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Criminal Law Section Newsletter

Notes From The Editor

Congratulations to our chairman, Mike Garrett of Augusta. Mike received the 2001 Indigent Defense Award by the State Bar of Georgia. The award recognizes an individual who has made an outstanding contribution in the area of indigent defense. Mike has represented indigent defendants for over 20 years.

Our article this month is from Dr. Jim Powell of Jonesboro. Jim is a well known psychologist who has testified as an expert witness in many trials. His article is about “Avoiding Contamination in Sexual Child Abuse Interviewing”.

Please call me if you have any suggestions for future articles.

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AVOIDING CONTAMINATION IN SEXUAL CHILD ABUSE INTERVIEWING

By James L. Powell, PH.D..
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The usually diplomatic and charming young ADA responded with a string of oaths when presented with the witness list by the defense attorney in a sexual child abuse case. What about my name caused her to lose her cool? She knew that the case was weak around the issue of the interview that had been poorly conducted. Since the Barlow v. State decision, Case No. S98G0562, video tapes of child interviews have to be admitted into evidence in Georgia as part of the expert testimony about proper techniques for interviewing and whether these were actually used in this particular case. Interviews can be powerful tools for convicting or acquitting.

An interview can help establish the truth, or it can be an instrument of brain washing, sometimes without the interviewer being aware. The phrasing of a question can influence the answer given. Any good salesman knows that you can structure the likely response by the way you phrase the question. That makes for good commissions for the sales representative, but it can contaminate a clinical interview, particularly with a young child.

Avoiding contamination serves the best interest of justice, but many child protective services workers and mental health professionals are still conducting interviews with an eye to obtaining an accusation rather than listening to the truth. Well meaning child advocates may be adding to the likelihood of contamination because they fail to conduct the right type of interview. The initial interview of the child is a forensic interview, not a therapy interview. In a therapy interview, the child is believed and what is believed is accepted at face value. That is called working from a phenomenological perspective, concerned about the beliefs of the client, internal emotional truth, over the issue of external truth. In a forensic interview for court, the concern is for establishing the veracity of the statements. There needs to be an assumption that there is an equal probability that the child was abused or not abused. Each part of the interview rules in or rules out the probability that the child is reporting what actually occurred.

Why not believe the child from the beginning? Children lie. As young as three years old, we find self motivated lies. Children will generally not lie about abuse, but they may be reporting what they believe is the truth without it being true. A child may be lying for self gain and begin to believe their story. Memories may have been blended into other memories so that previous abuse is attributed to a current figure like mom's boy friend. Children may be repeating what they have been told, directly or indirectly as mom seeks assurance that a particular person did not do something to them. This accusation is suggested so many times that the child begins to believe that he was the victim of the behavior that mom feared. After all, mom knows best. Many factors can influence the memories of children. The key for the interview is to avoid influencing the child in the interview while listening for other influences, either fact or contamination.

Contamination occurs from errors of omission and errors of commission. Errors of omission involve the failure to carry through with what is usual and customary to complete the interview, and errors of commission involve errors that indicate poor interviewing with incorrect questions and poor observations of the child.

The interview, therefore, needs to be as soon as possible after the initial outcry of abuse, ideally within twenty-four hours. All interviews need to be recorded if possible to document whether errors of influencing have occurred in this early contact with the child and whether the story changes over time. A written summary of the report may be very inaccurate. I have read summaries written by both law enforcement and DFACS and then watched the video tape of the same interview. The information alleged to have been said by the child was actually said by the child worker. We need motivated workers

who believe in children, but to avoid contamination at the early stages of an investigation, we need objective data that will keep aspects of the case from being in dispute. The failure to document by either audio or video tape provides the defense attorney with an attack on the prosecution's case.

I have seen interviews for court that have had previous interviews of nine to thirty sessions before the tape is made for court. Why could the initial information not be recorded? One therapist stated that she was waiting until the child would say exactly what was wanted before she would tape it. That is teaching, not clarifying memories.

If an outcry is not clearly substantiated in the first forensic interview, additional interviews can be conducted to try for more information. One professional group recommends no more than six interviews before ceasing to inquire on abuse. Then the child can be treated in therapy, but not around issues of abuse which the child does not describe. I have seen therapist use books and exercises that presuppose abuse when no abuse is being alleged. The child finally learns to feel abused, and there is a decreased probability that we will ever know if the child was abused.

The use of anatomical dolls has also been a source of contamination. There are no norms that have been established to qualify the dolls as test instruments for diagnosing sexual child abuse. While many abused children may put their fingers in the vagina of a doll, only a slightly smaller number of nonabused children do the same thing. In today's world of explicit television and plentiful pornography tapes, many preschool children know about sexual positions. These dolls can be useful in a limited number of cases to clarify what is difficult to describe only after all the verbal outcry and its supportive inquiry has been exhausted.

The introduction of the children to the interview process can be another source of contamination. Too much play and imagination may establish a bad response set. In one tape I reviewed, I watched a therapist act silly and play games with the child trying to develop a relaxed relationship with the child before starting the serious task of the interview. The therapist without meaning to was giving permission to the child to treat the interview as a game.

Another contamination is an authority figure telling the child that he knows what the truth is and that daddy will be locked up and that she is not to blame. Children often respect authority figures and will assume that the adult knows the truth and will take their statement as the authority rather than trusting their own memory and senses. I even watched the interview of a mother who said that she was certain that her husband was guilty because the policeman told her that the husband was guilty after talking to the child. That is giving much power to a person who is generally not trained to assess children.

Another source of contamination can be the presence of significant people in the child's life in the room during the interview. The child has to please them as well as respond to the examiner. I watched in one video a parent hold the child in her lap throughout the interview which gives the child nonverbal clues about mom's reaction. Even with the parent quietly out of sight, the examiner cannot be certain of the influence either way on the facts being presented.

The introduction of erotic material early in the interview can also contaminate the interview since the child may well think that they interviewer wants that type of talk and may invent material to please this authority figure. You can always clarify terms later and get information on anatomical parts after there is an outcry. This will prevent any question of bias due to influencing the thoughts of the child.

The truth ritual can establish ability of the child to know the difference between the truth and a lie. This also helps the child to know the importance of telling the truth in this context. One interviewer had the child practice telling lies to make sure the child knew what the truth was with the result it is impossible to know if the child was telling the truth in the interview. The case was pled down to simple battery rather than be lost in court by the bad interview

being seen by the jury.

The use of age appropriate language is another important factor. Children may not understand what is meant by a word, but not ask for clarification. Is a child merely using a term that was overheard, or is the child able to understand the meaning? A good interviewer understands developmental aspects of language and cognitive concepts that can help to clarify the allegations.

Inquiry can be an important component of the interview, but it is not just one fact from the scene such as the color of the wallpaper, but information that increase the probability of the allegation the child experienced the behavior. In false allegations, the story is frequently accurate to the point of soap operas and then becomes unlikely fantasies about sexuality. More details about the allegation can clarify the likelihood the story being true.

A common source of contamination involves coaching. This is often difficult to establish, but careful attention to details can increase the probability of the truth. If the parent is present during the interview, the child will not be an independent witness. In one interview I saw, the mother sat behind the child and kept contradicting the child to get the true story about the man she was divorcing. She yelled at the child that she was not saying what the mother had told her to say. The charges were finally dropped in that case. Most interviews are not that clear.

Questions asked in an interview can be placed on a continuum from those with very little potential for contamination to those that are high risk, reserved only for late in an interview when most facts are established and the risk of contamination is not as important. Open-ended questions get information that is not influenced by others if the interview is done as soon as possible after the outcry. More directive questions are focused or may be multiple choices. These questions frame the scope of the response and risk increased contamination. The directiveness is increased even more when the questions can be answered by yes or no. The danger with this type of question is that the child will try to please the interviewer rather than given the accurate answer, but these may be necessary to get the final details. Leading questions are more coercive and may give information to the child that makes it clear what information is being sought. The use of leading questions early in an interview creates contamination that is often impossible to get beyond. Repeated questioning may cause the child to feel that their response was not adequate and cause a change in answer to try to get it right; that is, to please the authority figure.

The goal of the forensic interview is to hear what the child has to say, not to get a specific outcome. The interviewer needs to clarify what the child is saying. When the child is shown dignity, respect, and attention, the information will generally surface without too much difficulty.

Are children lying when they tell their stories? Children lie about most things, and they sometimes lie about abuse. Most of the time the children are telling the truth, but they are often telling what they believe to be the truth. Memory is like a hard drive on the computer. When a file is opened and then saved, the material that goes to memory is the last version produced. Children often repeat what they remember talking about last or have been told as fact.

There are life situations that are higher risk for contamination. The verbal and nonverbal communications during a divorce, revenge motives, and desires to get rid of a boy friend so that the parents can be reunited are all situations that run the risk of leading to false allegations of child abuse.

From a prosecution perspective, the best interview possible must be conducted. That allows for information that will indict or cause the DA to choose not to explore the case. From a defensive point of view, a bad interview begins to create a reasonable doubt. On the other hand, many false allegations can be seen as such by a well-conducted interview. The inter-

views are important, but they are often poorly done by mental health professionals. Many professionals feel that they are helping children if they get a definite accusation of guilt rather than hearing the facts. Hopefully as mental health professionals become more knowledgeable and courts more aware of the issues, well conducted interviews may become even more important and welcomed by both sides.

SUGGESTED READINGS FOR ATTORNEYS FOR COURT PREPARATION

Ceci, S. J., & Bruck, M. (1995). *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony.* Washington, DC: American Psychological Association.

Ceci, S.J., & Hembrooke, H. *Expert Witnesses in Child Abuse Cases: What Can and Should be Said in Court* (1998). Washington, DC: American Psychological Association.

Doris, J., ed. (1991). *The Suggestibility of Children's Recollections: Implications for Eyewitness Testimony.* Washington, DC: American Psychological Association.

Kuehne, K. (1996). *Assessing Allegations of Child Sexual Abuse.* Sarasota, FL: Professional Resource Press.

Poole, D. A., & Lamb, M. E. (1998). *Investigative Interviews of Children.* Washington, DC: American Psychological Association.

Recent Decisions Taken From West Georgia Cases

DEFENSES IN GENERAL

36.6. In general.
Ga.App. 2001. Police failure to destroy methamphetamine of unknown source used in commonly-conducted reverse-sting operation was not so outrageous as to violate fundamental fairness or to shock universal sense of justice and constitute prejudicial error; state's failure to maintain accurate records as to the origin of the controlled substance did not affect whether defendant knowingly purchased contraband which he was neither licensed nor authorized to possess. O.C.G.A. §§ 16-13-35, 16-13-49. - *Gober v. State*, 249 Ga.App. 168.

INSTRUCTIONS, NECESSITY, REQUISITES AND SUFFICIENCY

785(3). Sufficiency in general.
Ga.App. 2001. Instruction that "when witnesses appear, they are presumed to speak the truth" can be misleading, and it use is not recommended. - *Summage v. State*, 546 S.E.2d 910. 248 Ga.App. 559.

OTHER OFFENSES

369.2(5). - Sex offenses; offenses relating to children.
Ga. App. 2001. Sexually explicit material cannot be admitted merely to show defendant's interest in sexual activity; it must be linked to the crime charged. - *Summage v. State*, 248. GA.App. 559.

HEARSAY

421(6). Identity.
Ga. 2001. Police officer's testimony that witness made out of court identification in a lineup

was hearsay and was not automatically admissible as original evidence to explain officer's conduct. O.C.G.A. §§ 24-3-1, 24-3-2. - *White v. State*, 273 Ga.App. 787.

In the absence of some other viable hearsay exception, such as necessity or res gestae, a law enforcement officer may not testify to a pretrial identification of the accused unless the person who actually made the identification testifies at trial and is subject to cross-examination. -Id.

Testimony about a pre-trial identification of the accused is admissible hearsay only if the declarant testifies at trial and is available for cross-examination; overruling *Woodward v. State*, 175 Ga.App. 449, 333 S.E.2d. 645; *Neal v. State*, 211 Ga.App. 829, 440 S.E.2d 717; *Wade v. State*, 208 Ga.App. 700, 431 S.E.2d 398; *Haralson v. State*, 234 Ga. 406, 216 S.E.2d 304. - Id.

Investigators testimony that witnesses picked defendant out of a photographic line-up was not admissible under hearsay exception for pre-trial identifications, where the witnesses did not testify at the trial; overruling *Montos v. State*, 212 Ga. 764, 95 S.E.2d 792. -Id.

OTHER OFFENSES

369.2(1) In general.
Ga. 2001. In admitting evidence of prior difficulties between victim and defendant, there is no requirement that the prior difficulty constitute a similar transaction. - *Givens v. State*, 273 Ga.App. 818.

ARREST - ON CRIMINAL CHARGES

63.5(6). Motor vehicles, stopping.
Ga.App. 2001. There exists no absolute criteria which must be satisfied before a roadblock is legitimate. U.S.C.A. Const. Amend.4. - *Hodges v. State*, 248 Ga.App. 295.

COURSE AND CONDUCT OF TRIAL IN GENERAL

633(1). In general.
Ga.App. 2001. It is important for appellate judges to remember that a defendant is entitles to a fair trial but not a perfect one, for there are no perfect trials. - *Redd. v. State*, 248 Ga.App. 107.

DECLARATIONS

412.1(4). Interrogation and investigatory questioning.
Ga.App. 2001. Merely telling a defendant that his or her cooperation will be made known to the prosecution does not constitute the hope of benefit sufficient to render a statement inadmissible. O.C.G.A. § 24-3-50. - *Bailey v. State*, 248 Ga.App. 120.

PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW

1030(1). In general.
Ga.App. 2001. "Plain error" is that which is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or which seriously affects the fairness, integrity or public reputation of a judicial proceeding. - *Archie v. State*, 248 Ga.App. 56.

COMPETENCY IN GENERAL

394.6(2). Grounds of motion.
Ga.App. 2001. Only tangible physical evidence is subject to motions to suppress; testimony is outside the scope of a motion to suppress and should be objected to on the trial. - *Shaw v. State*, 247 Ga.App. 867.

BURGLARY - PROSECUTION

29. Presumption and burden of proof.
Ga.App. 2001. Criminal intent required for

burglary conviction could be inferred by defendant's presence, companionship and conduct before and after the crime; defendant checked into hotel with three other suspects but had no luggage, defendant's van was found by officers at crime scene, and fingerprints of the co-defendants were found at the scene of the burglary. - *Monteagudo v. State*, 545 S.E.2d 351, 247 Ga.App. 801.

DOCUMENTARY EVIDENCE

436(2). Business records in general.
Ga.App. 2001. Police report may be admitted into evidence as a business records if the writing was made in the regular course of business and it was the regular course of business to make the records at the time of the act or within a reasonable amount of time thereafter. O.C.G.A. § 24-3-14. - *Johnson v. State*, 247 Ga.App. 660.

NATURE AND ELEMENTS OF CRIME

29(14). Homicide.
Ga. 2001. When a defendant is found guilty and sentenced for a malice murder, the trial court should vacate any felony murder convictions for the same killing. O.C.G.A. § 16-1-7(a)(1). - *Colwell v. State*, 273 Ga. 634.

DETERMINATION AND DISPOSITION OF CAUSE

118(2). Effect of change in law or facts.
Ga. 2001. Use of a deadly weapon instruction in murder trials to permit jury to infer intent to kill from use of deadly weapon is error in all cases which are pending on direct review or not yet final, but not to convictions challenged on habeas corpus. - *Harris v. State*, 543 S.E.2d 716. 273 Ga. 608.

INSTRUCTIONS: NECESSITY REQUISITES AND SUFFICIENCE

778(6). Intent and motive.
Ga. 2001. Use of a deadly weapon instruction in murder trial erroneously charged jury that it could infer intent to kill from use of a deadly weapon, whether or not accompanied by an instruction that jury has discretion to make such inference because the defendant used the weapon in a manner in which the weapon was ordinarily used and intended to accomplish natural and probable consequences of his use of that weapon; abrogating *Clark v. State*, 265 Ga. 243, 246, 454 S.E.2d 492, *Wood v. State*, 258 Ga. 598, 373 S.E.2d 183; *Thompson v. State*, 257 Ga. 481, 361 S.E.2d 154; *Mitchell v. State*, 271 Ga. 242, 244, 516 S.E.2d 782. - *Harris v. State*, 273 Ga. 608.

DEFENSES IN GENERAL

37.20. Good faith; advice of counsel.
Ga.App. 2000. Person cannot avoid legal consequences of his acts even if based on good faith reliance on the advice of counsel. - *Cullers v. State*, 543 S.E.2d 763, 247 Ga. App.155.

PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW

1030(1). In general.
Ga.App. 2000. Error which is examined under the plain errors standard is that which is obvious and affects the appellant's substantial rights, and where exceptional circumstances make it necessary to avoid a clear miscarriage of justice. - *Rogers. v.. State*, 247 Ga.App. 219.

PROCEEDINGS, GENERALLY

1081(4.1). - In general.
Ga.App. 2000. Notice of appeal filed more than 30 days after date of judgment, but within 30 days following withdrawal of motion for new trials, was timely, and thus appellate court had jurisdictions to entertain appeal. O.C.G.A. § 5-6-38(a). - *Richards v. State*, 542 S.E.2d 622.

629(6). List or disclosure of defense witnesses.
Ga.2001. When a defendant opts into reciprocal discovery under Georgia's Criminal Procedure Discovery Act, the obligation to furnish names, current locations, dates of birth, and telephone numbers or witnesses becomes reciprocal, and the defendant's attorney is required to furnish the same information within a specified time period. O.C.G.A. § 17-16-8(a). - *State v. Dickerson*, 273 Ga. 408.

TIME OF TRIAL

Decisions Subsequent to 1966.
577.10(1). In general; balancing test.
Ga.App. 2000. Speedy trial claim is analyzed under the four *Barker* factors of (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) the prejudice to the defendant, U.S.C.A. Const.Amend. 6. - *Nealy v. State*, 246 Ga.App. 752.

VENUE - PLACE OF BRINGING PROSECUTION

108(1). In general.
Ga.App. 2000. Proper venue for insurance fraud trial was in county where an allegedly staged automobile collision occurred, as that incident was an act in furtherance of insurance fraud scheme in which chiropractor defendant purportedly participated. O.C.G.A. § 33-1-9(a). - *Callaway v. State*, 247 Ga.App. 310.

PLEAS

292(1). In general.
Ga.App. 2000. In Georgia, a plea of former jeopardy which does not set forth a copy of the accusation of which it is alleged that the accused was previously tried is fatally defective. Const.Art. 1, § 1, Par. 18. - *Jackson v. State*, 246 Ga.App. 673.

TRIAL - PRELIMINARY PROCEEDINGS

632(2). Dockets and calendars.
Ga.App. 2000. Trial judge has discretion to call a case out of the order listed on the trial calendar. O.C.G.A. § 17-8-1. *Wilkins v. State*, 246 Ga.App. 667.

OTHER OFFENSES

371(1). In general.
Ga. 2001. When similar transaction evidence is admitted to show motive, intent, course of conduct, and bent of mind, a lesser degree of similarity is required than when such evidence is introduced to prove identity. - *Smith v. State*, 273 Ga. 356.

DISTRICT AND PROSECUTING ATTORNEYS

8. Powers and proceedings in general.
Ga. 2000. Prosecution's use of ex parte subpoena to obtain defendant's medical records violated defendant's constitutional right to privacy, requiring that subpoena seeking results of blood-alcohol test that hospital administered to defendant be quashed, where defendant did not have notice and opportunity to object to state's subpoena of medical records in which she had not waived her right of privacy. Const. Art. 1, § 1, Par. 1: O.C.G.A. § 24-9-40(a). - *King v. State*, 272 Ga. 788.