be spoofed with a cheap toll free service. (One of the sellers of this service, SpoofCard, has as its motto: “**Be who you want to be!**”)

“SMS Spoofing” - uses the short message service on most mobile phones and personal digital assistants (including Blackberry, iPhone, etc) to set who the message appears to come from by replacing the original sender ID (the mobile number) with chosen text.

E-mails - If a person gets access to another’s computer and e-mail program (which most people do not password protect) then e-mails can be sent by an unauthorized person in the name of the e-mail account holder.

Moreover, there are several ways an e-mail can be forged.

“Spoofing” - Making an e-mail appear to come from someone other than the sender.

The simplest spoofing can be done in minutes by simply changing the sender name in your e-mail program. If the e-mail is printed without its “headers,” there is no way to tell that it is spoofed.

The header is the technical information that is sent with every e-mail. It can easily be revealed on any e-mail that is still on the computer. A typical header looks like this ...

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From - Tue Apr 01 14:14:08 2009
Received: from imta10.emeryville.ca.mail.comcast.net ([76.96.30.14])
    by sccrmxc14.comcast.net (sccrmxc14) with ESMTP
    id <20080401141012s140015fioe>; Tue, 1 Apr 2009 14:10:12 +0000
X-Originating-IP: [76.96.30.14]
Received: from icje_nt1.icje.lawsch.uga.edu ([128.192.153.90])
    by IMTA10.emeryville.ca.mail.comcast.net with comcast
    id 8EA41Z02LlxH9N8oA00000; Tue, 01 Apr 2009 14:10:11 +0000
X-Authority-Analysis: v=1.0 c=1 a=2bGhCP708vgA:10 a=hT9cJopQTi_S3S2KQZgA:9
a=70tugJlnpzDk_xgQcnUA:7 a=68QoNwJ5AYTEu3fQtAPGg3RPM3QA:4 a=F4jHPeesYXcA:10
Content-class: urn:content-classes:message Content-Type: multipart/alternative;
X-MimeOLE: Produced By Microsoft Exchange V6.5
Date: Tue, 1 Apr 2009 10:11:50 -0400
Message-ID: <5456C07288D2E144B881BCCBF18F6D483BCF4D@icje_nt1.icje.lawsch.uga.edu>
In-Reply-To: <47F147Do.2070303@comcast.net>
X-MS-Has-Attach:
X-MS-TNEF-Correlator:
Thread-Topic: State Court Spring Conference Support
Thread-Index: AciTZFHwzOHcuuB6SfGq/Q4tdOGbewAmBFsA
References: <5456C07288D2E144B881BCCBF18F6D4836314D@icje_nt1.icje.lawsch.uga.edu>
<47F147Do.2070303@comcast.net>
From: "Rich Reaves" <rich@icje.law.uga.edu>
To: "Paul S. Milich" <milich@comcast.net>
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One can use the information in the full header of the e-mail to identify the IP address of the sender. At any given point in time, every computer connected to the Internet has a unique IP address assigned to it. Through the use of online databases and subscriber information obtained from the web or Internet Service Providers, it may be possible to identify who was assigned to the particular IP address in an email header at the time the message in question was sent.

So if the header info is available, this will detect a simple spoof. But there are many more sophisticated ways to spoof e-mail that can mask the real IP address and make forgery detection difficult or impossible. Bottom line: the basic SMTP e-mail system was not designed to be very secure or impervious to forgery.

Old Fashioned Forgery - A little time with a word processing program can create a printed e-mail that looks quite real, complete with apparently accurate header info.

“Trojan horses” - It is possible to infect a person’s computer with a virus that will commandeer the e-mail system and send out e-mails under the account holder’s name.

Social Network Sites

Users of Facebook and MySpace can create online profiles where they list contact information, school, work, and other personal information, and can post photo albums, songs, links and diaries. Besides creating their own profiles, Facebook and MySpace users can compile lists of their friends, post public comments on friends’ profiles, and send private messages to other users. They can join and create networks of users, often people who go to the same school, live in the same area or share specific interests such as “Law Students Who Love the Rule Against Perpetuities.” These Web sites also have search functions, which allow users to look up other users by name.

Both Facebook and MySpace give users the right to set their own privacy settings with regards to other users. Facebook’s default settings allow for profiles to only be viewed by registered users of the same network. Users can allow persons from outside their chosen networks to view their profiles on the default settings by accepting them as “friends.” On Facebook, users can compile lists of their “friends” by searching through the database and adding people they know to their friend lists. When a user wants to add a friend, Facebook sends a message to the friend which asks whether this person will accept the requesting user as their friend. If the requested friend accepts, the two new “friends” will be allowed to view each other’s profiles. If the friend rejects, neither will be allowed to view the other’s profile.

However, if desired, Facebook’s privacy settings allow users to change the default settings to limit the viewing of their profiles, or certain aspects of their profiles, to only those accepted as their “friends.” When users take this extra step, they ensure that only persons whom they accept as friends (regardless of whether they belong to the same network) will be allowed to view their profiles.

MySpace, as a default, allows all other registered users to view a person’s profile. However, just like Facebook, users are allowed to change their settings so that only their “friends” can see their profiles.

See also, **Zimbio** is an online social networking / sharing site that allows users to build interactive blogs (wikizines - web magazines) on whatever topic they choose. The site commonly covers headlines in entertainment, style, current events, and so forth.

Fourth Amendment Issues

In criminal cases, attempts to raise constitutional challenges to the admission of e-mails and MySpace or Facebook pages have been unsuccessful. *See generally*, Matthew Hodge, "The Fourth Amendment and Privacy Issues on the "New" Internet," 31 S.II.U.L.J. 35 (2006); Note, "Keeping Secrets in Cyberspace: Establishing Fourth Amendment Protection for Internet Communication," 110 Harv. L. Rev. 1591 (1997).

The biggest obstacle to Fourth Amendment protection of such information is that users simply do not have an expectation of privacy for the communications. First, the communications are intended to be viewed by the recipients and thus acquiring the communication from a recipient creates no constitutional problems. *See, e.g., United States Charbonneau*, 979 F. Supp. 1177 (S.D. Ohio 1997) (e-mail).

Second, the nature of this media is such that the communications (whether e-mails, Facebook postings, or chat room messages) may be easily and widely shared with others. *See, Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001).

Finally, a user has no reasonable expectation that the content of his communications cannot be viewed by the service provider. Indeed, service providers specifically warn users that their communications may be viewed by the provider for purposes of quality control, to respond to customer complaints, or for other purposes.

FACEBOOK TERMS

By posting User Content to any part of the Site, you automatically grant, ... an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to use, copy, publicly perform, publicly display, reformat, translate, excerpt (in whole or in part) and distribute such User Content for any purpose, commercial, advertising, or otherwise, on or in connection with the Site or the promotion thereof, to prepare derivative works of, or incorporate into other works, such User Content, and to grant and authorize sublicenses of the foregoing. You may remove your User Content from the Site at any time. ... however you acknowledge that the Company may retain archived copies of your User Content.

· When you enter Facebook, we collect your browser type and IP address. ...

Please keep in mind that if you disclose personal information in your profile or when posting comments, messages, photos, videos, Marketplace listings or other items, this information may become publicly available.

Of course, if the police want to search someone's computer, a warrant is required

that must specify the purpose of the search and the type of data sought. If the police, in the course of a computer search for one kind of data, come across a different type of data that suggests criminal activity, the police must stop and get a warrant to search for that additional data. *See, United States v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001).

Authentication Issues - Facebook and MySpace present the familiar problem that we cannot legally authenticate a message or communication based solely on the fact that the message “says” it is from the alleged author.

High tech method – When a person creates a Facebook or MySpace account, the service records the IP address of the sending computer and does this every time the user enters the system thereafter. So if a Facebook page entry can be traced to an IP address assigned to a particular person’s computer at the time the entry was made, this should be sufficient authentication because access to a specific Facebook account requires a user name and password.

A possible problem ... A person could create a phony Facebook account that is basically untraceable back to an identifiable source. Two easy ways to do this. (1) Go to a Starbucks with a laptop and create the account. Facebook will record the IP address of the Starbucks wireless network router (which does not keep a permanent log of the computers that log onto it). If a person posing as “Fred” took the precaution of entering the “Fred” Facebook page only through similar public wireless networks, the source of the page and the postings would be untraceable. (2) There are numerous internet sites that offer (usually for a small fee) a proxy server through which you can wash your IP address so that the sites you visit (such as Facebook) get a basically meaningless IP address.

“Sexting” is the sending of sexual comments or pictures. Unlike old fashioned phone sex, “sexting” usually creates saveable and sendable content that can be distributed globally. There have been several prosecutions of teenagers for child pornography -- though I am not aware of any in Georgia. Under the 1986 Stored Communications Act, 18 U.S.C. §§ 2701-2711, a service provider (such as MySpace or Facebook) must notify federal authorities if it finds child pornography (as defined by 42 U.S.C. § 13032) on its content pages.

Twitter

Twitter is a free social networking and micro-blogging service that enables its users to send and read other users' updates known as “tweets.” Tweets are text-based posts of up to 140 characters in length which are displayed on the user's profile page and delivered to other users who have subscribed to them (known as “followers”). Senders can restrict delivery to those in their circle of friends or, by default, allow anybody to access them. Ashton Kutcher is the current record holder with over one million “followers.” The content of a tweet is basically “this is what I’m doing right now.”

Users can send and receive tweets via the Twitter website, a cell phone, or a personal digital assistant. Access to the website requires username and password but cell phone use does not (an optional PIN is available for cell phone access). If a user knows a target's phone number, it is possible, using FakeMyText or similar sites on the internet to spoof a tweet (if the target has not set up a PIN for his access).

On January 5, 2009, 33 high-profile Twitter accounts, including Barack Obama's, were compromised, and falsified messages — including sexually explicit and drug-related messages — were sent. (CNN's Rick Sanchez's tweet informed his followers that he was not coming into work today because he smoked too much crack the previous evening). The accounts were compromised after a Twitter administrator's password was guessed via a "dictionary attack."

YouTube

YouTube is a video network site that allows registered members to upload videos that can be viewed by both registered and unregistered visitors to the web site. Tracing the source of a YouTube video raises the same technical and practical issues as a Facebook or MySpace page. The person who registers on YouTube will automatically give his or her IP address to the website and, if this can be traced back to the person's computer, this can be a source of authentication. But again, IP addresses can be masked in several ways.

Cross-media identification may be useful. If a person uploads a YouTube video and then places a link to it on his MySpace page (where he claims credit for it) or sends a link to it in an e-mail to a friend, the court may use these "clues" to connect the video to its source.

The content of a YouTube video can be authenticated in the same manner as any other video. If a witness who was present when the events took place testifies that the video is a fair and accurate recording of the events, then the video is authenticated. *Harper v. State*, 213 Ga. App. 444, 445 S.E.2d 303 (1994).

Web Sites

Think of the internet as a library filled with books and each Web site as an individual book in that library. The URL or web address is the name of the book. Authentication of a print out from a Web site requires the web address so that anyone can confirm that the print out came from that site. *See, e.g., Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002). Web sites do change content, however, from time to time and if the print out material is no longer on the current site (or in the cache on the computer used to access the site) then the testimony of the person who printed out the Web site's material will be required.

One issue with Web sites is authenticity — are they what they claim to be? I could

create and launch a web site called the Juvenile Judges of Georgia Official Web Site and fill it with all kinds of false information and libelous bios of the Judges. (But that would be wrong.) Another problem is that it is not terribly difficult to basically copy someone's Web site and present it as the original. This is why many financial institutions now have site keys that you must select and later identify before you log on to the site.

The fact that a Web site states that it has certain origins or affiliations is hearsay if offered to prove the truth of those statements. A witness should be required to testify from personal knowledge that he or she recognizes the Web site based on experience creating or contributing to the site or routinely relying upon the site in the course of the witness's business. *See, Matson v. Noble Inv. Group, LLC*, 288 Ga. app. 650, 655 S.E.2d 275 (2007) (uncertified copies of records downloaded off of Secretary of State's website were inadmissible).

It is also possible for a skilled computer user to invade a Web site and install unauthorized data on the site, particularly if the site has weak security. *See, e.g., United States v. Jackson*, 208 F. 3d 633, 637-38 (7th Cir. 2000) (court refused evidence of postings on hate group's Web site where postings could have been unauthorized).

Another issue with Web site material is hearsay. In Georgia, periodicals, treatises and other literature is not admissible on direct examination, *Cantrell v. Northeast Georgia Med. Ctr.*, 235 Ga. App. 365, 508 S.E.2d 716 (1998), though it may be admissible on the cross-examination of an expert if the source is shown to be authoritative in the expert's field and relevant to the expert's testimony. *Dean v. State*, 250 Ga. 77, 295 S.E.2d 306 (1982). The testifying expert need not have relied on the literature for it to be used in cross-examining him. *Brannen v. Prince*, 204 Ga. App. 866, 421 S.E.2d 76 (1992).

However, market reports and similar publications of prices and sales that are relied upon by businesses in the ordinary course are admissible to prove the facts, but not opinions, as published. *Suarez v. Suarez*, 257 Ga. 102, 355 S.E.2d 649 (1987); *Columbian Peanut Co. v. Pope*, 69 Ga. App. 26, 24 S.E.2d 710 (1943). *See also, State v. Erickstad*, 620 N.W.2d 136, 145-46 (N.D. 2000) (Kelly Web site admitted to prove blue book value of used car); *Elliott Assoc., L.P. v. Banco de la Nacion*, 194 F.R.D. 116, 121 (S.D.N.Y. 2000) (Bloomberg Web site admitted to prove certain interest rates).

A Checklist for Authentication of Written or Oral Communications As Originating From a Particular Person or Source

The goal is to supply sufficient, non hearsay evidence as to the identity of the source such that a reasonable person could find that the source is who he claims to be. *State v. Smith*, 246 Ga. 129, 269 S.E.2d 21 (1980); *Thomas v. State*, 268 Ga. 135, 485 S.E.2d 783 (1997). Various methods or “clues” can be combined to create a sufficient, circumstantial case for authentication.

(1) Is there admissible evidence that the person who allegedly made the communication later admitted making the communication?

-- If the person who made the statement is a party, the opponent may offer that statement into evidence as a party admission. *Simon v. State*, 279 Ga. App. 844, 632 S.E.2d 723 (2006).

The party need not have said “I sent a text message to Bob at exactly 4:55, p.m., on Sunday, April 26 regarding plans for dinner that evening.” It is enough if the party admitted some fact that circumstantially supports a finding that he sent the communication. *See, e.g., Price v. State*, 266 Ga. 723, 470 S.E.2d 652 (1996) (fact that defendant subsequently admitted that he spoke with someone from caller’s agency sufficient to authenticate the call).

-- If the person is not a party, the out-of-court statement may or may not be hearsay.

- If the person’s statement, subsequent to the communication in question, **demonstrates his knowledge** that the communication was made, this is circumstantial, non hearsay evidence supporting authentication.

-- *Example*: I received an e-mail purportedly from Joe. The next day, I see Joe and he asks: “Did you get my e-mail yesterday?” This is not hearsay because the mere fact that Joe made the statement demonstrated his knowledge that I received an e-mail purportedly from Joe the day before.

- On the other hand, if the person’s statement does not demonstrate such knowledge but only asserts that the person sent the communication, then it is hearsay and inadmissible (unless the person is the party opponent).

-- *Example*: I received an e-mail purportedly from Joe. The next day, I see Joe and I ask him: “Did you send me an e-mail yesterday?” And Joe says “Yes.”

(2) Does the person’s **conduct** suggest that he was the person who made the

communication?

-- Foretold Conduct – In the communication, the person said he would do something and we have admissible evidence that he subsequently acted in accordance with the communication.

-- *Example*: I received an e-mail purportedly from Joe. The sender says he will come to my office at 2:30. At 2:30, Joe comes to my office.

See, e.g., United States v. Tank, 200 F.3d 627 (9th Cir. 2000) (where sender asked recipient to meet at a particular place and the defendant showed up for that meeting, this was evidence that the defendant was the sender of the message); *Jackson v. State*, 677 S.W.2d 866 (Ark. App. 1984) (caller said he would meet at a particular time and place and subsequently the defendant did so); *In re F.P.*, 878 A.2d 91 (Pa. Super. 2005) (message made specific threats against recipient; fact that defendant carried out those threats supported a finding that the defendant was the person who sent the threats).

-- Reply Conduct – After the communication, the witness asked the person to do something and the person subsequently did it.

-- *Example*: I received an e-mail purportedly from Joe. I reply to the e-mail and ask Joe to come to my office at 2:30. Joe shows up at my office at 2:30.

(3) Does the content of the communication disclose facts that only the purported sender and few other people would know? *Allstate Ins. Co. v. Reynolds*, 138 Ga. App. 582, 227 S.E.2d 77 (1976).

-- Self Identification Facts – revealing facts about the sender that few other than the sender would know.

-- *Example*: I received an e-mail purportedly from Joe. In the e-mail, the sender mentions that he just got over the flu. I independently know that Joe recently had the flu.

Simon v. State, 279 Ga. App. 844, 632 S.E.2d 723 (2006); *Weathers v. State*, 198 Ga. App. 871, 403 S.E.2d 449 (1991). In *Hammontree v. State*, 283 Ga. App. 736, 642 S.E.2d 412 (2007), the content of the message referred to the sender as “spider man.” The use of this nickname was particularly damning in this child molestation case since the defendant has a spider tattoo on his private part.

-- Event Specifics – If the sender demonstrates knowledge of certain events and there is independent evidence that the sender witnessed those events, then this is circumstantial evidence of authentication.

-- *Example*: I received an e-mail purportedly from Joe. In the e-

mail, the sender mentions the boss spilling coffee on himself at a meeting. I independently know that Joe was at that meeting.

See, *Massimo v. State*, 144 S.W.3d 210, 216-17 (Tex. App. 2004) (e-mail message held properly authenticated where the e-mail was sent to the victim's e-mail address shortly after she and defendant had a physical altercation and the e-mail referenced that altercation); *Dickens v. State*, 175 Md. App. 231, 927 A.2d 32 (2007) (where text message referred to motel where victim was staying, fact that defendant had only hours earlier found and confronted victim at that hotel helped establish that defendant sent the message).

-- "Reply Letter Doctrine" -- To the extent the communication references other communications which are already authenticated, this is circumstantial evidence that the communication was authentic.

-- *Example*: I received an e-mail purportedly from Joe. The e-mail appears to be in reply to an earlier e-mail I sent Joe asking if he wanted to go to the Thrashers' game. *United States v Siddiqui*, 235 F.3d 1318 (11th Cir. 2000).

(4) Can the communication be linked to a means of transmission that requires a username and password that can be independently tied to the purported sender?

-- *Example*: A Facebook entry appears to have been posted by "Joe." If I can show that the username and password on this Facebook account is tied to Joe, I can authenticate the entry.

-- Tie it to Joe by the IP address on Joe's computer.

-- Tie it to Joe by other entries on the Facebook page.

(5) Is there trace evidence of the communication on the purported sender's computer or cell phone?

If an e-mail is still in the "Sent" folder on the computer, this may help authenticate the e-mail. 2 McCormick on Evidence, § 224 (6th ed. 2006) ("[W]hile presence in a computer file will constitute some indication of a connection with the person or persons having ordinary access to that file, much will depend on the surrounding facts and circumstances, and it is reasonable to require that these include some additional evidence of authenticity.")

(A "deleted" e-mail is not really erased from the hard drive.)

Some cell phones may contain lists of recent incoming or outgoing calls. Proof that a call was made on a particular phone is not enough authentication, however, since cell phones are not user protected (can be used by anyone with even brief access). However, if continuous possession of the phone by the owner can be established over the period during which the call was made, this would exclude non owner use of the phone.

Cell phone call records are easily available --- for a price.

(6) Can a witness with personal knowledge recognize the voice, or handwriting, or signature of the sender?

-- Voice Identification -- The witness must lay foundation as to how she knows the person's voice. *Brown v. State*, 278 Ga. 369, 602 S.E. 2d 834 (2004). Personal familiarity with a voice may be acquired for purposes of testifying at trial. *Willingham v. State*, 134 Ga. App. 603, 215 S.E.2d 521 (1975); *Taylor v. State*, 75 Ga. App. 205, 42 S.E.2d 926 (1947).

-- Handwriting or Signature -- three ways:

- Recognition - Testimony of witness familiar with the putative author's handwriting or signature. O.C.G.A. § 24-7-6; *Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007).

- Exemplar Comparison - The trier of fact compares known exemplars of person's handwriting or signature to the document in question. O.C.G.A. § 24-7-7.

- Expert Testimony - *See, e.g., Gross v. State*, 161 Ga. App. 489, 288 S.E.2d 733 (1982).

The Electronic Records and Signature Act, O.C.G.A. §§ 10-12-1 to 10-12-5, provides that all electronic records are to be treated as "writings" for authentication purposes.

One final note: Every form of electronic communication can be "spoofed," "hacked," or "forged." But this does not and can not mean that courts should reject any and all such communications. Indeed, the vast majority of these communications are just as they appear to be -- quite authentic.

“BENT OF MIND”

The rule prohibiting character evidence in criminal cases has long recognized exceptions for instances in which evidence that reflects poorly on the accused's character may nevertheless be admitted to prove a matter of specific relevance in the case such as motive, identity, intent, opportunity, plan, or absence of mistake or accident. Georgia is the only jurisdiction in the U.S. to add “bent of mind” to this list of exceptions and the use of this exception has progressively grown to the point today where it is swallowing the character rule in some instances. Its use in DUI cases is one example.

It has become automatic in many Georgia courts for trial judges to admit any and all prior DUIs of a DUI defendant to prove the defendant's “bent of mind.” Georgia is the only jurisdiction in the United States that uses “bent of mind” to indiscriminately admit a defendant's prior DUIs. *Wade v. State*, 295 Ga. App. 45, 670 S.E.2d 864 (2008); Milich, Georgia Rules of Evidence, (2d ed) § 11.13 (Thomson-West 2002).

Where did “bent of mind” come from?

Given that no other state or, in fact, no other English speaking legal system recognizes “bent of mind” as an exception to the rule against character evidence, how did Georgia end up using it?

First of all, it is important to understand that there is not a single case that in any way attempts to explain Georgia's unique use of this “exception.” Not a single case that describes how and why the “bent of mind” rule should be part of the law regarding character evidence.

In fact, the only Georgia cases that discuss “bent of mind,” (as opposed to simply incanting the phrase), do so quite skeptically. *See, e.g., Farley v. State*, 265 Ga. 622, 630, 458 S.E.2d 643 (1995) (“However, ‘bent of mind’ and ‘course of conduct’ have evolved into amorphous catch-phrases, difficult to define and slippery in application. While they may be legitimate purposes for introducing independent crime evidence under some circumstances, careful analysis of the relevance of the evidence is especially important when those purposes are claimed. Such careful scrutiny is essential because a person's bent of mind is dangerously close to being his character, and a person's course of conduct could easily show nothing more than a mere propensity to act in a certain manner.” Sears and Fletcher, JJ. concurring); *Wade v. State*, 295 Ga. App. 45, 670 S.E.2d 864 (2008) (noting the problems with “bent of mind” in DUI cases but deferring to the Georgia Supreme Court); *Payne v. State*, -- Ga. --, 2009 WL 578528 (2009) (Hunstein, Sears, and Carley in dissent -- quoting *Farley, above*, and a balding evidence professor: “Accord Paul S. Milich, Georgia Rules of Evidence, § 11.13, p. 189-190 (2d. ed. 2002) (“[u]sing phrases like ‘bent of mind’ or ‘course of conduct’ totally obscures the distinction between legitimate evidence and the prohibited evidence of character”).

In the earliest cases in which the expression “bent of mind” was used, the phrase seems to have been a synonym for “intent” and/or “motive.” The phrase was used in moonshining cases and then spread from there. (See discussion by Judge Deen in *Johnson v. State*, 154 Ga. App. 793, 796, 270 S.E.2d 214, 216 (1980) (“The opinions of the Court of Appeals immediately prior to 1950 are filled with moonshine liquor cases, in many of which evidence that defendants charged with moonshining had been previously convicted of the same offense was glossed over as part of a course of conduct, motive, or bent of mind.”))

Georgia’s statute on character evidence, O.C.G.A. § 24-2-2, provides no support for the “bent of mind” exception:

The general character of the parties and especially their conduct in other transactions are irrelevant matter unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct.

The “nature” of an ordinary DUI case does not “involve” the accused’s character nor is it “necessary or proper” to investigate the defendant’s character and “especially” the defendant’s “conduct in other transactions.”

In sum, the “bent of mind” exception has a dubious pedigree and when it has drawn any analysis from the appellate courts, the attention has mainly been critical.

Balancing the Use of “Similar Transactions”

The use of any exception to the character rule, especially “bent of mind,” should be subject to a careful balancing of the legitimate probative value of the similar transaction, if any, against the unfair prejudicial effect of the evidence.

Numerous cases have endorsed this balancing. A sampling ...

Curtis v. State, 282 Ga. App. 322 (2006) (“In exercising [its] discretion, the court should consider whether the [s]tate’s need for the similar transaction evidence outweighs the prejudice inherent to the defendant.”);

Brunson v. State, 207 Ga. App. 523 (1993) (“... evidence of independent crimes is never admissible unless its relevancy to the issues on trial outweighs the prejudice it creates.”);

Oller v. State, 187 Ga. App. 818 (1988) (“Evidence of similar crimes is admissible where its relevance to show identity, motive, plan, scheme, bent of mind and course of conduct, outweighs its prejudicial impact.”);

Wimberly v. State, 180 Ga. App. 148 (1986) (“The prejudicial effect of evidence concerning independent offenses is the paramount consideration behind the general rule of inadmissibility of such evidence, and if the evidence tends to show

a general criminal propensity more than it tends to prove an issue in the case, it should not be introduced to the jury.”);

Obiozor v. State, 213 Ga. App. 523 (1994) (“Any danger arising from this incidental placing of an appellant's character in evidence is offset when a balancing test is applied to determine whether the relevance of the similar transaction evidence outweighs its prejudicial impact.”);

Edwards v. State, 262 Ga. 470 (1992) (Fletcher, J. concurring: “... it must be demonstrated that the relevance of the independent act evidence outweighs its inherently prejudicial nature.”);

Carroll v. State, 143 Ga. App. 796 (1977) (“If the evidence [of uncharged conduct] tends to show a general criminal propensity more than it tends to prove an issue in the case, it should not be introduced to the jury.”).

The Purpose Behind the Character Rule

The rule prohibiting evidence of the defendant's bad character, including prior crimes and other bad acts, is over 350 years old. The primary purpose of the rule is to protect the presumption of innocence.

The presumption of innocence resonates with jurors to the extent that the jurors can identify with the defendant. If it was them, or their spouse, or their son or daughter who was standing trial, they would want the prosecution required to dot every “i” and cross every “t.” The fear of wrongful conviction is, as it should be, a weight upon the jury's brow.

But evidence of the defendant's past crimes tells the jury that the defendant is not really like them. The defendant has broken the law before and therefore probably broken the law again. The fear of wrongful conviction relaxes and is pushed aside by the fear of wrongful acquittal. The presumption of innocence turns into a presumption of guilt. *See, Jones v. State*, 257 Ga. 753, 756, 363 S.E.2d 529 (1988) (“It would clearly be difficult to maintain the presumption of innocence in the minds of the jurors if testimony were given of a long list of crimes alleged to have been committed by the accused.”)

The biggest mistake that some lawyers make when dealing with the character rule is confusing the legitimate and illegitimate probative value of such evidence. Evidence of the defendant's past crimes is not excluded because it is irrelevant. It is simple and persuasive logic that tells us that a person who has committed a crime in the past is more likely than the average citizen to have committed the crime charged, particularly when the two crimes are of the same kind. (This is called “the propensity inference.”) But is it precisely because this simple inference weighs so heavily on the presumption of innocence that such evidence must be excluded.

See, Lee v. State, 8 Ga. App. 413, 69 S.E. 310 (1910) (“Now, to prove in a criminal case that the defendant is a person of criminal bent of mind is not without

probative value on the issue as to whether he committed the particular crime involved; for criminals are more likely to commit new crimes than are persons free from the taint of previous criminality. To prove that the defendant had committed other offenses would naturally cause the jury more readily to believe that the defendant committed the particular offense in question; and this from a logical standpoint would not be a misuse of the testimony. The misuse is likely to come about by reason of the jurors becoming so prejudiced against the defendant personally on account of these other crimes that they could not fairly weigh the testimony against him in the particular case - that is, by reason of the danger of the jury's convicting the defendant "on general principles," as the common saying is, instead of determining his guilt of the specific offense for which he stands charged. This likelihood of the misuse of the testimony, this danger of arousing the prejudices of the jury, requires the courts to be very careful in allowing proof of other crimes, and affords the chief reason underlying the general rule, mentioned above, that such evidence is not ordinarily admissible.")

See, Williams v. State, 261 Ga. 640, 409 S.E.2d 649 (1991) ("The rationale for the [character] rule is that evidence of an independent offense or act committed by the accused is highly and inherently prejudicial, raising, as it does, an inference that an accused who acted in a certain manner on one occasion is likely to have acted in the same or in a similar manner on another occasion An accused is entitled to be tried for the offense charged in the indictment, independently of any other offense not connected with the transaction upon which the indictment was based.")

Cardell v. State, 119 Ga. App. 848, 850, 168 S.E.2d 889, 891 (1969) ("It goes without saying that testimony that the defendant has engaged in other criminal transactions is prejudicial to him in the case for which he is on trial, not because it has no probative value but because it has too much, as tending to indicate that he is of a criminal bent of mind and therefore more likely than the average citizen to have committed the act of which he is accused.").

Thus when a court admits the defendant's prior crime to show his "bent of mind" to commit crimes of that sort, it is doing precisely what the 350 year old character rule enjoins: it is admitting evidence of the defendant's past bad acts to suggest that he has a propensity to commit the crime on trial.

Story v. State, 95 Ga. App. 455, 98 S.E.2d 42 (1957) ("To permit the introduction of such evidence 'to show knowledge, motive, intent, scheme, or plan' merely to show 'bent of mind'; that is to say, to permit the introduction of such evidence to show that the defendant is more likely to commit again a crime of which he has previously been guilty is the precise reason for excluding such testimony.")

Nicholson v. State, 125 Ga. App. 24, 186 S.E.2d 287 (1971) ("If this court is not completely clear on what 'plan', 'scheme,' or 'course of conduct' may be, a jury would be completely confused. It could well believe that, e.g., a 'plan' to commit burglaries at every good opportunity is shown by other burglaries committed by a

defendant so he probably committed this one. This is the very purpose of the general rule - to prevent a conviction for a particular crime based upon a showing of a criminal 'bent of mind'.")

King v. State, 230 Ga. App. 301, 496 S.E.2d 312 (1998) ("In the same manner neither bent of mind nor course of conduct was an issue here unless the prosecution intended to show King's propensity to commit drug crimes. Under our law, however, that is not a permissible basis for introducing similar transaction evidence.")

Smith v. State, 232 Ga. App. 290, 501 S.E.2d 523 (1998) ("The primary aim of this rule is to avoid the forbidden inference of propensity. Just because a defendant has committed wrongful acts in the past is not alone legal grounds to believe he has done so on the occasion under scrutiny.")

Cardell v. State, 119 Ga. App. 848, 168 S.E.2d 889 (1969) ("But the mere fact that the defendant has recently committed a crime of the same sort as that for which he is on trial establishes no probative connection between the two crimes.")

Shinall v. State, 113 Ga. App. 127, 147 S.E.2d 510 (1966) ("That evidence of other crimes offers an inference of a criminal bent of mind which makes it easier to believe the defendant has committed the crime for which he is on trial is exactly the reason for excluding such testimony.")

Of course it is necessary sometimes to admit evidence that reflects poorly on the defendant's character. The State may need the evidence to prove motive, or opportunity, identity, knowledge, or absence of mistake or accident. But each time such evidence is admitted the court should do so with the sober recognition that the presumption of innocence has been compromised; that such evidence does not come without a high price.

See, Cawthon v. State, 119 Ga. 395, 46 S.E. 897 (1904) ("When one is on trial, charged with the commission of a crime, proof of a distinct and independent offense is never admissible, unless there is some logical connection between the two, from which it can be said that proof of the one tends to establish the other. While this rule is general, and subject to few exceptions, still there are some exceptions, as when the extraneous crime forms part of the *res gestae*, or is one of a system of mutually dependent crimes, or is evidence of guilty knowledge, or may bear upon the question of the identity of the accused or articles connected with the offense, or is evidence of prior attempts by the accused to commit the same crime upon the victim of the offense for which he stands charged, or where it tends to prove malice, intent, motive, or the like, if such an element enters into the offense charged. ... "This connection must clearly appear from the evidence. Whether any connection exists is a judicial question. If the court does not clearly perceive it, the accused should be given the benefit of the doubt, and the evidence should be rejected. The minds of the jurors must not be poisoned and prejudiced

against the prisoner by receiving evidence of this irrelevant and dangerous description.”) (approvingly quoting another source)

When Are Similar Crimes Admissible?

One of the most damaging errors in evaluating “similar transactions” under the character rule is the simplistic, and inaccurate notion that mere similarity between the prior crime and the crime on trial somehow magically converts illegitimate character evidence into admissible evidence. *McGee v. State*, 267 Ga. 560, 480 S.E.2d 577 (1997) (the issue “is not mere similarity but relevance to the issues in the trial of the case”); *Obizor v. State*, 213 Ga. App. 523, 445 S.E.2d 553 (1994) (“The ultimate issue in determining the admissibility of similar transaction evidence is not mere similarity but relevance to the issues on trial).

Mere similarity, without some specific relevance to issues in the case, is nothing more than the propensity inference dressed up in its most prejudicial clothing since, by definition, the more similar the crimes the more likely the jury will simply say: “He did it before therefore he probably did it again.” *See, e.g., Cain v. State*, 268 Ga. App. 39 (2004) (defendant’s prior theft of cars admissible to show his “bent of mind to steal cars.”) Indeed, some courts have become so confused that they have explicitly endorsed the propensity inference in citing the “exception.” *See, e.g., Shiver v. State*, 235 Ga. App. 358, 509 S.E.2d 658 (1998) (in assault case: defendant’s prior assaults admitted to prove his “bent of mind” and “propensity to resort to threats and violence to resolve conflicts.”)

Similarity was originally used to prove identity by proof of *modus operandi*. *See, e.g., Turner v. State*, 281 Ga. 647, 641 S.E.2d 527 (2007) (poisoning by antifreeze); *Ellerbee v. State*, 247 Ga. App. 46, 542 S.E.2d 146 (2000). But the fact that the defendant, charged with robbery in this case, has committed a robbery before does nothing, without more, to identify him or distinguish him from the many robbers out there --- it does, however, illegitimately show his propensity to commit that type of crime. *See, e.g., Ricks v. State*, 217 Ga. App. 666, 458 S.E.2d 862 (1995) (reversing conviction).

See, Farley v. State, 265 Ga. 622, 630, 458 S.E.2d 643 (1995) (“Rarely, will mere similarity be sufficient to establish a logical connection between a prior act and the charged offense.” (Fletcher, J. concurring) “Trial courts often allow independent crime evidence only because the circumstances of the independent crime are somewhat similar to the circumstances of the crime charged, without sufficient analysis of whether, because of that similarity, the independent crime evidence is actually relevant to an issue being tried. And this state’s appellate courts have often affirmed such decisions by trial courts with equally insufficient analysis.” (Sears, J. concurring)

Silly Sims

In *Collins v. State*, 242 Ga. App. 450, 529 S.E.2d 412 (2000), the court admitted 3 prior burglaries based on their "similarity" to the charged offense in that in each case the defendant "gained entry through a window, door, or ceiling."

In *Andrews v. State*, 267 Ga. 473, 480 S.E.2d 29 (1997), the accused was charged with shooting a stranger in a parking lot after the victim insulted him. The court admitted a shooting three years earlier, when the accused shot a female acquaintance. The Court held that the earlier shooting "... was similar to the crime for which appellant was being tried in that each homicide was committed with a handgun after a short conversation in the early morning hours of a fall day, and that each time appellant was captured a short distance away after leaving the scene."

In *Gardner v. State*, 273 Ga. 809, 546 S.E.2d 490 (2001), in both the prior and charged robbery, the defendant used a handgun, committed the crime in the "late evening hours" and fled the scene of his crime.

In *Hill v. State*, 176 Ga. App. 509, 336 S.E.2d 276 (1985), similarity between two sales of marijuana was that in both instances the defendant kept the marijuana in plastic baggies inside a brown paper bag.

In *Lankford v. State*, 204 Ga. App. 405, 419 S.E.2d 498 (1992), a DUI case, defendant's prior DUI was admissible because both the prior DUI and the incident at issue took place in defendant's county, while defendant was driving his own car, and at night.

Fields v. State, 223 Ga. App. 569, 479 S.E.2d 393 (1996) ("Evidence of a prior DUI offense, regardless of the circumstances surrounding its commission, is logically connected with a pending DUI charge as it is relevant to establish that the perpetrator has the bent of mind 'to get behind the wheel of a vehicle when it is less safe for him to do so.'")

Similar Transaction Must be Relevant to a Genuine Issue in the Case

The only way to prevent the "similar transaction" rule or "bent of mind" from swallowing the rule against character evidence is to properly limit its application to situations in which the evidence speaks to a genuine issue in the case.

See, *Smith v. State*, 232 Ga. App. 290, 501 S.E.2d 523 (1998) ("In exercising this discretion, the court should consider whether "the State's need for the similar transaction evidence outweigh[s] the prejudice inherent to the defendant." *Phillips v. State*, 215 Ga. App. 526, 451 S.E.2d 517 (1994). This consideration consists of at least two questions. First, is the issue for which the State is introducing the evidence a genuinely disputed issue? For example, if identity is the State's announced purpose but is not an issue contested by defendant, then the probative value of the similar transaction evidence is acutely if not fatally diminished. ... Second, does the State need this evidence to prove the issue, or

can the fact be proved otherwise? ... To illustrate, where intent may be easily inferred from the commission of the act itself, the probative value of similar transaction evidence proffered to prove intent will generally be outweighed by its prejudicial effect.”) (emphasis supplied)

Admitting similar transactions to prove “intent” or “bent of mind” when that is not in issue is a misuse of the rule. *See, Bacon v. State*, 209 Ga. 261, 71 S.E.2d 615 (1952) (“[C]riminal intent is an essential element in every crime where criminal negligence is not involved, and to hold, as the majority opinion of the Court of Appeals in this case [did], that evidence of other offenses is always admissible to show intent, whether or not there be any logical connection between them and the case on trial, would be to abolish the general rule, and to establish the exception as the general rule without any exception thereto.”).

The intent of the driver in an ordinary DUI case is never at issue. *Prine v. State*, 237 Ga. App. 679, 515 S.E.2d 425 (1999) (“DUI is a crime of general, not specific, intent. *Tam v. State*, 232 Ga. App. 15, 501 S.E.2d 51 (1998). In a crime of general intent, the ‘intent’ required is proved through proof of the commission of the act itself. In a DUI case such as the one charged herein, the act consists of (1) driving, (2) after consuming alcohol to the extent that one is (3) a less safe driver. OCGA § 40-6-391(a)(1). There is no proof of intent beyond proof of the act.”) (emphasis supplied) (See, again, the underlined language from *Smith*, above)

