Criminal Law Review

A PUBLICATION OF THE CRIMINAL LAW SECTION OF THE STATE BAR OF GEORGIA FALL 2003

Group Bias Evidence - Georgia's Strict Standards for Admissibility

by James H. Wall

Amid the myriad of trivialities emanating from the Eagle, Colo. trial court handling the Kobe Bryant case, the following headline surfaced lazily, like a piece of soggy driftwood, "Echoes of O.J.?" Intrigued, I continued to read. According to the article, "one of the lead investigators in the [Bryant] case was also a key figure in a racial profiling case [which] could provide the defense with an argument that the investigation of Bryant, a prominent black athlete, was carried out unfairly…"[1]

As it turns out, the Eagle County Sheriff's Office was sued in 1995 for racial profiling and paid $800,000 in settlement of the case.[2] One commentator described this revelation as "explosive evidence" which contained "shades of Mark Furhman and the O.J. Simpson case."[3] Whether this fact reveals "shades" of the Furhman-scenario, - where a witness and investigator is accused of planting evidence as a result of his personal racial bias, - is debatable. Yet, even assuming away the various significant distinctions between Furhman and the Eagle County sheriff's office, the question looms: Is the comparison itself even fair? Should the defense even be able to mention the racial profiling case at all? Georgia courts have addressed this very issue.

Group Bias

In the common law of evidence, bias describes the "relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party."[4] A witness's particular bias may be induced or influenced by that witness's "like, dislike, or fear of a party, or by the witness's self-interest."[5] Impeachment of a witness for bias then is based upon two assumptions: "(1) that certain relationships and circumstances impair the impartiality of a witness, and (2) that a witness who is not impartial may, consciously or otherwise, shade his or her testimony in favor of or against a party."[6] Since the accused has a right to cross-examine adverse witnesses, the bias of those witnesses is therefore a "proper subject of cross-examination as tending to discredit the witness[es] and to affect the weight of [their] testimony."[7]

A witness's bias results from the "underlying relationships, circumstances, and influences operating on the witness…"[8] In order for the trier of fact to properly assess the credibility of the witness, the trier must be adequately informed of those factors. Once apprised of these influences, the trier may then determine "whether a modification of testimony could reasonably be expected as a probable human reaction" to those influences.[9]

Yet the discovery of those influences may be problematic. The right to question adverse witnesses about bias does not include a corresponding "power to require the pretrial disclosure of any and all information that might be useful in contradicting unfa-

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Inside This Issue:

from the Chairman

by J. Michael Cranford

The State Bar Annual Meeting at Amelia Island was fabulous as usual. The Criminal Law Section was a Platinum Level sponsor for the event. If you missed it, you missed a great weekend full of entertainment and education.

The Criminal Law Section had a business meeting, luncheon and seminar. A quorum was present at the business meeting and a motion to raise the dues from $15 to $20 was made and properly seconded. After much discussion, the motion passed.

The "Interview The Child Witness" seminar was presented by Amy Morton, LMFT of Macon, Ga. Morton has testified for both defense and prosecution and is considered the leading expert in child interviewing.

The annual report was read and accepted and there was general consensus from those in attendance that our section should have more social functions in the future. As chairman, I am reminding everyone to support the section by coming to our seminars and to attend the State Bar meetings. ❑

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vorable testimony."[10] Further, the defendant's right to cross-examination is subject to reasonable restrictions[11] and the trial court has great latitude to "impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."[12] However, the restraints imposed must not go so far as to violate the Confrontation Clause.

The following test has been developed to help evaluate whether a trial court's restriction on the scope of cross-examination is appropriate. The limitation of cross-examination must not be prejudiced by the limitation imposed, such that the jurors "received a 'significantly different impression'" of the credibility of the witness than they would have without the limitation.[13] Additionally, the limitation is subject to a harmless-error analysis.[14]

Evidence of Bias

The existence of a witness's bias is usually demonstrated by circumstantial evidence through the existence of relationships, personal conduct, or personal utterances.[15] However, in certain situations, external facts exist which allow an inference of bias, or a motive to testify, and those facts are also admissible for the witness's impeachment.[16] The range of facts that allows an inference of bias is wide and varied, including facts that show a familial relationship, employment or business relationship, friendship, dislike, or fear on the part of the witness.[17] Since the range of circumstances which allow an inference of bias is so vast, it would seem that there would be a corresponding freedom during cross-examination to probe that bias. After all, cross-examination to discover "'partiality of mind is … always relevant as discrediting the witness and affecting the weight of his testimony."[18] In fact, case law recognizes the "'force of a hostile emotion, as influencing the probability of truth-telling…'"[19]

Yet, the scope of cross-examination for bias is subject to limitation[20] and since the facts and circumstances that may allow an inference of bias are so varied, the trial court is vested with the discretion to determine whether or not the "proffered impeachment evidence is probative of bias, and if so, whether its probative worth is outweighed by its prejudicial impact or should otherwise be excluded."[21] Evidence of a witness's bias may be excluded "when it creates a danger of unfair prejudice, confusion of the this issues, misleading the jury, or results in a needless presentation of cumulative evidence."[22]

Group Bias

Group bias is a term of two meanings. First, it refers to the bias that exists between individuals who are members of the same group and who might then shade their testimony for the benefit of each other or for the group.[23] Second, it also refers to the bias or prejudice that a witness may maintain toward a specific group or a member of that group.[24] In either instance, evidence of the witness's group bias is admissible for impeachment purposes provided that certain conditions are met.

In the first instance, the existence of a witness's and another party's common membership in a group can be admissible, "even without proof that the witness or party has personal-

ly adopted [the group's] tenets" where the common membership is probative of bias.[25] If the group professes certain beliefs, the jury is allowed to draw an inference of the witness's subscription to those beliefs by virtue of the witness's membership in the group.[26] The argument has been made that even if common membership does tend to show bias, to allow a trier of fact to hear that evidence can be an abuse of discretion in certain instances. For example, membership in some groups, for example prison gangs, is inflammatory and enhances the likelihood of the defendant being convicted based merely on his or her association with the group.[27] The Court has rejected this argument, finding instead that it is the type of organization and the attributes of that organization that allow for an inference of bias rather than mere association with it.[28] Additionally, the evidence of group membership must do more than simply enlighten the jury as to the "abstract beliefs" of the organization,[29] but rather must speak to the potential for bias. Thus, a defendant's guilt "may not be proven by associating him with unsavory characters."[30]

With the second type of group bias, there must also be some evidence that the bias is somehow connected to the issue at hand. Courts have recognized that hostile emotions can influence truthful testimony of a witness.[31] Further, where a witness is prejudiced towards a particular group, that prejudice may be the source of a partiality against the defendant.[32] Accordingly, a defendant is thus entitled to cross-examine the witness as to whether or not any such prejudice exists and to explore the effect of that prejudice, if any, upon the witness's testimony.[33] The necessity of such cross-examination is especially important where the testimony is from a witness who may be motivated by "malice, vindictiveness, intolerance, prejudice, or jealousy."[34]

Georgia Courts

Georgia's standard of admissibility for evidence of group bias is more restricted than most other jurisdictions. If the cautionary language from the Court of Appeals is any indication, perhaps the restriction is merely a natural reaction by the judiciary that reflects sensitivity to the passions historically aroused by racial animus in the state.[35]

Yet, since the fact finder must evaluate the credibility of the witness as part of her task, any fact that is relevant to the witness's credibility is also relevant to the fact finder in a particular case.[36] A sensitivity to history should not be indulged at the fact finder's expense. Yet, to admit any and all facts that may relate to witness credibility would "quickly overwhelm the trial, leaving little prominence for the facts of the underlying case."[37] What to do?

Policy of Georgia Courts

The justification for the tight restrictions placed upon impeachment by evidence of group bias rests upon the determination made long ago that evidence "which tends to destroy the impartiality of the juror, should be discountenanced."[38] Thus, any attempt to introduce evidence that in the estimation of the court seems to be aimed at merely introducing prejudice should be rejected and the evidence should be excluded as irrelevant and prevented from "influencing the minds or exciting the passions of the jurors."[39] Verdicts should instead be the result of "calm deliberation, founded upon the law and the evidence. The accomplishment of that objective can never be assured where irrelevant things which tend to destroy the impartiality of the jurors are allowed to creep into the trial."[40]

Cross Examination

In Georgia, while the defendant has the right to a "thorough and sifting cross-examination" of the witnesses called against him,[41] the "trial court has discretion to limit the scope of cross-examination."[42] The scope of cross-examination must relate directly or indirectly to the questions being decided by the jury.[43] With regard to witness credibility, evidence of "a witness's bias, prejudice, interest, fears or other factors that might influence the witness's testimony, is always relevant and admissible."[44] Where a relationship exists between the witness and the accused, it is deemed proper for counsel to expose that relationship to the jury either for the purpose of revealing any bias or prejudice of the witness, or for showing that the witness may be testifying under fear or duress.[45] Probing for such bias or prejudice on cross-examination does not place the defendant's character in issue. Instead, the testimony simply goes to show whether or not the witness may have a reason to be intimidated by the defendant such that his testimony may be affected.[46] Where there is no relationship, witness bias or prejudice toward a particular ethnic, racial or other group may be admissible to impeach the witness subject to certain constraints.[47] However, suggestions that are unsubstantiated or that are speculative are discouraged since they are "not only irrelevant and unfair to the witness, [but also] they implicitly invite the jury to engage in speculative generalizations about racial and ethnic prejudices."[48]

Bias Considerations

The Code provides that the "state of a witness's feelings toward the parties and his relationship to them may always be proved for the consideration of the jury."[49] The Supreme Court held that excluding cross-examination on the issue of bias was a denial of the right of effective cross-examination and thus, constitutional error.[50] In the Simpson case, the trial court noted that the defendant had a right to cross-examine the witness about general racial bias and that undue restriction of such a cross-examination was reversible error.[51] In Georgia, however, a trial court's exclusion of evidence of general racial bias or prejudice alone is not a denial of the right to effective cross-examination.[52] Georgia requires that any evidence of general bias or prejudice must be also be "accompanied by a showing that there exists evidence

of specific intent to harm the accused such that a rational trier of fact could reasonably infer shading of evidence or deception or a personal self-interest or self-preservation motive by the witness, in such case, that could give rise to an inference of deception or shading the evidence against the accused."[53]

This requirement of specific intent to harm the defendant is much more restrictive than the requirement set forth in other jurisdictions.

Procedure

First, prior to cross-examining the witness for bias, it is essential that the cross-examiner have a good-faith basis to believe that any assertions of bias are true.[54] Second, in order to cross-examine a witness specifically for bias and prejudice, such bias or prejudice must relate to the facts of the case.[55] Next, the facts must reveal a self-interest or self-preservation motive to lie.[56] Finally, the necessary foundation must be established outside the presence of the jury "to satisfy the trial court that it can be factually proven."[57] The factual predicate must show a specific bias arising out of the self-interest of the witness such that a "reasonable trier of fact could infer the likelihood of testimony being shaded or falsified as a consequence."[58] If the cross-examiner fails to establish or substantiate the inquiry by the presentation of relevant facts, the trial court may refuse the inquiry entirely.[59] Notably, in Georgia it has been specifically held that evidence which simply attacks the bias of the "criminal justice system or of the police in general is ordinarily irrelevant and inadmissible."[60]

Once the factual predicate is established, evidence is then to be evaluated in a manner similar to that seen in a Fed. Rule 403 analysis. The foundation laid must be "sufficient to justify the risk of dredging up passions that may overcome the jury or the public, undermining the administration of justice and the perception of equal justice."[61] Thus, "[o]nly a potential violation of due process by denial of the right of confrontation in the proper case, supported by the evidentiary basis, will justify … permitting such cross-examination."[62] As this apparent balancing-test indicates, the bar is high indeed. Proffered testimony which serves only to "interject racial bias into the proceeding" is properly excluded.[63]

Once that foundation has been established, the witness is then confronted with facts that indicate bias or prejudice and is given a chance to admit those facts.[64] If the witness "denies or equivocates, evidence may then be presented to support the impeachment."[65]

Standard of Review

Trial courts have wide latitude in excluding such evidence, and the trial court's exclusion of such evidence will not be disturbed absent a manifest abuse of discretion.[66]

Two Examples

Specificity – *Smith v. State*

A white defendant was charged with murdering an African-American. The State's witness claimed that the defendant had boasted about the deed and described his victim with a racial slur. The defendant denied making the slur and claimed instead that the State's witness was himself a racist and that he had made the slur.[67]

The defendant attempted to rebut the allegation of his own racism by introducing testimony that he had once dated an African-American. When the trial court prohibited the introduction of such testimony, the court erred since such evidence would have had a tendency to make the defendant's desired inference, that he was not "the type of person who would make such a statement" more probable.[68] Thus, the jury could infer that the defendant had not made the admission containing the racial slur as the State's witness had testified.

The defendant attempted to cross-examine the State's witness as to his own racist views and whether or not he owned a cigarette lighter with a "rebel flag and 'racist-type language on it.'"[69] It was an abuse of discretion for the trial court to exclude cross-examination as to whether the State's witness was a racist because such cross-examination was an attempt to show that the State's witness rather than the defendant had made the racial slur.[70] Thus, whether or not the State's witness was a racist was "relevant and material to who had made the racial comment."[71] However, it was not error for the trial court to exclude cross-examination as to the witness's lighter since such a generalization would not support the defendant's claim that the witness had made the racial slur instead of the defendant.[72]

Self-Interest – *Farley v. State*

A female hotel clerk identified the defendant, an African-American male, to police as the person who had robbed the hotel where she worked. Subsequent to that robbery but prior to the defendant's trial for that offense, the hotel clerk was victimized by a different African-American male in an unrelated crime. As a result of the second crime, the clerk admitted to defense counsel that she had developed a "problem with blacks." The defendant claimed that the trial court erred when it prohibited cross-examination of the witness as to her racial bias.[73]

The Court of Appeals observed that a particular attack on the credibility of a witness may be "effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness…"[74] However, such bias or prejudice must "relate directly to the issues or personalities in the case at hand" and arise from a "self-interest or self-preservation motive that could be reasonably inferred to cause testimony to be shaded or distorted…"[75] A "generalized attitude would not satisfy such interest of the witness, especially when such attitude arises after the fact."[76]

The Court of Appeals held that the prohibition of such cross-examination

was not error since the witness only possessed a "generalized negative attitude" that arose subsequent to the facts about which she was testifying and no evidence was proffered to show that she was hostile to the defendant.[77]

For specific cross-examination as to bias and prejudice, the witness would have to be asked what her personal feelings were toward the defendant. Absent such inquiry, any further inquiry into her bias would not be relevant.[78]

If she had been asked about her personal feelings toward the defendant and had replied that she did have "ill will" toward the defendant, cross-examination could "go no further."[79] If she denied having any "ill will" against the defendant, the defendant would have been "able to go into the occurrence of the subsequent [crime], but would not be able to go into the statement about her racial feelings…"[80] Instead, the "jury would be permitted on their own to draw an inference of ill will… from the fact of the occurrence and not from any generalized attitude or 'particulars of occurrence.'"[81]

Importantly, Judge Ruffin wrote separately to "express [his] concerns" with the "proposed foundation requirement" of a specific intent to harm the defendant.[82] Although he did agree that there should be "some foundation established", Judge Ruffin wrote that he felt that the requirement of specific intent was "too strict" and not required by O.C.G.A. § 24-9-68.[83] Finally, he warned that the specific intent requirement is "too narrowly stated to avoid violations of the Confrontation Clause."[84]

Conclusion

The restrictive policy of Georgia courts as related to evidence of group bias is grounded in noble motives. The courts wish to preserve the impartiality of jurors. Yet, noble motives notwithstanding, Georgia needs to join the ranks of those jurisdictions that allow cross-examination for general feelings of group bias or prejudice for impeachment purposes. Relevancy concerns and the risk of unfair prejudice have both been addressed by other jurisdictions that currently allow such inquiry into group bias. That analysis has been to: (1) assess the relevancy of the evidence; and (2) subject the evidence to a Rule 403 analysis and determine whether its admission of the evidence would be unfairly prejudicial.

Georgia's current preference for excluding group bias evidence has too much paternalistic flavor. By excluding group bias evidence, the courts are trying to shield the jury from potentially inflammatory evidence. Yet, the jury has been specifically selected by both parties and has been vested with the power to evaluate evidence and decide questions of fact. There is simply no reason to assume that juries will abandon all reason and fall victim to inflamed passions aroused by evidence of a witness's group bias. However, to address this concern the trial judge may give limiting instructions to the jury. Courts generally presume that juries follow instructions that they have been given, absent evidence to the contrary.[85] Additionally, the court may also sanitize evidence that might be patently offensive through the use of generic terms.

To continue to require a specific intent to harm a defendant or a showing of some self-interest on the part of the witness is to remove from the jury evidence they might otherwise consider in their evaluation of witness credibility. As such, the current restriction on this evidence would seem to act more like a hindrance to the proper administration of justice, rather than as a safeguard of it. In the federal jurisdiction, assessing the probative value of group bias and the admissibility of such evidence is "a matter first for the district court's sound judgment… and ultimately, if the evidence is admitted, for the trier of fact."[86] If the district courts have such faith in the trier of fact, Georgia courts should as well. ❑

Endnotes

1. ABC News, "Echoes of O.J." (Aug. 1, 2003), available at http://abcnews.go.com/sections/us/goodmorningamerica/kobe_bryant030801.html, last visited Aug. 7, 2003.

2. Id.

3. Id.

4. United States v. Abel, 469 U.S. 45, 52 (1984).

5. Id.

6. Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 607.04[1] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997).

7. Id.

8. Id., at §607.04[1].

9. Id.

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Endnotes Continued

10. Pa. v. Ritchie, 480 U.S. 39, 53 (1987).

11. DiBenedetto v. Hall, 272 F.3d 1, 8 (1st Cir. 2001).

12. Del. v. Van Arsdall, 475 U.S. 673, 679 (1986).

13. DiBenedetto, infra at 10, citing Del. v. Van Arsdall, 475 U.S. 673, 679 (1986).

14. Id.

15. Weinstein, supra at § 607-35.

16. United States v. Maynard, 476 F.2d 1170, 1174 (D.C. App. 1973).

17. Weinstein, supra at §607.04[5].

18. Outley v. City of New York, 837 F.2d 587, 594 (2d Cir. 1988).

19. United States v. Kartman, 417 F.2d 893, 897 (9th Cir. 1969).

20. Outley, infra at at 594.

21. United States v. Robinson, 530 F.2d 1076, 1080.(D.C. Cir. 1976).

22. Lee v. Florida, 422 So.2d 928, 931 (Fl. App. 1982).

23. Abel, infra at 52.

24. Smith v. Civil Service Board, 52 Ala. App. 44, 52 (1974).

25. Abel, infra at 52.

26. Id.

27. Id., at 53.

28. Id., at 54.

29. Dawson v. Del., 503 U.S. 159, 166 (1992).

30. United States v. Dickens, 775 F.2d 1056, 1058 (9th Cir. 1985).

31. Kartman, infra at 897.

32. Id.

33. Id.

34. Davis v. Alaska, 415 U.S. 308, 317 (1974).

35. See Farley v. State, 225 Ga. 687, 692 (1997) cautioning against "fishing in the dangerous currents of racial bias or prejudice…"

36. Paul S. Milich, Georgia Rules of Evidence, 237 (ThomsonWest ed., 2d ed. 2002)

37. Id.

38. Teasley v. State, 177 Ga. App. 554 (1986), quoting Styles v. State, 129 Ga. 425, 429 (1907).

39. Id.

40. Id.

41. O.C.G.A. § 24-9-64

42. Duckworth v. State, 268 Ga. 566, 567 (1997).

43. Shropshire v. State, 210 Ga. App. 241, 242 (1993).

44. Milich, supra at 243.

45. Whatley v. State, 165 Ga. App. 13 (1983).

46. Mitchell v. State, 207 Ga. App. 306, 307 (1993).

47. Milich, supra at 244.

48. Id.

49. O.C.G.A. § 24-9-68 (Amended effective 2/21/1995)

50. Davis, infra at 318.

51. State v. Simpson, 1995 WL 520692 (Cal.Super.Doc.).

52. Farley, infra at 691, referring to Davis v. Alaska, 415 U.S. 308, 318 (1974).

53. Id, emphasis added.

54. Milich, supra at 226.

55. Farley, infra at 691.

56. Id.

57. Id., at 692.

58. Id., at 691

59. Milich, supra at 244. See also Harris v. State, 216 Ga. App. 297 (1995).

60. Milich, supra at 245.

61. Id., at 692.

62. Id.

63. Shropshire, infra at 242.

64. Milich, supra at 244. See also Simmons v. State, 266 Ga. 223 (1996).

65. Id.

66. Harris v. State, 216 Ga. App. 297, 298 (1995).

67. Smith v. State, 270 Ga. 240, 245 (1998)

68. Id.

69. Id.

70. Id.

71. Id.

72. Id.

73. Farley, infra at 689.

74. Id., at 690.

75. Id.

76. Id.

77. Id., at 693.

78. Id.

79. Id.

80. Id.

81. Id.

82. Id., at 694, J. Ruffin, concurring.

83. Id., at 697.

84. Id., at 696.

85. Butler, infra at 252.

86. Abel, infra at 54.

Recent Decisions from West Georgia Case Law

II. On Criminal Charges

71.1(5). Particular objects searched or seized

Ga. 2003. Photographs developed from film in disposable camera found in defendant's duffel bag were fruit of search incident to valid arrest, and thus were admissible in murder prosecution. U.S.C.A. Const.Amend. 4. - *Wright v. State*, 579 S.E.2d 214. 276Ga.454

XXIV. Review

(E) Presentation and reservation in lower court of grounds of review

1. in general

1042. Sentence or judgement

Ga.App. 2003. Defendant waived for appellate review claim that trial court improperly used prior conviction to fix length of his sentence, where defendant failed to object to evidence of prior conviction during pre-sentencing phase of trial; overruling *Eason v. State*, 215 Ga.App. 614, 451 S.E.2d 820. West's Ga.code Ann. § 17-10-2(a). - *Turner v. State*, 578 S.E.2d 570. 259 Ga. App. 902

(J) Issues Relating to Jury Trial

858(3). Documents or demonstrative evidence.

Ga. App. 2003. Demonstrative evidence may be received into evidence and may go out with the jury during deliberations. - *Crowe v. State*, 578 S.E.2d 134. 259 Ga. App. 780

(M) Declarations

417(14). Statements corroborating or impeaching testimony of witnesses.

Ga.App. 2003. Even though a witness may recant on the stand, his prior inconsistent statements constitute substantive evidence on which the jury may rely. - *Jones v. State*, 577 S.E.2d 878. 259 Ga.App. 698

V. Forfeitures.

171. Particular cases.

Ga.App. 2003. In civil forfeiture proceeding claimant's invocation of privilege against self-incrimination when questioned about presence of cocaine, marijuana, currency, and stereo system in his automobile constituted admissions that claimant either consented to the conduct of possession of marijuana with intent to distribute and possession of cocaine with intent to distribute, or that he knew or reasonably should have known of the conduct, and thus forfeiture of claimant's property was authorized. West's Ga.Code Ann. § 16-13-49. - *Sanders v. State*, 577 S.E.2d 94. 259 Ga.App. 422.

(M) Declarations

412.2(2). Accusatory stage of proceedings.

Ga.App. 2003. Although an ordinary traffic stop curtails the freedom of action of the detained motorist and imposes some pressures on the detainee to answer questions, such pressures do not sufficiently impair the detainee's exercise of his privilege against self-incrimination so as to require that he be advised of his constitutional rights under *Miranda.* U.S.C.A. Const.Amend. 5. - *Razor v. State*, 576 S.E.2d 604. 259 Ga.App. 196.

(J) Best and Secondary Evidence.

398(1). In general.

Ga.App. 2002. The best evidence rule applies only when a writing is introduced to establish the existence or contents of the document, and is not applicable when a party uses the document to prove a fact. - *Cooper v. State*, 575 S.E.2d 691. 258 Ga.App. 825.

(E) Arguments and conduct of counsel.

699. Control by court in general.

Ga.App. 2002. Statutory prohibition against more than one counsel for each side being heard during closing argument of criminal prosecution precluded defendant's two attorneys from each making a concluding argument at trial; overruling *Limbrick v. State*, 152 Ga.App. 615, 263 S.E.2d 502. O.C.G.A. § 17-8-70. - *Sheriff v. State*, 574 S.E.2d 449.

Statutory prohibition against more than one counsel for each side being heard in conclusion of criminal prosecution necessarily applies to both the State and the defense, regardless of which side makes the argument which is last chronologically, O.C.G.A. § 17-8-70. - Id.

(P) Documentary Evidence.

438(2). Particular prosecutions.

Ga. 2003. Better practice in a criminal trial is for someone other than a family member to identify the photograph of a decedent taken during life, to obviate the risk of a family member's emotional outburst during a trail. - *Kilpatrick v. State*, 575 S.E.2d 478. 278 Ga. 151.

XXII. Arrest of Judgment.

969(1). In general

Ga.App. 2002. A motion in arrest of judgment of *habeas corpus* are the only remedies available when no demurer to the indictment is interposed before judgment is entered on the verdict; therefore, a motion for new trial is ordinarily not the proper method to attack the sufficiency of the indictment, but Court of Appeals has made an exception when the motion for new trial raises the ground of ineffective assistance of counsel. - *Harris v. State*, 574 S.E.2d 871. 258 Ga.App. 669.

(G) CHARACTER OF ACCUSED.

378. Rebuttal of evidence of good character.

Ga.App. 2002. When a defendant testifies and admits prior criminal conduct, he has raised an issue that may be fully explored by the State in its cross-examination. - *Gaston v. State*. 571 S.E.2d 477. 257 Ga.App. 480

(N) HEARSAY.

419(5). Statements of persons not available as witnesses.

Ga. 2002. To be admissible under the necessity exception to hearsay rule, the party presenting the evidence must prove that the declarant is unavailable to testify at trial, the declarant's out-of-court statement is relevant to a material fact and more probative on that fact than other available evidence, and the statement shows particular guarantees of the trustworthiness. O.C.G.A. § 24-3-1. - *Yancey v. State*, 570 S.E.2d 269. 275 Ga. 550.

II. COMPUTENCY

(D) CONFIDENTIAL RELATIONS AND PRIVILEGED COMMUNICATIONS.

208(1). In general

Ga. 2002. Georgia does not recognize a common-law or statutory physician-patient privilege. - *Veasley v. State*, 570 S.E.2d 298. 275 Ga. 516.

VI. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

(B) SELF-DEFENSE

784. Mutual or voluntary conduct.

Ga. 2002. "Mutual combat," for purposes of defense against murder charge, involves the use of deadly weapons when both parties are at fault and are willing to fight because of a sudden quarrel. - *Johnson v. State*, 570 S.E.2d 309. 275 Ga. 630.

XX. TRIAL

(B) COURSE AND CONDUCT OF TRIAL IN GENERAL.

641.2(2). Criminal nature of proceeding, in general.

Ga. 2002. The right to private counsel attaches in all criminal prosecutions, not merely those resulting in imprisonment or a fine. Const. Art. 1, § 1, Par. 14. - *Barnes v. State*, 570 S.E.2d 277. 275 Ga. 499.

XVII. EVIDENCE.

(C) BURDEN OF PROOF.

335. - Particular facts

Ga. 2002. Venue is a jurisdictional fact that must be proved by the State, but venue does not invoke double jeopardy concerns; consequently, the grant of a new trial due to the State's failure to prove venue is not a reversal due to insufficient evidence within the ambit of *Burks* and its progeny. U.S.C.A. Const.Amend. 5; Const. Art. 1, § 1, Par. 18. - *Grier v. State*, 569 S.E.2d 837. 275 Ga. 430.

II. ON CRIMINAL CHARGES

63.5(9). Duration of detention and extent or conduct of investigation or frisk.

Ga.App. 2002. State failed to establish stop of defendant's vehicle at roadblock as constitutionally valid, given that the only evidence presented by State regarding roadblock came from testimony of state trooper who stopped defendant at roadblock; trooper's supervisor did not testify and there was no other evidence, written or testimonial, establishing that supervisory officers decided to implement roadblock for legitimate purpose. - *Blackburn v. State*, 570 S.E.2d 36. 256 Ga.App. 800.

(V) WEIGHT AND SUFFICIENCY.

564(3). Circumstantial evidence.

Ga.App. 2002. The State may establish venue by whatever means of proof are available to it, and it may use both direct and circumstantial evidence. - *Tinger v. State*, 568 S.E.2d 832. 256 Ga.App. 574.

XVII. EVIDENCE

(D) FACTS IN ISSUE AND RELEVANCE.

351(2). Conduct and declarations at time of arrest.

Ga.App. 2002. Testimony that gun was found in rape defendant's possession at time of his arrest 18 months after the offense was committed was irrelevant, on grounds that the arrest was not closely related in time to the offense and bore no logical relation to the offense. - *Richardson v. State*, 568 S.E. 2d 548. 256 Ga.App. 322.

(K) DEMONSTRATIVE EVIDENCE.

404.65 Weapons and related objects.

Ga.App. 2002. A weapon may be admissible if the identification is sufficient to allow the jury to decide, under the evidence relative to identification, whether it is the identical weapon used by the defendant. - *Ogle v. State*, 567 S.E.2d 700. 256 Ga.App. 50.

XX.TRIAL

(E) ARGUMENTS AND CONDUCT OF COUNSEL.

709. For prosecution.

Ga. 2002. Prosecutor's comment during closing argument on numerous objections made by defendant's attorney during trial is not error, as counsel has ample latitude to argue what has transpired in case from its inception to its conclusion, and conduct of party or his counsel. - *Arevalo v. State*, 567 S.E.2d 303. 275 Ga. 392.

XXIV. REVIEW

(C) DECISIONS REVIEWABLE.

1023(3). Preliminary or interlocutory orders in general.

Ga. 2002. Pre-trial orders denying a constitutional speedy trial claim are directly appealable and are not subject to statutory interlocutory appeal requirements. U.S.C.A. Const.Amend. 6; O.C.G.A. § 5-6-34(b). - *Callaway v. State*, 567 S.E.2d 13. 275 Ga. 332.