

**FIFTH DIVISION
BROWN, C. J.,
MERCIER, P. J., and EPPS, J.**

**NOTICE: Motions for reconsideration must be
received no later than 4:30 pm on the 10th day after
the decision was issued to be deemed timely filed.
<https://www.gaappeals.gov/rules>**

October 13, 2026

In the Court of Appeals of Georgia

A26A1409. NUNEMAKER v. THE STATE.

MERCIER, Presiding Judge.

Following this Court’s grant of an application for interlocutory appeal in his ongoing prosecution for rape, aggravated child molestation, child molestation, and enticing a child for indecent purposes, Adam Nunemaker contends that the trial court misapplied Georgia’s Rape Shield Statute, OCGA § 24-4-412. Specifically, Nunemaker argues that the trial court improperly held that the Rape Shield Statute requires the automatic exclusion of any prior act of sexual abuse committed against a child victim, despite any potential relevancy of that evidence. For the reasons set forth below, we agree, vacate the trial court’s ruling, and remand with direction.

As is relevant to consideration of this appeal, the record indicates that the alleged victim, R. C., a minor child, and her siblings were intermittently placed as foster children with the Nunemaker family for periods of time between 2013 and 2018. Even when not being fostered, R. C. and her siblings visited the Nunemakers. In July 2018, however, R. C. and her siblings were placed with a different family interested in the possibility of adopting the children.

In September 2017, R. C. reported in a forensic interview that she had been molested by both her mother's boyfriend at that time, Oscar Ruben Lopez-Gabriel, and a male cousin who was also a minor at the time. Although she had not previously accused Nunemaker, on December 26, 2018, R. C. made an outcry that she had been sexually abused by him as well, precipitating a forensic interview conducted on January 7, 2019.

The State subsequently indicted both Lopez-Gabriel and Nunemaker.¹ Lopez-Gabriel's indictment alleged acts of rape and sexual abuse occurring between January 18, 2016 and January 17, 2017, and the indictment against Nunemaker alleged acts occurring between June 16, 2014, and July 7, 2018. Lopez-Gabriel later entered a

¹ There is no indication in the record that her cousin was ever charged with any crime or prosecuted.

negotiated plea of guilty for two counts of child molestation, while the prosecution of Nunemaker continues.

In the current matter, the State, relying on the Rape Shield Statute, filed a motion in limine requesting the exclusion of any evidence during Nunemaker's trial related to R. C.'s molestation by Lopez-Gabriel or the alleged molestation by her cousin. Nunemaker opposed the exclusion of the evidence, asserting that it was relevant to the issue of identification (or misidentification) and should not be barred.² In the alternative, Nunemaker argued that, even if the Rape Shield statute was otherwise applicable, the evidence was admissible under the exception found in OCGA § 24-4-412(b)(4) (allowing admission of "[e]vidence whose exclusion would violate the defendant's constitutional rights"). Following a hearing, the trial court

² Nunemaker states that his "theory of the case and sole defense, supported by expert testimony, is that R. C. suffers from complex trauma resulting from sexual abuse by Lopez-Gabriel and [her male cousin], which, combined with the pain from [a] December 2018 [urinary tract infection] and scripted memories of abuse, led to memory fabrication and confabulated allegations against [Nunemaker]." Nunemaker further posits that "R.C. believes that she was abused by [him] because she has conflated memories of previous abuse with her memories of [Nunemaker]."

granted the State’s motion to exclude evidence of R. C.’s prior molestation or alleged molestation.³ This interlocutory appeal followed.

The question now before us is whether, in a prosecution for rape, aggravated child molestation, child molestation, and enticing a child for indecent purposes, Georgia’s Rape Shield Statute *automatically* bars any evidence of the victim’s prior sexual abuse (in this case, molestation) committed by perpetrators other than the defendant, despite any potential relevance to a defense such as misidentification. We find that it does not.

Our recent opinion in *Parker v. State*, 379 Ga. App. 180 (928 SE2d 265) (2026) is instructive here. There, we considered the admissibility of prior accusations of sexual abuse (evidence falling outside of the Rape Shield Statute) and explained:

Georgia’s Rape Shield Statute, OCGA § 24-4-412, does not categorically bar the admission of evidence of prior accusations of sexual abuse. See *State v. Burns*, 306 Ga. 117, 119–20(2) (829 SE2d 367) (2019) [(evidence of prior false accusations involves the victim’s propensity to make false statements regarding sexual misconduct but not the victim’s past sexual behavior)]; see also *Gallegos-Munoz v. State*, 319 Ga. 803, 811–12(2)(b) (906 SE2d 711) (2024). Rather, the admissibility of such evidence is governed by “applying the familiar and usual rules of

³ The trial court also excluded evidence that R. C. had been exposed to sexually explicit conduct. Nunemaker does not challenge the exclusion of this evidence in his appellate brief, and, as such, we do not consider it.

evidence” set forth in the 2013 Evidence Code. *Gallegos-Munoz*, 319 Ga. at 812(2)(c) (quoting *Burns*, 306 Ga. at 124(2)).

When considering the admissibility of such evidence under Georgia law, “[a] fundamental question is relevancy, because relevant evidence is admissible, unless a specific exception applies, and irrelevant evidence is inadmissible.” *Gallegos-Munoz*, 319 Ga. at 816(2)(e); see OCGA § 24-4-402. “Relevant evidence” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” OCGA § 24-4-401. To that end, when the relevancy of evidence depends upon proof of a conditional fact, the trial court must first examine the available evidence to determine whether a jury could reasonably find the conditional fact by a preponderance of the evidence. See OCGA § 24-1-104(b); see also *Gallegos-Munoz*, 319 Ga. at 816(2)(e).

Even if evidence is deemed relevant, the trial court may, in its discretion, exclude the evidence “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. There is no “mechanical solution” when conducting this balancing test, but rather “a trial court must undertake in each case a considered evaluation of the proffered justification for the admission of such evidence and make an independent determination of whether the probative value of the evidence is ‘substantially outweighed’ by any of the negative effects laid out in Rule 403.” *Gallegos-Munoz*, 319 Ga. at 818(2)(e) (punctuation omitted). See *State v. Orr*, 305 Ga. 729, 736–37(3) (827 SE2d 892) (2019). In so doing, the trial court “can take into account the risk that presenting evidence of certain conduct would result in a ‘mini-trial,’ where the evidence does not bear directly on the charges at issue and where the conduct is not conceded by all to have taken place.” *Gallegos-Munoz*, 319 Ga. at 818(2)(e).

Parker, 379 Ga. App. at 182.

A similar analysis applies to the potential admissibility of prior acts of sexual abuse committed against a child victim. We have previously determined that evidence that does not reveal the past sexual *behavior* of an alleged victim, if relevant, may be admissible at trial under appropriate circumstances. See *Lemacks v. State*, 207 Ga. App. 160, 161 (427 SE2d 536) (1993); *Raines v. State*, 191 Ga. App. 743, 744–745(2) (382 SE2d 738) (1989). And, evidence of a victim’s past sexual molestation or rape is not evidence of the victim’s past sexual *behavior*; instead, it is something that happened to the victim without consent. *Lemacks*, 207 Ga. App. at 161 (evidence of prior molestation of a victim “is relevant to the determination of the guilt or innocence of the defendant and is not subject to the provisions of” the Rape Shield Statute); *Raines*, 191 Ga. App. at 745(2) (“Obviously, a prior rape committed against the victim has nothing whatsoever to do with her past sexual behavior.”) (emphasis omitted). So, like the prior accusation evidence considered in *Parker*, the admissibility of evidence that a child victim was previously molested, as is the case here, is not automatically excluded, but is, instead, governed by “applying the familiar and usual

rules of evidence[.]” 379 Ga. App. at 182 (quoting *Gallegos-Munoz*, 319 Ga. at 812(2)(c)) (quotation marks omitted)).

In reaching its contrary conclusion, the trial court misinterpreted a footnote in *White v. State*, 305 Ga. 111, 118(2) n.8 (823 SE2d 794) (2019). In *White*, our Supreme Court considered a previous version of the Rape Shield statute (OCGA § 24-4-412(a) (2013)) which included a single exception relating to the admission of prior acts of sexual behavior relevant to the issue of an alleged victim’s consent and had been amended to apply to child molestation cases for the first time. See *Robinson v. State*, 308 Ga. App. 562, 567(1) (708 SE2d 303) (2011) (version of Rape Shield Statute that existed prior to 2013 amendment applied to aggravated child molestation cases, but not to child molestation cases). Our Supreme Court observed:

Now that Georgia’s Rape Shield Statute has been amended to apply to child molestation cases, we must also note that prior case law from the Court of Appeals that was decided based on trials that began before the January 1, 2013 amendment became effective and that allowed evidence of a child’s past sexual *behavior* to be admitted at trial has been superseded by the current version of the statute. To the extent that these cases and their progeny can be read to support the erroneous proposition that evidence of a victim’s past sexual *behavior* could be admissible under the Rape Shield Statute *if relevant to an issue other than consent*, they are hereby overruled.

White, 305 Ga. at 118(2) n.8 (citations omitted; emphasis added). The trial court interpreted this footnote to mean, in essence, that *all cases* decided under the previous version of the Rape Shield statute had been superceded and were no longer good law, including cases like *Raines*, 191 Ga. App. at 745(2), and *Lemacks*, 207 Ga. App. at 161, which considered the definition of “sexual behavior” and applied the Rape Shield Statute to evidence that fell *outside* of that definition.

The trial court’s interpretation of *White* is incorrect for several reasons. First, even though the 2013 statute superceded any prior version of the Rape Shield Statute, it did not alter the statute’s specific and express application to the victim’s past sexual *behavior*. Former OCGA § 24-2-3, which was effective prior to the 2013 statute considered in *White*, stated:

[E]vidence relating to the past sexual behavior of the complaining witness shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or other witnesses, except as provided in this Code section. For the purposes of this Code section, evidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness’s marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards.

And, the version of Rape Shield considered in *White*, OCGA § 24-4-412(a) (2013), provided:

[E]vidence relating to the past sexual behavior of the complaining witness shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or other witnesses, except as provided in this Code section. For the purposes of this Code section, evidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards.

Both before and after 2013, this operative language regarding the exclusion of prior sexual behavior remains identical.⁴ So, contrary to the trial court's decision, pre-2013 caselaw interpreting this language (and specifically the definition of "sexual behavior") continues to be valid and informative precedent. See *Gallegos-Munoz*, 319 Ga. at 811(2)(b) (finding that a pre-2013 case interpreting the admissibility of prior accusation evidence remained valid because Georgia's unique Rape Shield Statute had been retained after enactment of the 2013 Evidence Code).

Second, the enactment of a new Georgia Evidence Code in 2013 did not obviate prior decisions interpreting the language of Georgia's unique Rape Shield Statute. While the 2013 Evidence Code largely tracks the Federal Rules of Evidence, Federal

⁴ "The Rape Shield Statute has been part of Georgia law since 1976, see Ga. L. 1976, p. 741. Since that time, the General Assembly has reworked the exceptions to the provision (which are irrelevant to our current inquiry) and amended the statute to broaden the offenses to which it applies, but the core language remains unchanged[.]" *Burns*, 306 Ga. at 120(2) (citation omitted).

Rule 412, the federal Rape Shield Statute, was not adopted. Instead, Georgia's own Rape Shield Statute was retained. Therefore, because Georgia's Rape Shield statute is not materially identical to the federal rule, our case law interpreting our own provision remains applicable. See *Watson v. State*, 303 Ga. 758, 760(2)(b) n.3 (814 SE2d 396) (2018) (when a Georgia evidentiary rule "does not have any equivalent provision in the federal rules, ... it is appropriate to rely on decisions under the old Code"); *Bradshaw v. State*, 296 Ga. 650, 654(2) (769 SE2d 892) (2015) ("In the absence of a provision in the Federal Rules of Evidence governing accomplice testimony ... and in light of the nearly identical language of accomplice provisions in the old and new Evidence Codes, we give the new accomplice provision the same meaning as the old one.").⁵ Again, this means that our former cases interpreting what constitutes "sexual behavior" remain valid.

Third, the *White* opinion carefully placed limitations on its overruling of prior cases, stating: "To the extent that [prior cases] can be read to support the erroneous proposition that evidence of a victim's past sexual *behavior* could be admissible under

⁵ When enacting the 2013 Evidence Code, the General Assembly expressly stated: "Unless displaced by the particular provisions of this Act, the General Assembly intends that the substantive law of evidence in Georgia as it existed on December 31, 2012, be retained." Ga. L. 2011, p. 100, § 1.

the Rape Shield Statute if relevant to an issue other than consent, they are hereby overruled.” *White*, 305 Ga. 119(2) n.8. Cases interpreting what constitutes sexual behavior and finding the Rape Shield Statute inapplicable to acts not fitting that definition *were not overruled*. Ultimately, our Supreme Court was clarifying that, because the 2013 statutory amendment made child molestation cases subject to the Rape Shield Statute’s prohibition against the introduction of the victim’s sexual behavior, pre-2013 cases allowing the admission of sexual *behavior* evidence were no longer valid precedent. *Id.*

In summation, then, we find that, in this prosecution for rape, aggravated child molestation, child molestation, and enticing a child for indecent purposes, Georgia’s Rape Shield Statute does not automatically preclude Nunemaker from offering evidence of the victim’s prior sexual abuse committed by other perpetrators, as this does not qualify as evidence of prior “sexual behavior.” Instead, the admissibility of this evidence is governed by applying the usual rules for admission of evidence. See *Parker*, 379 Ga. App. at 182. Accordingly, we must vacate the trial court’s order to the extent that it holds that evidence of R. C.’s molestation by perpetrators other than Nunemaker is automatically inadmissible under the Rape Shield Statute, and we

remand the case for the trial court to consider admissibility of this prior-molestation evidence by applying the usual rules of evidence. See OCGA §§ 24-4-401, 24-4-402, 24-4-403.⁶

Judgment vacated in part and case remanded with direction. Brown, C. J., and Epps, J., concur.

⁶ Given this holding, we do not reach Nunemaker's remaining enumeration of error.