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Re-enactment of Key Witness Testimony in the Third Murder Trial of Jim Williams

Frank W. Seiler
Bouhan, Williams & Levy LLP

Ronald L. Carlson
University of Georgia School of Law

LAW DAY '97 PROGRAM:
A RE-ENACTMENT OF THE MURDER TRIAL OF JIM WILLIAMS

Presenters:

Ronald L. Carlson

FULLER E. CALLAWAY PROFESSOR OF LAW

THE UNIVERSITY OF GEORGIA SCHOOL OF LAW

and Author: *Trial Handbook for Georgia Lawyers, Second Edition*

LAWYERS COOPERATIVE PUBLISHING COMPANY, 1993 AND 1996 POCKET PART)

AND

FRANK W. "SONNY" SEILER

Lead Defense Attorney for Williams' trials 2, 3 & 4

Presented at a
CLE Seminar for alumni and friends of
The University of Georgia School of Law

March 7, 1997
The University of Georgia Chapel
Athens, Georgia

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Trial Characters

All characters portrayed in the re-enactment are law students at The University of Georgia School of Law and are involved in the Mock Trial Program or the Moot Court Program.

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(NOTE: THE ATTACHED PAGES ARE FROM CARLSON, *TRIAL HANDBOOK FOR GEORGIA LAWYERS, SECOND EDITION*, LAWYERS COOPERATIVE PUBLISHING COMPANY, 1993 AND 1996 POCKET PART).

§ 4.9 USE OF JUSTIFIABLE FORCE—The defense that is customarily known as self-defense is embodied in the Criminal Code as the use of force in defense of self or others.

A person is not justified in using force if he initially provokes the use of force against himself with the intent to use such force as an excuse to inflict bodily harm upon the assailant; is attempting to commit, committing or fleeing after the commission or attempted commission of a felony; or was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to such other person his intent to do so and the other notwithstanding continues or threatens to continue the use of unlawful force. OCGA 16-3-21.

A person is justified in threatening or using force against another when he reasonably believes that such threat or force is necessary to defend himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent death or great bodily injury to himself or a third person or the commission of a forcible felony. OCGA 16-3-21.

A person is justified in threatening or using force against another when he reasonably believes that such threat or force is necessary to prevent or terminate such other's unlawful entry into or attack upon a habitation; however, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if the entry is made or attempted in a violent and tumultuous manner and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person dwelling or being therein and that such force is necessary to prevent the assault or offer of personal violence or he reasonably believes that the entry is made or attempted for the purpose of committing a felony therein and that such force is necessary to prevent the commission of the felony. OCGA 16-3-23.

Accused, who was attempting to commit robbery, was not justified in firing pistol by fact that victim's companion pulled out knife. Smith v State (1975) 235 Ga 327, 219 SE2d 440.

In trial for manslaughter, evidence that defendant had been previously attacked with a knife and received scars to his chest is relevant as to whether he reasonably and honestly believed that deadly force was necessary to prevent death or great bodily injury to himself. Trial court committed reversible error in refusing to allow defendant to physically exhibit the scars. Daniels v State (1981) 248 Ga 591, 285 SE2d 516, on remand 161 Ga App 200, 289 SE2d 825 (the lapse of time between prior occurrence and the homicide goes to the weight and credit to be accorded to the testimony).

When defendant produces evidence of self defense, the burden is on the State to establish beyond a reasonable doubt that defendant did not act in self defense. Malone v State (1982) 160 Ga App 883, 288 SE2d 595.

The defense of justification is lodged in OCGA 16-3-20.

Justification permits the use of force when a governmental officer needs to do so to fulfill official duties or when a person is required to do so to protect others, and the like.

Where a court charges both the statutory defense of justification, including justification in mutual combat, and a pattern jury instruction based upon the statute, the pattern instruction should reflect the correct statutory language. Gerald v State (1988) 189 Ga App 155, 375 SE2d 134.

A defendant who shoots victim during fist fight is not entitled to instruction on law of mutual combat where there was no evidence that defendant and victim mutually agreed or intended to fight with deadly weapons. Martin v State (1988) 258 Ga 300, 368 SE2d 515.

Overruling earlier cases to the contrary, the Supreme Court held that, regardless of the felony specified by the state as the underlying felony to a felony murder charge, where there is sufficient evidence of a confrontation between the defendant and the victim or other circumstances which ordinarily would support a charge on justification, the defendant is not precluded from raising justification as a defense. Heard v State (1991) 261 Ga 262, 403 SE2d 438, 102-85 Fulton County D R 12B, reported at (Ga) 102-110 Fulton County D R 15B.

Reversible error occurred in a murder case involving the defense of justification since nowhere in the charge was the jury informed that when the affirmative defense of justification is raised the state has the burden of proving the absence of the elements of that affirmative defense; nor was the jury told that if they believed the defendant to have been justified, it would have been their duty to acquit him. Anderson v State (1992) 262 Ga 7, 413 SE2d 722, 103-52 Fulton County D R 16B. The fact that a victim who was fatally shot had hit the defendant in the head with a beer bottle during an altercation three and one-half days before the defendant shot the victim, was not sufficient evidence of provocation to entitle the defendant to the requested charge on voluntary manslaughter in a prosecution for malice murder; the court could conclude as a matter of law that the prior altercation did not constitute even slight evidence of provocation because of the cooling off period between the altercation and the killing. Aldridge v State (1988) 258 Ga 75, 365 SE2d 111.

§ 29.14 CHARACTER OF VICTIM OF ASSAULT OR HOMICIDE—Where the accused is charged with an assault or homicide and the defense is self-defense, he may introduce evidence that the person assaulted or killed had a dangerous or turbulent character. Jefferson v State (1937) 56 Ga App 383, 192 SE 644. Such evidence, however, is generally confined to the victim's reputation in the community. Specific acts against third persons often are not admissible. Jefferson v State, supra; Faulkner v State (1991) 261 Ga 655, 411 SE2d 268, 102-221 Fulton County D R 11B. But there are exceptions, as subsequent cases in this section illustrate. As to reputation proof, it has been held, in a murder prosecution, that such evidence is admissible only after the accused has shown prima facie that the victim attacked him and he was honestly attempting to defend himself. Dennis v State (1960) 216 Ga 206, 115 SE2d 527; Sims v State (1984) 251 Ga 877, 311 SE2d 161. Moreover, the accused's statement alone may not be sufficient to make a prima facie showing. Dennis v State, supra.

Evidence of specific acts of violence by a victim against third persons shall be admissible where the defendant claims justification. A defendant claiming justification and seeking to introduce evidence of specific acts of violence by the victim against third persons should notify the trial court of such intention prior to trial. Chandler v State (1991) 261 Ga 402, 405 SE2d 669, 102-143 Fulton County D R 13B.

In murder trial, after laying a proper foundation, defendant may offer proof of specific prior acts of the victim toward defendant that demonstrate defendant's reasonable belief that his use of force was necessary in order to defend himself. Wiseman v State (1982) 249 Ga 559, 292 SE2d 670, appeal after remand 168 Ga App 749, 310 SE2d 295.

The Rape Shield Law did not prohibit questions concerning a victim's past conduct of a non-sexual nature. George v State (1987) 257 Ga 176, 356 SE2d 882, on remand 184 Ga App 61, 361 SE2d 284.

A victim's prior conviction for a controlled substance violation is not admissible to show either the victim's reputation for violence or the reasonableness of the defendant's belief that force was necessary in order to defend himself or herself. Wood v State (1988) 258 Ga 598, 373 SE2d 183.

The identity and general background of the victim are relevant issues in a murder trial. Roper v State (1989) 258 Ga 847, 375 SE2d 600, cert den 493 US 923, 107 L Ed 2d 270, 110 S Ct 290.

The rape shield statute (OCGA 24-2-3), which prohibits admission of all evidence pertaining to the reputation of the complaining witness concerning past sexual activity with persons other than the defendant, prohibited the introduction of evidence that the victim contracted gonorrhea three months before she was raped and one month before the birth of a child, wore sexually suggestive clothing and acted promiscuously when she frequented night clubs, and demanded money from another man threatening to claim that he raped her. Ford v State (1988) 189 Ga App 395, 376 SE2d 418.

The rape shield statute does not prohibit evidence that the victim had lied about sexual misconduct by men other than the defendant, since the evidence does not involve the victim's past sexual conduct but rather the victim's propensity to make false statements regarding sexual misconduct; however, the trial court should make a threshold determination, outside the presence of the jury, that a reasonable probability of falseness exists. Smith v State (1989) 259 Ga 135, 377 SE2d 158, cert den 493 US 825, 107 L Ed 2d 53, 110 S Ct 88.

A victim's acts of violence to persons other than the defendant are inadmissible to prove the character of the victim for violence. Lolley v State (1989) 259 Ga 605, 385 SE2d 285.

A probate court's order of committal and a superior court's orders that the deceased refrain from violent behavior was not admissible as evidence of the deceased's reputation for violence where there was no evidence suggesting that the deceased's specific bad acts were directed toward the defendant. Chapman v State (1989) 259 Ga 706, 386 SE2d 129.

Although the victim's violent character may be established by evidence that the victim had a reputation for a particular type of violence, the victim's violent character may not be established by proof of specific acts of violence. Hill v State (1989) 259 Ga 655, 386 SE2d 133 (ovrld on other grounds by Edge v State (Ga) 103-31 Fulton County D R 21, reported at 261 Ga 865, 414 SE2d 463).

Evidence that metabolites of cocaine were found in the murder victim's bloodstream was properly excluded since the defendant failed to demonstrate how the victim's use of cocaine contributed in any way to behavior by the victim that might have constituted provocation and therefore would have been relevant to a defense of involuntary manslaughter. Hawes v State (1991) 261 Ga 164, 402 SE2d 714, 102-80 Fulton County D R 12B.

A physician's testimony concerning the victim's physical condition after the alleged rape was not evidence of the victim's past sexual behavior in violation of the rape-shield statute, rather was relevant to defendant's claim that he did not penetrate the victim because of her gross physical condition; it was also admissible to impeach the victim's claim that she was diagnosed with vaginal infections after the alleged rape and to challenge the victim's claim that the defendant was the cause of her vaginal infections. White v State (1991) 201 Ga App 53, 410 SE2d 441, 102-175 Fulton County D R 5B.

A ten-year-old child molestation victim's credibility was improperly bolstered by testimony of a police officer to the effect that he found the victim, whose videotaped statement he had viewed, to be credible. The court said that the victim's credibility was exclusively within the jury's province and admission of bolstering testimony was reversible error. Guest v State (1991) 201 Ga App 506, 411 SE2d 364, 102-208 Fulton County D R 14B.

Bullard v Metropolitan Life Ins. Co. (1924) 31 Ga App 641, 122 SE 75. A medical examiner who was a qualified autopsist who had performed over 7,000 autopsies, including 20 autopsies in which the cause of death was pulmonary embolism, was qualified to testify to a causal relationship between the blood clot that killed a victim and the gunshot wounds inflicted by a defendant, where his findings and testimony were based on his examination and on medical grounds within his area of expertise. Perkins v State (1990) 260 Ga 292, 392 SE2d 872, op withdrawn, substituted op (Ga) 1990 Ga LEXIS 292.

It appears to be the view of the Georgia courts that an expert will be permitted to give his opinion whenever it will be of assistance to the jury, even if the opinion goes to the ultimate fact in issue. Metropolitan Life Ins. Co. v Saul (1939) 189 Ga 1, 5 SE2d 214. There is an important restriction barring opinions when the opinion touches upon a mixed question of law and fact.

The courts have quoted with approval the statement that the trend is to allow expert opinion testimony reconstructing motor vehicle accidents from physical evidence, provided the expert witness is sufficiently qualified in the particular field, has before him enough physical evidence to provide him with the important variables involved, makes his reasoning process clear to the trier of fact, and forms his conclusion based on the facts and in accordance with common observations and experiences of man. 10 Am Jur Proof of Facts 137, 144, Reconstruction of Accident.

Accident reconstruction proof may involve estimations of speed of cars prior to impact, resolving point of impact between vehicles where that is contested, path of vehicles after collision, and the like. For details, see R. Carlson, Successful Techniques for Civil Trials 2d § 4:38 (Lawyers Cooperative Publishing 1993).

An expert in crime-scene reconstruction can offer conclusions as to details of how a murder was committed; the conclusions could not have been reached by the jury without professional skill and

knowledge, and the expert testimony was as consistent with the defense theory as with the prosecution. McAllister v State (1989) 258 Ga 795, 375 SE2d 36.

§ 24.22 EXPERT TESTIMONY ON VALUE OF SERVICES—A properly qualified witness may state the usual and customary charge for particular kinds of services in the locality and at the time the services were rendered. Bankers Health & Life Ins. Co. v Plumer (1942) 67 Ga App 720, 21 SE2d 515.

In applying this general rule, the courts have made no distinction based on the various types of services rendered, either in their reasoning or their holding, and persons who may be supposed to have some specific knowledge as to the value of their services, such as physicians, attorneys, architects, or real-estate brokers, are not put into a different category from those persons whose knowledge of the value of services of the type they performed may be rather limited. Reserve Life Ins. Co. v Gay (1958) 214 Ga 2, 102 SE2d 492, conformed to 97 Ga App 320, 102 SE2d 928.

Chiropractors' bills are not such medical bills as the legislature has declared in OCGA 24-7-9 may be admitted without proof by the expert witness of their reasonableness and necessity. Giles v Taylor (1983) 166 Ga App 563, 305 SE2d 154.

§ 24.23 EXPERT TESTIMONY ON VALUE OF REAL ESTATE—While a non-expert familiar with real estate values may testify as to value of real estate, see § 24.15, the increasing complexity of real estate valuation makes expert testimony desirable, even necessary, in many cases.

In a condemnation proceeding, the value of land is a question of fact for the jury. National Ben Franklin Fire Ins. Co. v Purvis (1940) 61 Ga App 674, 7 SE2d 296. The witness does not have to be an expert in order to testify as to value, but he must show that he has had an opportunity for forming a correct opinion. OCGA 24-9-66. He must show that either from residence or from doing business in the community or from some equivalent observation he has acquired such a familiarity with the general level of local values as to enable him to judge the particular property intelli-

gently. Central Georgia Power Co. v Cornwell (1912) 139 Ga 1, 76 SE 387. But if a witness to the value of a piece of real property shows such knowledge of the values of comparable property in the vicinity as renders him able, in the determination of the trial judge, to form an intelligent and helpful judgment on the subject, together with an adequate knowledge of the property to be valued, his opinion is admissible. Schumpert v Carter (1932) 175 Ga 860, 166 SE 436.

To entitle a witness to testify as to the value of a thing which is of such a nature as to have a current or market value, he must be acquainted with the value of things of the class to which the thing whose value is in question belongs. Globe & Rutgers Fire Ins. Co. v Jewell-Loudermilk Co. (1927) 36 Ga App 538, 137 SE 286.

In order to be competent to testify to the value of land, it is not necessary that the witness be an expert or be engaged in the business of buying and selling similar properties in the locality. Miller v Luckey (1909) 132 Ga 581, 64 SE 658.

The witness must be familiar with values of the kind of property involved and the qualification rests largely in the discretion of the court, Central Georgia Power Co. v Cornwell (1912) 139 Ga 1, 76 SE 387.

The witness must have some peculiar means of forming an intelligent and correct judgment as to the value of the property in question or the effect upon it of a particular improvement, beyond that which is presumed to be possessed by men generally. Fowler v National City Bank (1934) 49 Ga App 435, 176 SE 113.

Comparable sales are a standard of comparison which afford a yardstick for an opinion as to value. It has been held that the general knowledge and experience of an expert witness may be based in part on hearsay, and that fact does not render his opinion incompetent, Central R. & B. Co. v Skellie (1890) 86 Ga 686, 12 SE 1017. But some courts have taken the position that hearsay testimony as to comparable sales of similar land should not be admitted, even though offered for the restricted purpose of showing the basis of an expert's opinion of value and not as substantive evidence. State Highway Dept. v Wilkes (1962) 106 Ga App 634, 127 SE2d 715.

Before a witness states his opinion as to property value, there must be a preliminary showing of the factors upon which such opinion is based. OCGA 24-9-66.

§ 24.24 EXPERT TESTIMONY ON HANDWRITING—Most of the rules pertaining to expert testimony generally apply to expert testimony on handwriting.

In addition to experts, as well as to the testimony of those who know a person's handwriting, the statute provides an additional method of proof. The statute provides that other writings, which are proven or acknowledged to be genuine, can be introduced for the purpose of comparison by the jury. Such other papers must be submitted to the opposite party before she announces ready for trial. Jackson v Jackson (1982) 163 Ga App 767, 296 SE2d 100.

§ 24.25 QUESTIONED DOCUMENTS—In addition to questions relating to handwriting, it appears to be permissible in Georgia for properly qualified experts to testify as to questioned documents. See Harrison v State (1969) 120 Ga App 812, 172 SE2d 328; E. B. Martin & Sons v Bank of Leesburg (1911) 137 Ga 285, 73 SE 387.

§ 24.26 EXPERT TESTIMONY ON FINGERPRINTS—Fingerprints and expert testimony relating to fingerprints are admissible in evidence. Anthony v State (1951) 85 Ga App 119, 68 SE2d 150; McCoy v State (1976) 237 Ga 118, 227 SE2d 18.

§ 24.27 EXPERT TESTIMONY ON BALLISTICS—The testimony of a properly qualified ballistics expert is admissible. Moughon v State (1876) 57 Ga 102.

Expert evidence to identify the weapon from which a shot was fired is generally admissible under the rules governing other forms of expert evidence; it is the modern tendency of the courts to allow the introduction of expert testimony to show that the bullet or cartridge found at the scene of a crime was fired from a particular gun, where it is definitely shown that the witness by whom the

testimony is offered is, by experience and training, qualified to give an expert opinion on firearms and ammunition. Gibson v State (1934) 178 Ga 707, 174 SE 354. Similarly, such a witness has been permitted to testify that he was able to identify the gun from which a particular cartridge, shell, or case was fired by means of a comparison of the markings on such cartridge, shell, or case with one fired by the witness in the suspected gun, the witness detailing carefully the test upon which he based his opinion. Gibson v State, supra.

The comparison of shot used in the defendant's shotgun with shot found in or near the victim of the crime has been permitted for the purpose of identifying the weapon involved in the crime. Moughon v State (1876) 57 Ga 102. Thus, it has been held that a witness who has had experience in firing shells of a given description, who has observed the impression made upon objects struck by shots fired from shells of that character, and who has also examined and probed the wound of a person alleged to have been murdered is competent to state as his opinion that the wound upon the deceased was made by the discharge of a shell of the character referred to. Byrd v State (1914) 142 Ga 633, 83 SE 513. It has been held that a non-expert can testify as to the caliber of a particular weapon. Garner v State (1909) 6 Ga App 788, 65 SE 842.

An expert witness cannot state as a fact that a bullet in question and the test bullet were fired from the same gun. He can state only his opinion to that effect. Bruno v State (1939) 189 Ga 74, 5 SE2d 376. However, it has also been held that admitting testimony of a firearms expert that the projectile removed from the victim's body was probably discharged from the handgun identified by the defendant was harmless. Even though the expert could not be positive in the identification, there was only one projectile in the victim's body and the defendant had stated, in effect, that the identified weapon had fired the fatal shot. Anderson v State (1988) 258 Ga 278, 368 SE2d 508.

Ballistics, see Duckworth v State (1980) 246 Ga 631, 272 SE2d 332.

§ 24.28 EXPERT TESTIMONY ON MENTAL CAPACITY— Statements made by accused in course of court-ordered psychiatric examination may constitutionally form basis of opinion testimony by properly appointed experts as to mental capacity at time of offense without violating right of accused not to incriminate himself; this holding does not determine admissibility at trial of confessions or other implicating declarations made by accused to court-appointed medical examiner. Presnell v State (1978) 241 Ga 49, 243 SE2d 496, revd, in part on other grounds 439 US 14, 58 L Ed 2d 207, 99 S Ct 235.

There is a general proposition in evidence law that the trier of fact may reject expert testimony and accept contradicting lay judgments. There may be an exception to this general proposition where a defendant presents expert opinion, in consequence of Georgia statutory law. Nagel v State (1993) 262 Ga 888, 427 SE2d 490, 92 Fulton County D R 973 (at release hearing, medical and lay experts testified Nagel was no longer mentally ill).

A state psychiatrist's alleged failure to give a defendant adequate Miranda warnings prior to interviewing the defendant did not require exclusion of the psychiatrist's rebuttal testimony where the testimony was limited to the defendant's mental state and did not describe any statements by the defendant regarding the crimes for which he was on trial. Tankersley v State (1991) 261 Ga 318, 404 SE2d 564, 102-124 Fulton County D R 12B.

Granting or denying of motions for funds to hire an expert psychiatric witness is within the discretion of the court, and no error will be found in denying motion where defendant had salaried investigator working on case and was represented by four retained counsel. Whitaker v State (1980) 246 Ga 163, 269 SE2d 436. See also Meders v State (1992) 261 Ga 806, 411 SE2d 491, 103-13 Fulton County D R 11B, cert den (US) 121 L Ed 2d 71, 113 S Ct 114, reh den (US) 121 L Ed 2d 570, 113 S Ct 640.

The jury was not precluded from finding the defendant guilty, but mentally ill, by the fact that all experts called by both sides agreed that it was highly unlikely that the defendant knew right from wrong at the time of the crime. Nelms v State (1986) 255 Ga 473, 340 SE2d 1.

§ 24.29 EXPERT TESTIMONY ON CHILD ABUSE SYNDROME—The trial court erred in prohibiting the defendant from cross-examining in the jury's presence an expert witness who was testifying as to the "indicators" of child abuse syndrome and whether the victim had exhibited certain of those indicators, where the expert had indicated on cross-examination outside the jury's presence that the victim's indicators could have come from her family but that she had ruled them out in this case; it was for the jury to determine whether the indicator exhibited by the victim was inculpatory or exculpatory of the defendant and without the cross-examination the jury was left with the erroneous impression that there was no other explanation for the victim's "indicators" and the witness's opinion other than the acts attributed to the defendant. Jimmerson v State (1989) 190 Ga App 759, 380 SE2d 65.

A DFCS worker was qualified to testify as an expert concerning the child abuse accommodation syndrome, despite the fact that she was not trained as a psychiatrist or psychologist, since she gained her knowledge about child molestation through experience and ongoing training. Kelly v State (1990) 197 Ga App 811, 399 SE2d 568.

In a child molestation trial, the court erred in excluding expert testimony that the child did not exhibit the "unusual and inappropriate behavior" typical of a sexually abused child, since such "typical" behavior is not within the ken of the average juror and therefor a proper subject of expert testimony, and the question of whether, notwithstanding the victim's behavior, the victim was or was not molested would remain exclusively for jury resolution. Hall v State (1991) 201 Ga App 626, 411 SE2d 777, 102-216 Fulton County D R 12B.

Testimony by the forensic pathologist who performed the autopsy on the defendant's stepson that the childhood maltreatment or abused child syndrome was the "manner" in which the fatal injuries occurred constituted his opinion that the fatal injuries in fact resulted from child abuse and impermissibly invaded the prov-

ince of the jury. McCartney v State (1992) 262 Ga 156, 414 SE2d 227, 92 Fulton County D R 21, corrected (Ga) 92 Fulton County D R 845.

A physician's testimony based on a physical examination, that he had an opinion as to whether an illegal child molestation victim had in fact been sexually molested was inadmissible. Harris v State (1991) 261 Ga 386, 405 SE2d 482, 102-143 Fulton County D R 11B.

§ 24.30 DNA TESTS—Deoxyribonucleic acid (DNA) identification techniques are based on sound scientific theory, and if proper procedures are followed, analysis of clean, undegraded samples of sufficiently high molecular weight DNA can produce reliable results, as to be admissible in evidence. The admission of DNA test results requires a determination of not just whether general scientific principles and techniques are valid and capable of producing reliable results, but also whether that laboratory substantially performed the scientific procedures in an acceptable manner. These requirements are the result of the novelty of DNA analysis in forensics, the complexity of the tests and the present lack of national standards governing the tests. Caldwell v State (1990) 260 Ga 278, 393 SE2d 436.

Statute on DNA analysis, see OCGA 24-4-60 et seq.

§ 24.31 EXPERT TESTIMONY ON DENTAL EVIDENCE—A dentist's testimony regarding dental impressions, x-rays, and photographs taken to match the defendant's teeth to bite marks was held admissible. Harris v State (1991) 260 Ga 860, 401 SE2d 263, 102-54 Fulton County D R 14B.

§ 24.32 EXPERIMENTS AND DEMONSTRATIONS—The court has discretion to permit an expert or skilled witness to testify as to experiments performed by him, Shelton v Rose (1967) 116 Ga App 37, 156 SE2d 659, provided the experiment substantially duplicates the conditions shown by the evidence actually to have existed.

Slight discrepancies in the conditions at the time of the incident

involved and the time of the experiment will not render the experiment inadmissible, but such slight discrepancies go to the weight to be given such evidence. Atlanta & W. P. R. Co. v Hudson (1907) 2 Ga App 352, 58 SE 500. See R. Carlson, Successful Techniques for Civil Trials 2d § 3:15 (1992).

An expert may perform an experiment in the course of his testimony, provided it is of such nature that it will aid rather than tend to confuse the jury. See Christian Constr. Co. v Wood (1961) 104 Ga App 751, 123 SE2d 151.

The trial judge has a wide discretion in ruling upon the permissibility of demonstrations in the courtroom. Hudson v State (1933) 46 Ga App 668, 168 SE 912.

§ 24.33 TESTS FOR INTOXICATION—OCGA 40-6-392, effective January 1, 1991, addresses the use of chemical tests for alcohol or drugs. It outlines the procedures to be used, specifies who may perform such tests, establishes presumptions, and provides that a person's refusal to submit to such a test shall be admissible against him in a criminal trial.

In vehicular homicide case, except where suspect is dead, unconscious, or otherwise in a condition rendering him incapable of refusal, failure of arresting officer to advise suspect of his right to have an additional test for intoxication performed by a qualified person of his own choosing or to refuse to submit to any test renders the results of the intoxication test inadmissible in later proceedings. Rogers v State (1982) 163 Ga App 641, 295 SE2d 140.

In prosecution for driving under influence of alcohol, admission into evidence of defendant's refusal to take a blood-alcohol test does not violate defendant's constitutional right against self-incrimination. Wessels v State (1983) 169 Ga App 246, 312 SE2d 361.

§ 24.34 ELECTRONIC SPEED DETECTION DEVICES—The use of electronic speed detection devices has been recognized by the statute that provides that a case can be made and a conviction obtained if the vehicle exceeded the posted limit in excess of ten miles per hour. OCGA 40-14-8 (exception for school and residential zones).

A defendant's failure to object to admission of the evidence of automobile speed gained through the use of a speed detection device does not dispose with the necessity of proof of a necessary foundation to be presented by the State. Johnson v State (1988) 189 Ga App 192, 375 SE2d 290 (disapproved by Carver v State, 208 Ga App 405, 430 SE2d 790, 93 Fulton County D R 1564).

The statutory requirements for admissibility for speeding citations issued by state officers, that the police vehicle be visible to approaching motorists for at least 500 feet, do not apply to the state patrol. Carver v State (1991) 199 Ga App 842, 406 SE2d 236, 102-101 Fulton County D R 14b, later proceeding 208 Ga App 405, 430 SE2d 790, 93 Fulton County D R 1564.

The defense of entrapment is inapplicable to the use of such devices. See § 4.5.

§ **24.35 MISCELLANEOUS SCIENTIFIC TESTS**—The variety of tests upon which a duly qualified expert may testify increases and will continue to do so.

If the accuracy of a scientific test is accepted by a substantial body of scientific opinion, expert testimony regarding that test is admissible. The admission of such testimony rests within the discretion of the trial judge. West v State (1946) 200 Ga 566, 37 SE2d 799.

The controlling test for the admissibility into evidence of a scientific principle or technique is not whether or not it has gained general acceptance by a substantial body of scientific opinion, but rather whether or not the principle or technique has reached a scientific state of verifiable certainty by the decision of the trial court based upon the evidence presented by the parties, or the exhibits, treatises, or the rationale of cases in other jurisdictions. Harper v State (1982) 249 Ga 519, 292 SE2d 389 (truth-serum test).

In presenting novel scientific evidence by experts, suggested foundation points appear in Daubert v Merrell Dow Pharmaceuticals, Inc. (1993, US) 125 L Ed 2d 469, 113 S Ct 2786, 93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep ¶ 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632. This case replaces the general acceptance requirement for scientific proof in federal courts with a new standard.

§ 24.36 CONTENTS OF THE HYPOTHETICAL QUESTION—An expert can base her opinion on facts which the expert has observed. Armed with such information, the expert can opine as to a diagnosis in the case of a physician or can forecast for the future where a solid foundation is laid. For example, for the purposes of determining alimony, expert testimony regarding a husband's earnings is not limited to the husband's actual present income but may include the husband's earning capacity to the extent that the wife contends the capacity differs from present income. Lowery v Lowery (1992) 262 Ga 20, 413 SE2d 731, 103-44 Fulton County D R 17. But where there was no factual basis given for the calculation made and no foundation laid as to the witness' knowledge of the symptoms or causes of Sudden Infant Death Syndrome (SIDS), it was error to admit the opinions of a biostatistician that there was about a five percent chance that the suspected murder victims died of SIDS. Johnson v State (1991) 261 Ga 419, 405 SE2d 686, 102-147 Fulton County D R 10B. An expert is not allowed to simply speculate. Because questions called for speculative answers, a certified public accountant was not permitted to give the following testimony in a divorce action: to estimate what a husband's Federal income tax would be for return to be filed following year; to state what social security payments would be for a man earning a stated amount in a year in which trial was held; and to state what the wife's Federal income tax would be if jury awarded certain amount as alimony. Pippinger v Pippinger (1976) 236 Ga 585, 224 SE2d 418.

One way to get record facts before an expert and avoid a "speculative" objection is with a hypothetical question. When an expert testifies as to his opinion, based upon facts which he has observed, it is not necessary that the question be stated hypothetically or that the witness state the factual foundation of his opinion. Finley v Franklin Aluminum Co. (1974) 132 Ga App 70, 207 SE2d 543. In other cases, a hypothetical will be advantageous.

What are some of the features of the hypothetical question?

It should contain a recital of the facts that are to be assumed by the witness and should be sufficiently complete to permit him to form an opinion following a request for his expert opinion.

All matters that are justified by the testimony may be included in the question, Zurich Ins. Co. v Zerfass (1962) 106 Ga App 714, 128 SE2d 75, but it is not necessary that the question include all facts in the case. Ellis v Southern R. Co. (1953) 89 Ga App 407, 79 SE2d 541.

Where an expert witness has no personal knowledge of the facts, the usual and generally approved procedure for eliciting his testimony is for counsel to present the facts on which opinion testimony is desired by hypothetical questions—questions which, for the purpose of the trial, assume a state of facts which has been shown by the evidence of other witnesses—and ask the expert to state his opinion based on those facts. Atlantic & B. R. Co. v Johnson (1907) 127 Ga 392, 56 SE 482; Von Pollnitz v State (1893) 92 Ga 16, 18 SE 301. However, it must include all the facts upon which the answer is based. Ellis v Southern R. Co. (1953) 89 Ga App 407, 79 SE2d 541.

It is not proper to assume facts that are contrary to the evidence, see Travelers Ins. Co. v Hutchens (1962) 106 Ga App 631, 127 SE2d 712.

Where the facts are in dispute, counsel is entitled to base a hypothetical question on the testimony, supporting his own theory of the case. Zurich Ins. Co. v Zerfass (1962) 106 Ga App 714, 128 SE2d 75.

Normally, a hypothetical question may not include facts which are not in evidence before the trier of the facts. Elliott v Georgia Power Co. (1938) 58 Ga App 151, 197 SE 914. All the facts assumed by the question should be in evidence prior to asking the hypothetical question. Ellis v Southern R. Co. (1953) 89 Ga App 407, 79 SE2d 541. However, if the unsupported fact is testified to later, it has been held that there is no harmful error in admitting the hypothetical question. Gossett v State (1948) 203 Ga 692, 48 SE2d 71.

It is not necessary that the assumed facts have been directly testified to if the facts can be reasonably deduced or inferred from the evidence. Beard v Westmoreland (1954) 90 Ga App 632, 84 SE2d 93.

There is a developing trend to allow an expert to testify to opinions based on hearsay reports which the expert considers reliable; this testimony can be direct and need not necessarily be cast in a hypothetical format. The opinion of an expert may be based in part upon hearsay. When it is based thereon, it goes to the weight and credibility of the testimony, not to its admissibility. Security Ins. Group v Brackett (1974) 132 Ga App 415, 208 SE2d 109.

§ 24.37 HYPOTHETICAL QUESTION ASKED OF PHYSICIAN OR SURGEON—A duly qualified physician may upon the basis of facts set forth in proper hypothetical questions, or the testimony given by other witnesses in the case which the expert heard, or more generally, upon the basis of the physician's own knowledge gained in the course of his professional attendance upon the person whose condition is in question, or gained upon an examination of such person made to qualify the physician as a witness, state his opinion as to the nature of the disease, injury, or disability from which a person is or was suffering, and as to the facts or causes which probably or might have, produced such condition; as to how injuries or wounds were inflicted and whether a wound could have been self-inflicted; as to when and where a disease was contracted; as to the general effects of an ailment or injury (that is, the effect commonly produced upon the body and mind of a human being in the natural and ordinary course by disease or injury of a designated character); as to the probable continuance and future course of an existing disease or disability; as to the duration and permanency of or the reasonable probability of ultimate recovery from injuries; as to what extent, or how, an injury will affect a person's ability to perform labor; and as to the probable or possible cause of death. See Von Pollnitz v State (1893) 92 Ga 16, 18 SE 301.

There is, of course, no objection to the expression by a qualified physician of an opinion as to the cause of a death or of a particular physical condition, based upon wholly hypothetical questions, where the subject is one requiring superior learning or experience and where the hypothetical questions fairly describe the conditions

of the person in question and reflect the testimony before the jury upon that point. Kelly v Adams (1951) 84 Ga App 450, 66 SE2d 144. It has also been frequently stated or recognized, in this connection, that a medical opinion as to causation, based on assumed facts which are erroneous or outside the evidence and which the evidence does not attempt to establish, is not admissible. Ellis v Southern R. Co. (1953) 89 Ga App 407, 79 SE2d 541.

§ 24.38 ANSWER TO HYPOTHETICAL QUESTION—As with any other answer, the answer to the hypothetical question must be responsive, Paulk v Thomas (1967) 115 Ga App 436, 154 SE2d 872.

§ 24.39 CROSS-EXAMINATION OF EXPERT WITNESS—Most of the general rules relating to the cross-examination of witnesses apply to the cross-examination of expert witnesses. See §§ 16.1 et seq.

A defendant in a drug case has the right to subpoena memos, notes, graphs, computer printouts, and other data a state crime laboratory chemist relied upon to support her testimony and opinion during trial. The substance taken from the defendant was cocaine. Eason v State (1990) 260 Ga 445, 396 SE2d 492.

The expert may be cross-examined as to his knowledge, skill and understanding, Richards v Harpe (1930) 42 Ga App 123, 155 SE 85. Also, the cross-examiner may, in his hypothetical question, put in facts in evidence omitted from the hypothetical questions asked on direct examination. Davis v State (1922) 153 Ga 669, 113 SE 11. Mere abstract questions or questions involving scientific knowledge are not, as a general rule, permissible, although questions are proper which test the value of a witness' opinion, his knowledge, observation, bias, or prejudice. Thompson v Ammons (1925) 160 Ga 886, 129 SE 539. He may be asked upon what authorities he bases his opinion.

The court may, in its discretion, allow counsel to cross-examine the witness as to the amount he received or expects to receive for testifying as an expert, but not as to compensation received in other cases or for other services, unless such compensation has a

material bearing on the interest in the case at the bar. Yearwood v State (1946) 201 Ga 247, 39 SE2d 684. It often does. It has been held that the expert may be cross-examined as to testimony he has given in other cases and for which parties he usually testifies. Sutton v State Highway Dept. (1961) 103 Ga App 29, 118 SE2d 285. But an expert could not be cross-examined about the reversal of certain other cases in which he had testified. Rogers v State (1987) 257 Ga 590, 361 SE2d 814. And it was held proper to deny cross-examination on whether juries in prior cases had followed an expert's recommendations. Carter v State (1987) 257 Ga 510, 361 SE2d 175. If the expert states that his opinion is based on books in his field of expertise, counsel is permitted to read from standard books in the field and cross-examine the expert concerning those books. A similar rule applies where, upon cross, a cross-examiner's book is recognized as a standard by the expert.

In summary, books of science and art are not admissible to prove the opinions of experts announced therein. Suarez v Suarez (1987) 257 Ga 102, 355 SE2d 649. They are usable on cross examination, however, to impeach. Cross-examination from obsolete or arcane treatises can be rejected.

A trial court in a prosecution for statutory rape can exclude cross-examination asking a physician whether he felt it was unusual to wait two weeks before the victim was examined, because the question was not directed to the physician's area of specialized knowledge. Payne v State (1988) 258 Ga 711, 373 SE2d 626.

CHAPTER 24

OPINION EVIDENCE

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§ 24.5 OPINIONS ON ULTIMATE ISSUE IN NEGLIGENCE CASES—No opinions allowed as to negligence, see Hermitage Indus. v Schwerman Trucking Co. (1993, DC SC) 814 F Supp 484, 38 Fed Rules Evid Serv 1120. In Georgia regarding opinions on negligence, see Steverson v Hospital Authority of Ware County (1973) 129 Ga App 510, 199 SE2d 881 (province of jury to say whether result was caused by negligence; however, witness may be asked whether this was proper medical practice, or whether operation was done in skillful manner); Fowler-Flemister Coal Co. v Evans (1917) 20 Ga App 260, 92 SE 1010; McCormick, Evidence 32 (3d ed. 1984). See also Green, Georgia Law and Evidence § 113 (4th ed 1994)("Nor can a witness testify that damage was occasioned by negligence. . ."); Milich, Georgia Rules of Evidence § 15.1; Reed v Heffernan (1984) 171 Ga App 83, 318 SE2d 700. In Lawhorne v Soltis (1989) 259 Ga 502, 384 SE2d 662, Justice Clarke stated that "opinion evidence is not admissible if the inference drawn is a mixture of law and fact."

§ 24.8 OTHER LIMITATIONS ON OPINION EVIDENCE—It is a hornbook rule that no witness, lay or expert, can tell the trier of fact that a particular witness was lying, or that another "told the truth" when he testified. Finding that a witness accomplished this purpose indirectly, the Court of Appeals reversed in Flowers v

State (1996) 220 Ga App 814, 468 SE2d 199, 96 Fulton County D R 831, reconsideration den, corrected (Ga App) 96 Fulton County D R 1563 (an expert witness may not testify as to his opinion of the victim's truthfulness).

§ 24.17 MATTERS AS TO WHICH EXPERT WITNESS MAY OR MUST TESTIFY—Where an expert is hired by a party in a criminal proceeding, not called by that party, but called by the opposing party, testimony to the expert's original employment by the first party is irrelevant and could be prejudicial. Blige v State (1994) 264 Ga 166, 441 SE2d 752, 94 Fulton County D R 1328.

In WMI Urban Servs. v Erwin (1994) 215 Ga App 357, 450 SE2d 830, 94 Fulton County D R 3616, reconsideration den (Nov 29, 1994), the Court of Appeals asserted that an expert could base an opinion partly on non-record material: "[A]n expert may state his opinion and the facts on which that opinion is based, even if the opinion is based in part on hearsay. See *King v Browning,* 246 Ga 46(1), 268 SE2d 653 (1980)."

As a result of *King v Browning,* Georgia law seems to favor the proposition that an expert's opinion is not prohibited simply because it is based partly upon hearsay that is not otherwise in the record. This proposition was approved and King v Browning was cited in Orkin Exterminating Co. v McIntosh (1994) 215 Ga App 587, 452 SE2d 159, 94 Fulton County D R 4008, reconsideration den (Dec 13, 1994) and cert den (Ga) 1995 Ga LEXIS 435 (when expert is qualified, the fact that the opinion is based upon hearsay goes to weight and not admissibility). Only a few cases like Green v State (1996) 266 Ga 237, 466 SE2d 577, 96 Fulton County D R 625 break from this conclusion. However, even though an expert may rely upon hearsay, that fact does not automatically convert the hearsay into admissible evidence. While there are occasional deviations from the latter observation, see contrary cases like Brinks, Inc. v Robinson (1994) 215 Ga App 865, 452 SE2d 788, 94 Fulton County D R 4175, reconsideration den (Dec 20, 1994), the dominant force in Georgia opinions is an excluding one. See Department of Human Resources v Corbin (1991) 202 Ga App 10, 413 SE2d 484, 102-228 Fulton County D R 20, cert den (Ga) 1992 Ga LEXIS 186. Details are analyzed in Carlson, Experts, Judges,

and Commentators: The Underlying Debate About an Expert's Underlying Data. 47 Mercer L. Rev. 481, 488-491 (1996).

§ 24.18 QUALIFICATIONS REQUIRED OF EXPERT WITNESS—In Georgia, does an adversary have the right to insist upon an out-of-order cross-examination of an opposing expert when the inquiry relates to qualifications? A resounding "yes" to this question was supplied in Dimambro Northend Associates v Williams (1983) 169 Ga App 219, 312 SE2d 386, 389-90:

> It is clear that a party has the right to a thorough and sifting cross-examination of the experts called by the opposing party. See Knudsen v Duffee-Freeman, Inc, 96 Ga App 872, 879, 99 SE2d 370 (1957). We find no Georgia cases which mandate that a party has the right to cross-examine the opposing party's experts on the limited question of their qualifications before those witnesses are allowed to give expert testimony on direct examination. However, we find no Georgia cases which hold that no such right exists. What is clear is that "our courts have uniformly held that for the testimony of an expert witness to be received, *his qualification as such must be first proved. [Cits.] If that prerequisite is not met the opinion of the expert must be excluded.*" (Emphasis supplied.) Knudsen v Duffee-Freeman, Inc., supra at 879, 99 SE2d 370. It is likewise clear that the determination of whether this essential prerequisite has been met is within the trial court's exercise of sound discretion. See generally Hogan v Olivera (1977) 141 Ga App 399, 401, 233 SE2d 428.
>
> It would seem that a trial court cannot truly be said to have made an objective and impartial threshold determination of the admissibility of expert testimony unless the opposing party is afforded the opportunity, if he so requests it, to cross-examine the witness on the question of his qualification *before* that discretionary determination of admissibility is made by the trial court. In other jurisdictions there is a right to such a preliminary limited cross-examination on the issue of expert qualifications, the denial of which has been held erroneous. See Davis v Pennsylvania R. Co. (1906) 215 Pa

> 581, 64 A 774. We believe that this should be the rule in Georgia. The discretionary determination of the qualification to give expert testimony should be made only after the trial court has heard all the relevant evidence bearing on this issue. In the instant case appellant requested but was refused a preliminary opportunity to cross-examine Mr. Elliott on his expert qualification. This was error.

On another topic, the issue of whether an expert should be tendered to the court as an expert in a scientific field after completion of qualifications has been addressed. In Ingram v State (1986) 178 Ga App 292, 342 SE2d 765 the court states the proper procedure when qualifying an expert:

> The opinions of experts may be given. OCGA 24-9-67. Although the state did not expressly ask as it should have,[1] after laying the foundation, that the court deem the agent qualified to testify as an expert in drug business methods and language interpretation, the evidence of the agent's training and vast experience upon which knowledge was based were sufficient to qualify him as an expert on these matters. It is clear from the transcript that the court determined the agent to be an expert witness, which is initially within the court's province. Clary v State (1910) 8 Ga App 92, 68 SE 615. Once so established, it was within the discretion of the trial court to allow the agent's statements regarding the scanner and the meaning of "smoke," even if the statements were conclusory. The final analysis is of course up to the jury. We find no abuse in the trial court's exercise of its discretion in this regard. Hicks v State (1981) 157 Ga App 79, 80, 276 SE2d 129.

In Newberry v D.R. Horton, Inc. (1994) 215 Ga App 858, 859, 452 SE2d 560, 95 Fulton County D R 48, reconsideration den (Dec 20, 1994) and cert den (Ga) 1995 Ga LEXIS 543 the court stated that "a motion for directed verdict is not an authorized vehicle to challenge the competency of expert opinion testimony on

1. Then all parties and the jury would know the character of the testimony, and also, when the charge on expert opinion was given regarding its legal ramifications, there would be no mistake about what evidence the charge referred to.

the ground that the witness was not tendered as an expert." 215 Ga App at 860. Another case dealing with an untendered expert is Hestley v State (1995) 216 Ga App 573, 455 SE2d 333, 95 Fulton County D R 973, cert den (Ga) 1995 Ga LEXIS 620 (it appears the court tacitly accepted the witness as an expert in the field of burglary investigation). The court's preference for a formal tender was apparent in Stephens v State (1996) 219 Ga App 881, 467 SE2d 201, 96 Fulton County D R 404: "The officer in this case gave his opinion without being tendered or qualified as an expert on the use of illegal drugs. (Citation) This unqualified testimony was not competent evidence of an intent to distribute."

In Minter v State (1995) 266 Ga 73, 463 SE2d 119, 95 Fulton County D R 3459, the state's witness was the county medical examiner, a pathologist. He testified about hyperparathyroidism, hypertension and delusional symptoms, all issues relevant to defendant's insanity defense. Since it was established that the pathologist was a licensed physician who had limited practical experience treating patients who suffered from hyperparathyroidism, he was qualified to render an opinion regarding the medical basis of the insanity defense.

§ 24.21 EXPERT TESTIMONY ON HOW INCIDENT OCCURRED—An expert may testify as to speed based upon skid marks. See § 24.11 of this text, and Rumsey's Agnor Georgia Evidence § 0-14 (1993): "An expert can clearly give his opinion as to speed based on an examination of facts at the scene of a wreck." See also Whidby v Columbine Carrier, Inc. (1987) 182 Ga App 638, 356 SE2d 709 (ovrld in part on other grounds by Pender v Witcher, 194 Ga App 72, 389 SE2d 560, revd on other grounds 260 Ga 248, 392 SE2d 6 and vacated on other grounds 196 Ga App 856, 397 SE2d 193).

§ 24.35 MISCELLANEOUS SCIENTIFIC TESTS—In Georgia, the *Frye* test for novel scientific evidence does not control. This test made general scientific acceptance the rule for court acceptance of a scientist's opinion. In federal trials, the *Frye* rule controlled many federal courts until 1993. In Daubert v Merrell Dow Pharmaceuticals, Inc. (1993, US) 125 L Ed 2d 469, 113 S Ct 2786,

93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep ¶ 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632 the Supreme Court described *Frye's* dominant position in state courts for testing scientific expert proof, then rejected it for federal courts (footnotes omitted):

> In the 70 years since its formulation in the *Frye* case, the "general acceptance" test has been the dominant standard for determining the admissibility of novel scientific evidence at trial. See E. Green & C. Nesson, Problems, Cases, and Materials on Evidence 649 (1983). Although under increasing attack of late, the rule continues to be followed by a majority of courts, including the Ninth Circuit. The *Frye* test has its origin in a short and citation- free 1923 decision concerning the admissibility of evidence derived from a systolic blood pressure deception test, a crude precursor to the polygraph machine. . . . .
>
> Frye made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials.

What will be the fallout from the Daubert decision? Lawyers already decry a climate of "jukebox" experts: pay your money and select your tune. Will Daubert accelerate the trend to unbridled availability of expert opinions? To deal with the problem of junk science in the courtroom, federal courts will need to rigorously apply the factors suggested by the U.S. Supreme Court for testing and approving scientific evidence.

Other cases on scientific evidence, see Caldwell v State (1990) 260 Ga 278, 393 SE2d 436, later proceeding 263 Ga 560, 436 SE2d 488, 93 Fulton County D R 4139 (DNA); Orkin Exterminating Co. v McIntosh (1994) 215 Ga App 587, 592, 452 SE2d 159, 94 Fulton County D R 4008, reconsideration den (Dec 13, 1994) and cert den (Ga) 1995 Ga LEXIS 435 (objection that expert "outside the mainstream of scientific thought"). See Milich, Georgia Rules of Evidence § 15.9.

§ 24.39 CROSS-EXAMINATION OF EXPERT WITNESS— Books or scholarly journals may be employed to cross-examine

experts. Brannen v Prince (1992) 204 Ga App 866, 421 SE2d 76, 92 Fulton County D R 231, reconsideration den, corrected (Ga App) 92 Fulton County D R 1638.

CHAPTER 31

MISTRIAL

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§ 31.1 NATURE OF MISTRIAL—Courts have authority to discharge a jury from giving any verdict whenever, in the court's opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. Royal Crown Bottling Co. v Bell (1959) 100 Ga App 438, 111 SE2d 734.

In criminal cases, the declaration of a mistrial may result in the discharge of defendant if he was in jeopardy. The effect of declaring a mistrial is to continue the case for trial before another jury. 75B Am Jur 2d, Trial §§ 1706, 1708, 1709, 1711, 1736, 1741, 1746, 1747. But the constitutional inhibition against double jeopardy does not apply to every case in which a mistrial has been granted after the commencement of the trial. For example, in a capital murder prosecution where the district attorney's quotation from court cases was not intended to goad the defendant into moving for a mistrial, the trial court's order setting aside a sentence was not a double jeopardy bar to retrial on sentencing. Georgia Supreme Court held the prosecutor intended to enhance the opportunity for a verdict in favor of death. Hardy v State (1988) 258 Ga 523, 371 SE2d 849, cert den 489 US 1040, 103 L Ed 2d 237, 109 S Ct 1174.

A jury may be discharged before verdict without consent of defendant in cases of necessity. Oliveros v State (1904) 120 Ga 237, 47 SE 627.

The power to discharge the jury ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious reasons. See Hill v State (1965) 221 Ga 65, 142 SE2d 909 (ovrld on other grounds by Henderson v State, 251 Ga 398, 306 SE2d 645). And where there is no manifest necessity for discharging the jury, such discharge is improper and defendant is entitled to be discharged to protect him against double jeopardy, assuming the defendant did not consent to the discharge. Oliveros v State (1904) 120 Ga 237, 47 SE 627.

Retrial after a mistrial because the jury was hopelessly deadlocked (which is to be determined in the discretion of the trial court) does not constitute double jeopardy. Glass v State (1983) 250 Ga 736, 300 SE2d 812. See also Johnson v State (1991) 261 Ga 678, 409 SE2d 500, 102-185 Fulton County D R 8B.

Retrial of a criminal defendant is not barred following declaration of a mistrial over his objection, where there is "manifest necessity" for declaration of the mistrial or the "ends of public justice" would be defeated by allowing the trial to continue. Abdi v State (1982) 249 Ga 827, 294 SE2d 506, habeas corpus proceeding (CA11 Ga) 744 F2d 1500, reh den, en banc (CA11 Ga) 749 F2d 733 and cert den 471 US 1006, 85 L Ed 2d 164, 105 S Ct 1871.

If defendant consents to a mistrial, he may not thereafter utilize the mistrial as the basis of a plea of double jeopardy. McCormick v Gearinger (1984) 253 Ga 531, 322 SE2d 716.

Double jeopardy did not apply where mistrial was based on prosecutorial misconduct that was inadvertent. Wicker v State (1987) 181 Ga App 612, 353 SE2d 40.

Where the State prosecutes a defendant on two different offenses in a single prosecution, one of which is included in the other (felony-murder and arson), and the defendant receives a mistrial on the greater offense (felony-murder), the remaining conviction of

the lesser offense (arson) does not bar retrial of the greater offense. Bell v State (1982) 249 Ga 644, 292 SE2d 402.

Where defense counsel objects to remarks made by district attorney in closing argument but does not move for mistrial, and where trial court sustains objection and admonishes jury to disregard improper remarks, it is not error for the trial court not to have granted a mistrial sua sponte. Coleman v State (1979) 243 Ga 715, 256 SE2d 452.

Mistrial motion was denied as untimely where motion was not made at time incident forming basis for motion occurred, but only after several other witnesses had testified. Thomas v State (1987) 256 Ga 616, 351 SE2d 453.

Any claim concerning the prosecutor's use of peremptory challenges to strike members of the defendant's race from the jury should be raised prior to the time the jurors are sworn. State v Sparks (1987) 257 Ga 97, 355 SE2d 658.

A motion for mistrial was untimely where based on supposed irregularities in jury selection, but made after five witnesses had already testified. Riley v State (1987) 257 Ga 91, 355 SE2d 66.

In other cases, defendants have been more successful.

Consider Beck v State (1992) 261 Ga 826, 412 SE2d 530, 103-26 Fulton County D R 19. A trial court's rulings were upheld that double jeopardy barred reprosecution of a defendant on charges of child molestation after a mistrial was granted due to the prosecutor's violation of an order that excluded evidence of similar transactions; the trial court orally ruled that the prosecutor had deliberately intended to goad the defense counsel into asking for a mistrial. Beck v State (1992) 261 Ga 826, 412 SE2d 530, 103-26 Fulton County D R 19.

Trial court had no authority to declare a mistrial after a jury returned its verdict finding the criminal defendant not guilty, even through mistrial order was based on defendant's own jury tampering and court, prior to verdict, attempted to reserve a right to declare mistrial after jury completed its deliberations. State v Jorgensen (1987) 181 Ga App 502, 353 SE2d 9.

Double jeopardy may prevent a defendant from being retried following the improper granting of the State's motion for mistrial. George v State (1987) 257 Ga 176, 356 SE2d 882, on remand 184 Ga App 61, 361 SE2d 284.

Trial court's grant or refusal to grant mistrial is largely in the discretion of the trial judge, but mistrial should be granted when it is essential to preserve right of fair trial. Lynch v State (1975) 234 Ga 446, 216 SE2d 307.

If no manifest necessity exists for aborting a trial and other and less drastic measures could be used, granting mistrial in absence of defendant's motion is abuse of discretion. Haynes v State (1980) 245 Ga 817, 268 SE2d 325.

§ 31.2 RIGHT TO HAVE MISTRIAL DECLARED—The declaration of a mistrial is not a matter of right, but is addressed to the sound discretion of the court, Moon v State (1969) 120 Ga App 141, 169 SE2d 632, and that discretion will not be disturbed unless there is some abuse of the discretion. Hill v State (1965) 221 Ga 65, 142 SE2d 909 (ovrld on other grounds by Henderson v State, 251 Ga 398, 306 SE2d 645).

A trial court was upheld in failing to direct a mistrial when the district attorney allegedly made improper remarks in the jury's presence where the codefendant's attorney specifically stated that he did not want a mistrial, and the defendant's attorney agreed that a cautionary instruction was sufficient. Beach v State (1988) 258 Ga 700, 373 SE2d 210.

The trial court did not abuse its discretion in denying a motion for mistrial for the prosecution's alleged unlawful use of peremptory strikes where the motion was made after the jury was sworn. Hill v State (1989) 259 Ga 557, 385 SE2d 404.

Defendant in murder trial did not have right to have mistrial declared on basis of outburst of victim's mother in court, or fact that victim's sister was visibly upset during trial and fell to floor at one point; court did not err in refusing to declare mistrial where court instructed jury to disregard outburst and to eradicate it from their minds. Shy v State (1975) 234 Ga 816, 218 SE2d 599.

The trial court in a civil case may, upon the motion of either party, grant a mistrial for improper remarks of counsel. As an alternative, the court has a duty on objection to improper conduct by counsel to rebuke counsel and endeavor to remove the improper impression from the jurors' minds by proper instructions. Counts v Moorehead (1974) 232 Ga 220, 206 SE2d 40.

A mistrial should have been granted where the state did not give the defendant notice of its intent to refer to a prior trial and period of incarceration, and then referred to such prior trial during the sentencing phase of a murder trial; however, as the error occurred in the sentencing phase, the conviction could be upheld and the mistrial applied only to the sentencing phase. Wright v State (1985) 255 Ga 109, 335 SE2d 857.

When a juror volunteered during voir dire an opinion that the defendant was guilty, failure to declare a mistrial was not erroneous; since a motion for mistrial is not ripe before the jury is sworn, the judge promptly instructed the prospective jurors to respond only to the questions and not make extraneous remarks; the juror in question was stricken for cause. Graves v State (1991) 260 Ga 779, 399 SE2d 922, 102-38 Fulton County D R 12C.

Although a mistrial is not a viable remedy before a jury has been sworn, the court would not rely upon counsel's inaccurate nomenclature where it was clear that counsel was seeking that the panel be excused and another be made available because of the prosecutor asking defense counsel during voir dire if he intended to disclose defendant's witnesses. The court held that although the question was inappropriate, since it could have improperly led prospective jurors to believe that defendant had a duty to present evidence, the error was harmless where the trial court stated that defendant was not required to furnish a list of witnesses and later gave proper instructions about the presumption of innocence and burden of proof. Swint v State (1991) 199 Ga App 515, 405 SE2d 333, 102-78 Fulton County D R 17b.

By failing to move for mistrial or to renew his objection after the trial court's curative instructions, a defendant waived any claim that the prosecutor's improper opening reference to the

grand jury's findings was such as to warrant a new trial. Smith v State (1991) 261 Ga 512, 102-180 Fulton County D R 10B.

The trial court abused its discretion in refusing to grant a mistrial after the prosecutor referred in closing argument to the defendant's driver's license suspension, a fact that had not been admitted into evidence and upon which no basis for admission existed. Chapman v State (1991) 202 Ga App 267, 414 SE2d 240, 102-204 Fulton County D R 20.

§ 31.3 GROUNDS FOR DECLARING MISTRIAL—Among the grounds for a mistrial are the death or serious illness of a party, a juror, or the judge, 75B Am Jur 2d, Trial § 1717. Death or serious illness in the immediate family of a juror may also warrant the declaration of a mistrial. 75B Am Jur 2d, Trial § 1719.

The court may discharge the jury when one or more members of the jury have been guilty of such misconduct as to render their discharge necessary in order to prevent the frustration of the ends of justice or which is of such a nature as reasonably to indicate that a fair and impartial trial cannot be had. 75B Am Jur 2d, Trial §§ 1722-1726.

A party may move to withdraw a juror or for a mistrial based upon the misconduct of a juror where that misconduct is of such nature as reasonably to indicate that a fair and impartial trial cannot be had, as where a juror has accepted favors from a party, counsel, or an interested person. Alabama G. S. R. Co. v Brown (1913) 140 Ga 792, 79 SE 1113.

For right to mistrial where juror reads account of case, see § 36.4.

Where it appears that a juror, through false answers on voir dire or otherwise, was accepted on the jury when he should not have been, the court may discharge the jury. 75B Am Jur 2d, Trial § 1720.

An unauthorized separation of the jury or unauthorized absence of a juror may be ground for a mistrial where it seems probable that the jury was tampered with, 75B Am Jur 2d, Trial § 1727, but

a mere harmless separation of a juror will not require a mistrial. See § 36.5.

A jury may be discharged for acts or statements, which would influence their verdict, made in their presence and out of the presence of the court, unless jurors testify that such facts will not influence their verdict and an admonitory instruction is given. 75B Am Jur 2d, Trial § 1742.

The absence of the accused from a trial where his presence was necessary is ground for discharging the jury. 75B Am Jur 2d, Trial § 1735.

See § 2.3 for a discussion of conduct of a party that may give rise to a mistrial.

A mistrial should have been granted after testimony referring to a subject excluded by in limine ruling and where, despite in limine motion by defense attorney and discussion as to proposed redaction of defendant's statement to comply with in limine ruling and instructions by both the court and prosecutor to testifying detective, the detective gave testimony relating that same information to the jury in another fashion. King v State (1991) 261 Ga 534, 407 SE2d 733, 102-182 Fulton County D R 13B, appeal after remand 262 Ga 477, 421 SE2d 708, 92 Fulton County D R 2454.

§ 31.4 EFFECT OF DISAPPEARANCE OF ADMITTED EXHIBITS DURING TRIAL—A difficult situation develops when exhibits that have been admitted in evidence disappear before the final arguments and the jury retires to deliberate. It is possible to obtain a mistrial due to the disappearance of exhibits.

§ 31.5 DISCLOSURE OF LIABILITY INSURANCE—An unresponsive or inadvertent answer to a proper question that tends to disclose existence of insurance is not normally ground for a mistrial. Steinmetz v Chambley (1954) 90 Ga App 519, 83 SE2d 318.

However, if the fact of insurance is brought to the attention of the jury and it is determined that instructions to disregard such fact would not be sufficient to remove the prejudicial effect, then it would be appropriate to grant a mistrial. Heinz v Backus (1925) 34 Ga App 203, 128 SE 915.

No abuse of discretion was found under the circumstances in denying a motion for mistrial after plaintiff's counsel, in a response to a question by the court, indicated that the defendant had insurance. A. G. Boone Co. v Owens (1936) 54 Ga App 379, 187 SE 899.

And where a witness twice referred to the fact that the defendant had insurance, it was sufficient to instruct the jury to disregard such testimony. Babb v Kirk (1938) 57 Ga App 299, 195 SE 452.

In an ordinary negligence case, not only is a liability insurance policy of a litigant not admissible in evidence, but disclosure to the jury of the mere existence of such contract is ground for a mistrial. Central of Georgia R. Co. v Wooten (1982) 163 Ga App 622, 295 SE2d 369.

§ 31.6 DISCHARGE FOR INABILITY OF JURY TO ARRIVE AT VERDICT—While according to some courts there is no common-law power to discharge a jury for inability to agree upon a verdict in capital or felony cases without the consent of the accused, the general rule is that in all criminal prosecutions a jury may be discharged for this reason. Nolan v State (1875) 55 Ga 521.

Courts are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances that would render it proper to interfere. Lovett v State (1888) 80 Ga 255, 4 SE 912.

Where there is delay in arriving at the verdict, it is recommended that the jury be brought back into the courtroom in the presence of parties and counsel. The judge, on the record, should ask the foreman if they are able to arrive at a verdict, and if not, the proper instruction should be read to them urging them to listen to each other's arguments with an open mind and to make every reasonable effort to reach a verdict.

The Allen charge informs a dead-locked jury that absolute certainty cannot be expected, that the case will have to be retried

using the same evidence, and that the minority ought to give more weight to the opinions of the majority. It can be phrased so that it is "mild" or "strong," depending upon how strongly it urges dissenting jurors to accede to the will of the majority. It has been approved in many states and in the federal courts. Allen v United States (1896) 164 US 492, 41 L Ed 528, 17 S Ct 154 (ovrld on other grounds by Agnew v United States, 165 US 36, 41 L Ed 624, 17 S Ct 235) as stated in Williams v State, 322 Md 35, 585 A2d 209.

The accused is entitled to have the jury remain together a reasonable length of time before they are discharged for inability to agree on a verdict. 75B Am Jur 2d, Trial § 1744. Mere inability to agree is not the test. It must appear, from the length of time they have been deliberating and their inability to agree, that it may fairly be presumed that they will never agree. 75B Am Jur 2d, Trial § 1744.

A defendant was not entitled to have an "Allen" charge given a second time when one juror remained unwilling to reach a verdict in murder trial. Burleson v State (1989) 259 Ga 498, 384 SE2d 659.

No manifest necessity to terminate trial over defendant's objection was found where jury deliberated only thirteen minutes and jury foreman indicated that jury probably could have reached verdict. Cobb v State (1980) 246 Ga 619, 272 SE2d 296.

No abuse of discretion was found in giving the "Allen" charge to a jury which announced that it was a hung jury after it had been out two hours. Griner v State (1982) 162 Ga App 207, 291 SE2d 76.

The decision whether or not or when to give the "Allen" charge is within the sound discretion of the trial judge. Epps v State (1983) 168 Ga App 79, 308 SE2d 234 (jury out two hours, giving Allen charge not erroneous).

It was not error for the court to give an "Allen" charge after several hours of jury deliberation, even though the jury had not given any indication that it was deadlocked. Kilpatrick v State (1986) 255 Ga 344, 338 SE2d 274.